

# **Family Law and the Servicemembers Civil Relief Act**

Mark E. Sullivan  
Raleigh, North Carolina

## **I. INTRODUCTION**

## **II. OVERVIEW OF THE NEW STATUTE – SERVICEMEMBERS CIVIL RELIEF ACT**

### **A. Purpose (50 U.S.C. App. § 502)**

1. To enable servicemembers (SMs) to devote their entire energy to the defense needs of the Nation; and
2. to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service

### **B. Who is covered? (50 U.S.C. App. § 511)**

1. Covered servicemembers include –
  - a. Those members of the Army, Navy, Air Force, Marine Corps and Coast Guard who are on active duty under 10 U.S.C. 101(d)(1);
  - b. Members of the National Guard who are called to active duty as authorized by the President or the Secretary of Defense for over 30 consecutive days under 32 U.S.C. 502(f) to respond to a national emergency declared by the President and supported by federal funds;
  - c. Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.
2. A SM is also covered for periods of time when he or she is absent from duty because of sickness, wounds, leave or other lawful cause [i.e., he is still a SM even if absent from active duty for one of the above reasons]
3. 50 U.S.C. App. § 516, the protections of the Act are extended to members of the Reserve Components (RC) – the National Guard and Reserve – from receipt of orders to report for duty to the date that they report
4. Covered individuals under certain sections of the SCRA include dependents of a SM (a spouse, a child, or anyone for whom the SM provided over half of the person's support for the 180 days immediately preceding an application for relief under the Act)

### **C. What tribunals are covered?**

1. 50 U.S.C. App. § 511(5) – any court or administrative agency of the United States, a state or a political subdivision thereof
  2. Criminal proceedings are excluded under 50 U.S.C. App. § 512(b)
  3. Does this mean the Maryland Department of Environmental Protection? The Orange County Board of Housing Appeals? The Zoning Commission of Seattle? The answer is YES to all the above!
- D. What about the SM’s lawyer? Under 50 U.S.C. App. § 519, whenever “servicemember” is used, it includes the attorney and/or the agent (under a power of attorney) of the SM
- E. Can the SM waive his rights?
1. This is covered in 50 U.S.C. App. § 517. A waiver of SCRA rights is only effective if it is made during the period of military service.
  2. In addition, certain waivers must be made in writing in at least 12-point type.
  3. If the court wants to have the SM execute a written waiver in connection with a stay of proceedings so that the case may go forward and there is a clear record that the SM has knowingly and voluntarily waived his or her rights under the SCRA, this form should suffice:

**WAIVER OF RIGHT TO REQUEST STAY OF PROCEEDINGS**

I acknowledge that I have the right to request a stay of proceedings in this case under the Servicemembers Civil Relief Act. The stay of proceedings, or continuance, would postpone a hearing in this case if it were granted.

I hereby waive and give up the right to a stay of proceedings. I want to proceed with this case.

\_\_\_\_\_  
(signature)

Date:\_\_\_\_\_

\_\_\_\_\_  
Printed Name

[here print acknowledgment and notarization if required]

- F. A summary of the major changes in the new Act can be found at the SILENT PARTNER, “Summary of the Servicemembers Civil Relief Act,” located at [www.abanet.org/family/military](http://www.abanet.org/family/military).

### III. STAY OF PROCEEDINGS

A. Where the SM has not made an appearance, 50 U.S.C. App. § 521 governs. A stay of proceedings under 50 U.S.C. App. § 521(d) is not be controlled by the procedures under 50 U.S.C. App. § 522, which apply when the SM has received actual notice of the action.

1. The court must first determine whether an absent or defaulting party is in the military service.

a. Before entry of a judgment for the plaintiff, the court (including “agency”) shall require the plaintiff to file an affidavit. The affidavit shall state “whether or not the defendant is in the military service and showing necessary facts in support of the affidavit.”

b. If it appears that the defendant is a SM, then a default judgment may not be taken until after the court appoints an attorney to represent the defendant.

c. If that attorney cannot locate the SM, the actions of the attorney cannot waive any defense of the SM or otherwise bind him or her.

d. If the court cannot determine whether the defendant is in military service, then the court may require the plaintiff to post a bond as a condition of entry of a default judgment. Should the defendant later be found to be a SM, the bond may be used to indemnify the defendant against any loss or damage which he or she may incur due to the default judgment (if it should be later set aside).

e. Upon application by either side or the court, the Department of Defense must issue a statement as to military service. 50 U.S.C. App. § 582. The office in DOD to contact for information under the SCRA on whether a person is in the armed forces is:

Defense Manpower Data Center [Attn: Military Verification]  
1600 Wilson Blvd., Suite 400  
Arlington, VA 22209-2593  
[Telephone 703-696-6762 or -5790/ fax 703-696-4156]

f. Go to the DMDC website for SCRA inquiries, <https://www.dmdc.osd.mil/owa/scra/home>, and enter the last name and Social Security number of the individual. These are mandatory entries; the form on the main page also asks for a first name, middle initial and date of birth (DOB), which will help with the search. Further information is available on the “Help” section of the above website.

To execute a report, click on the “LookUp” button, which will open up a second window holding the report generated by DMDC. If the individual is on active duty, the report will show his or her branch of service and beginning date of active duty status. If DMDC does not have information as

to whether the individual is on active duty, the generated report will only list the supplied last name, first name and middle initial (if supplied), with the text:

“Based on the information you have furnished, the DMDC does not possess any information indicating that the individual is currently on active duty.”

The report is signed by the DMDC Director.

If the Social Security number is unavailable, the requester may request by mail a manual search, using the DOB of the individual instead of the SSN. You must send a stamped, self-addressed envelope with your mail request.

- f. Criminal penalties are provided for filing a knowingly false affidavit.
2. Then the court must decide on a stay of proceedings. In cases where the defendant is in military service –
    - a. The court shall stay the proceedings for at least 90 days (upon application of counsel or on the court’s own motion) if the court determines that:
      - (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant, or
      - (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.
  3. If a judgment has been entered against the SM during his period of military service (or within 60 days after the end of service), the court shall reopen the judgment to allow the SM to defend if
    - a. he was materially affected due to military service in asserting a defense, and
    - b. he has a meritorious or legal defense to the action or some part of it, so long as
    - c. the application is filed within 90 days after the end of military service. 50 U.S.C. App. § 521(g).
  4. Reopening or vacating the judgment shall not impair right or title acquired by a bona fide purchaser for value under the default judgment.
- B. 50 U.S.C. App. § 522 applies to a stay of proceedings where the SM has notice of the proceedings and has filed an application for stay (including an application filed within 90 days after the end of military service)
1. The court may (upon its own motion) and shall (upon motion of a SM) enter a stay of proceedings for at least 90 days if the motion includes

- a. A statement as to how the SM's current military duties materially affect his ability to appear, and stating a date when the SM will be available to appear, and
- b. A statement from the SM=s commanding officer stating that
  - (1) the SM=s current military duty prevents his appearance and
  - (2) military leave is not authorized for the SM at the time of the statement.
- c. Caveat: There is no indication that either of these must be in the form of an affidavit or, for that matter, in any particular format whatsoever. Apparently a letter, a formal memo or even an e-mail message would suffice.
- d. Further caveat: When you are assisting the SM and/or the commander in drafting statements to support a stay, use plain English – not “militarese.” A judge cannot understand, and certainly can’t sympathize with, the situation of a soldier whose commander writes: “According to the MOU between DivArty, DCSPER and the DIC, this soldier will be the ASP OIC 24/7 until REFRAD when he is not serving as SDO.” *Huh???*
- e. A sample motion for stay of proceedings can be found at ATCH-1.
- f. A request for a stay does not constitute –
  - (1) an appearance for jurisdictional purposes, or
  - (2) a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).
- g. The SM may request an additional stay based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522(d)(1).
- h. If the court refuses an additional stay, then the court must appoint an attorney to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).
  - (1) Questions: What does this attorney do? Who pays him or her? How does the attorney get in touch with the unavailable defendant or plaintiff? How can the attorney hope to represent the SM with no information, preparation or input by the “involuntary client”? Is the attorney supposed to try the entire case in the SM’s absence? Whose malpractice policy is going to cover this nightmare?

- (2) Further question: Which section applies when the SM has notice but has not made an appearance? That is, what governs when he has been served properly with the summons and complaint or petition but has not filed an answer or substantive motion? Both of them? Neither one?

#### **IV. STAY OR VACATION OF EXECUTION OF JUDGMENTS, ATTACHMENTS AND GARNISHMENTS**

- A. In any action started against a SM before his period of military service, during it or within 90 after the end of service, when a SM's military duties materially affect his ability to comply with a court order or judgment, then the court may (on its own motion) and shall (on motion by the SM) –
  1. stay the execution of any judgment or order entered against him, and
  2. vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party
  3. regardless of whether it is before or after judgment. 50 U.S.C. App. § 524.

#### **V. REQUEST FOR ANTICIPATORY RELIEF**

- A. The SCRA doesn't require breach or default before offering protections to covered individuals.
- B. Example – the anticipatory relief provisions of 50 U.S.C. App. §591:

*ANTICIPATORY RELIEF.*

*(a) APPLICATION FOR RELIEF.—A servicemember may, during military service or within 180 days of termination of or release from military service, apply to a court for relief— (1) from any obligation or liability incurred by the servicemember before the servicemember's military service; or (2) from a tax or assessment falling due before or during the servicemember's military service.*

- C. These anticipatory relief provisions can be used to request relief from pre-service obligations, such as child support or alimony, when a prospective breach is likely. For example, when the SM is earning more in his civilian job before mobilization than he will be earning on active duty, and the civilian wage garnishment will terminate upon his call to active duty, the SM should use this section to request a reduction in child support or alimony and to request a new garnishment from DFAS (Defense Finance and Accounting Service) to pay the other party on a timely basis.

#### **VI. USING THE SCRA “STAY REQUEST” IN FAMILY LAW CASES**

- A. Defensive use on behalf of the servicemember – questions to ask the client:
  1. Is delay necessary?

2. Is delay desirable? [e.g., build-up of arrears, citations for contempt as results]
3. If it is helpful at present, will a delay of the day of reckoning help in the long run?

B. Resisting the motion for a stay on behalf of the non-military partner or spouse:

1. Attack the stay request. Does it contain the mandatory elements?

SCRA Stay Request – a Checklist for Opposing the Initial 90-Day Stay

✓	<b>Elements of a Valid 90-Day Stay Request.</b> Does the request contain...
	A statement as to how the SM's current military duties materially affect his ability to appear? And stating a date when the SM will be available to appear?
	A statement from the SM=s commanding officer stating that the SM=s current military duty prevents his appearance?
	And stating that military leave is not authorized for the SM at the time of the statement?

2. How much leave has member accrued? Ask for a copy of the SM's LES (Leave and Earnings Statement) to find out.
3. What is the nature of the "military necessity" that prevents a hearing? Is the SM serving in Iraq, where he cannot be given leave and is facing hostile fire on a daily or weekly basis? Or is he serving as "backfill" at Ft. Bragg or Ft. Lewis so that others may deploy overseas, working a comfortable day shift of 7:30 – 4:30 with weekends off?
4. Sometimes a SM exaggerates the amount of time needed to be in court. Often a court case can be heard and resolved in a few hours or a few days. What happens if the SM complains to his commander that he will need to be gone for 30 days to take care of his case back in court? Answer – a letter from the commanding officer stating that the SM's duty requirements prevent appearance and that he is not authorized leave. Preempt this approach by specifying in the pleadings what is requested and approximately what amount of time will be required in court.
5. Is member's presence necessary?
6. What about video depositions? Use of the Internet? Is anyone truly "unavailable" any more?
  - a. In *Massey v. Kim*, 455 S.E.2d 306 (Ga. Ct. App. 1995), the SM asked for a stay of proceedings to delay pending discovery until the completion of his overseas tour of duty. The court denied his request, pointing out improvements in modern communications since the passage of the SSCRA.
  - b. In *Keeffe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981), the court denied the SM's stay request to delay discovery, indicating that the SM should appear by videotape deposition pursuant to Fed. R. Civ. P. 30(B)(4).

- c. One court specifically pointed out that “Court reporters may take depositions in Germany including videotape depositions for use in trials in this country.” *In re Diaz*, 82 B.R. 162, 165 (Bankr. Ga. 1988).
7. What about summary judgment based on affidavits?
  8. Can the matter be resolved on an interim basis with a temporary hearing? In *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989), the court determined that temporary modifications of child support, in general, do not materially affect the SM’s rights since they are interlocutory and subject to modification.
  9. Is the SM truly unable to appear? The Welfare Reform Act of 1996 requires that the armed forces issue regulations to ease the granting of leave for SMs to appear in court and administrative paternity and child support hearings. *See* DoD Directive 1327.5, Leave and Liberty (IO 4, 10 Sep. 1997).
  10. When will the temporary exigency be over? There is nothing that prevents a judge from responding to the commanding officer to ask some questions that will help determine what can be done to move the case forward. Perhaps the SM can respond to discovery while he is unavailable for a court appearance.
  11. See ATCH-2, a flow chart on defending against the SCRA, adapted from one found at Hooper, "The Soldier's and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney's Perspective," 112 Mil. L. Rev. 93 (1986). At ATCH-3 is a flow chart on the request for an additional stay. At ATCH-4 is a checklist for judges.
  12. See ATCH-5, “Legal Considerations in SCRA Stay Request Litigation: The Tactical and the Practical,” for more information.

## VII. INTERNET SCRA RESOURCES:

Fire up your ISP (internet service provider) and start with a visit to the home page of the Army JAG School, <http://www.jagcnet.army.mil/TJAGLCS>. When you get there, click on "TJAGLCS Publications" on the left side, then scroll down to "Legal Assistance" and look for JA 260, "Servicemembers Civil Relief Act Guide," a thorough examination of every section of the SCRA by the faculty of the Army JAG School.

Legal Services, <http://www.jagcnet.army.mil/legal>, the Army Judge Advocate General's Corps public preventive legal information site (Servicemember’s Civil Relief Act information center).

“A Judge’s Guide to the Servicemember’s Civil Relief Act” is available at the website for the Military Committee of the ABA Family Law Section, [www.abanet.org/family/military](http://www.abanet.org/family/military). You’ll also find there a SILENT PARTNER info-letter on “Summary of the Servicemembers Civil Relief Act.”

ATCH-1

**Sample motion for stay of proceedings under Servicemembers Civil Relief Act (SCRA)**

[HEADING OF CASE]

MOTION FOR STAY OF PROCEEDINGS

Pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 522, the defendant moves this court for [an initial 90-day stay of proceedings][a further stay of proceedings], showing that his ability to defend herein is materially affected by his military duties. In support of this motion and in compliance with the SCRA, the defendant has included --

As Encl # 1, a letter or other communication that:  
states the manner in which current military duty requirements materially affect the defendant=s ability to appear, and gives a date when the defendant will be available to appear; and

As Encl # 2, a letter or other communication from the defendant's commanding officer stating that:  
the defendant's current military duty prevents appearance, and that military leave is not authorized for the defendant at the time of the letter.

WHEREFORE the defendant prays that this court grant him a stay of proceedings until [date] and such other relief as is just and proper.

Date:

\_\_\_\_\_  
Janet A. Smith, Attorney for Defendant  
123 Bartlett Street, Salisbury, NC 26799  
919-555-1234

.....  
[Notes: While this motion is written by the defendant’s attorney, the SCRA mentions the “application of the servicemember,” which means the SM or his legal representative could file the motion, application, petition or other document requesting a stay of proceedings. The “SM’s legal representative” would be his lawyer (civilian or military attorney) or an individual who holds his power of attorney. It may be addressed to the court, the clerk, the presiding judge, the defendant=s attorney, or the opposing counsel.

The statute appears to call for two statements, but the information required may be conveniently combined into *one* statement if that comes from the SM’s commanding officer. While the examples here are two statements which give limited information, a good letter should set out the facts in detail -- not merely conclusions -- as to how the defendant=s military duties adversely affect his ability to prepare and present the case, including appearances at depositions, responses to interrogatories and document requests, and appearance at trial. Although not required by the SCRA, it is a wise idea to set out how much leave the defendant has accrued, whether he has asked for leave, how much leave was requested, and whether the request has been approved or denied, including who approved or denied it, the date of such action, the limitations, if any, on an approved leave, etc. The purpose of this is to show that the defendant is exercising good faith and due diligence in his application for a stay, rather than using the stay request purely for tactical advantage.]

Encl #1

Sergeant Leopold Legume, SSN 123-45-6789  
Company C, 3d Battalion, 123d Underground Balloon Regiment  
V Corps, U.S. Army  
APO AE 91099

[date]

TO WHOM IT MAY CONCERN:

My current military duty requirements materially affect my ability to appear in the following manner: I am currently serving as a truck driver in the above unit at Camp Bondsteel in Kosovo. My tour of duty is for 180 days, beginning May 1, 2008. I was recalled to active duty in the U.S. Army from my assignment in the Army Reserve, which is the 122d Transportation Battalion, Salisbury, North Carolina. I am in the field every day of the week, and I am unavailable to appear at my hearing on child support. I have asked for one week=s leave in order to fly back to North Carolina and attend the hearing. This was denied by my commander.

I need to be personally present in court on my hearing date of June 1, 2008, to testify as to my compensation, both civilian (before the Reserve call-up) and military (a substantial reduction from my civilian pay), my reasonable living expenses (before and after the call-up) and certain bills of the plaintiff that I have taken over at her request since the last child support order herein that would constitute grounds for a variance from the Child Support Guidelines. I will be available to appear on or after December 1, 2008.

[signature of defendant]

.....

Encl #2

Major Regina Richards, Commander  
Company C, 3d Battalion, 123d Underground Balloon Regiment  
V Corps, U.S. Army  
APO AE 91099

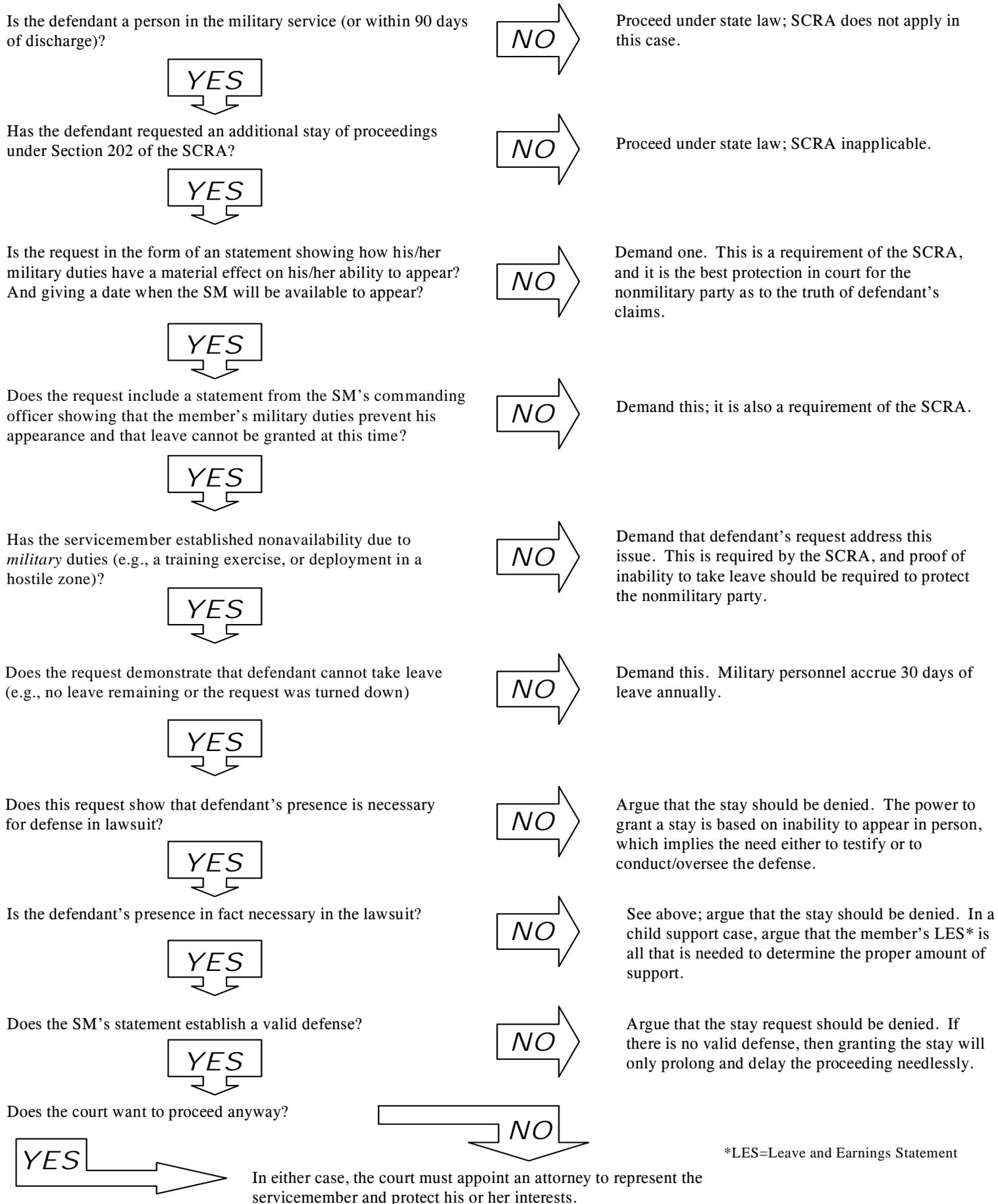
[date]

TO WHOM IT MAY CONCERN:

1. I am the commanding officer of SGT Leopold Legume, SSN 123-45-6789.
2. His current military duty prevents his appearance in court on May 1, 2004.
3. He has requested one week=s leave for this court appearance. I denied his request, and military leave is not authorized for him at this time.

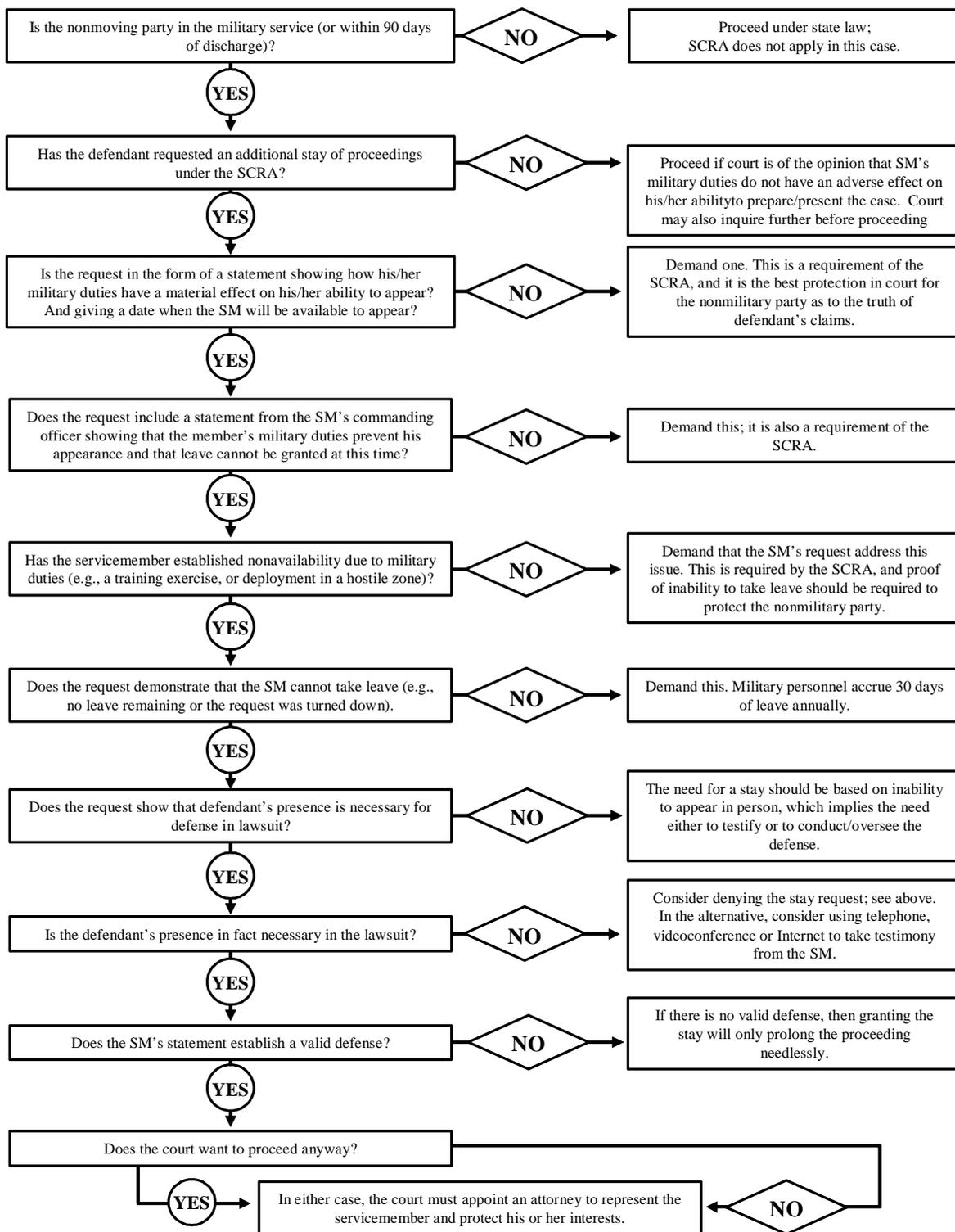
[signature of commanding officer]

# SCRA Flow Chart for Opposing “Additional Stay”



\*LES=Leave and Earnings Statement

### ATCH 3 - SCRA Flow Chart for "Additional Stay"



## **The Servicemembers Civil Relief Act: A Judge’s Checklist**

[NOTE: The SCRA can be found at 50 U.S.C. Appendix § 501 et seq.]

In using this checklist, keep in mind the purpose of the Act: to enable servicemembers (SMs) to devote their entire energy to the defense needs of the nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. App. § 502)

✓ **Who is covered?** (50 U.S.C. App. § 511) Those covered include:

- Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
- National Guard members called to active duty by President or Secretary of Defense for over 30 days under 32 U.S.C. 502(f) (national emergency declared by the President and supported by federal funds)
- Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration

✓ **Default situation** – no appearance by SM (servicemember) (50 U.S.C. App. § 521). You must -

- 1. Require affidavit of military status by moving party
- 2. Inquire into whether missing party is in military service by requesting check of records by Dept. of Defense<sup>1</sup>
- 3. Don’t enter default decree against SM – appoint an attorney to represent him/her
- 4. If you cannot determine whether missing party is in military, require movant to post bond to indemnify the non-movant if:
  - a. there may be a defense, and presence of SM is needed to make it, OR
  - b. with due diligence, appointed attorney can’t contact client or otherwise determine whether defense exists

✓ **Use of bond?** (50 U.S.C. App. § 522(b)(3))

- As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
- Bond may be used to indemnify defendant against loss/damage from default judgment (if later set aside) should he/she later be found to be a SM.

✓ **Request for stay** – SM or attorney requests suspension of case (50 U.S.C. App. § 522)

- Grant stay of proceedings (discretionary on court’s own motion, mandatory on SM’s motion) for at least 90 days if motion includes-
  1. Statement as to how the SM’s current military duties materially affect his ability to appear, and
  2. stating a date when the SM will be available to appear, and
  3. Statement from the SM=s commanding officer that SM=s current military duty prevents his appearance, and
  4. military leave is not authorized for the SM at the time of the statement

✓ **Grant additional stay (beyond initial 90 days)?**

- Yes if continuing material effect of military duty on SM’s ability to appear.
- Same information required as above.

✓ **Deny additional stay?**

- Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
- Expect attorney to renew stay request since he/she cannot prepare, present case without assistance from the unavailable SM.

✓ **Unsure whether to grant or deny additional stay?**

- Ask for a copy of the SM’s current LES (Leave and Earnings Statement), issued twice a month, to see how much leave SM has accrued, used in the past few months.
- Propound questions from the court to SM’s commanding officer as to duty hours, days for the SM, his or her availability to attend court or to participate by telephone, Internet or videoteleconference

✓ **Execution of orders, judgments** (50 U.S.C. App. § 524)

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<sup>1</sup> Upon application by either side or the court, the military service must issue a statement as to military service. 50 U.S.C. App. § 582. Contact: Defense Manpower Data Center, 1600 Wilson Blvd., Suite 400, Attn: Military Verification, Arlington, VA 22209-2593, [telephone 703-696-6762 or –5790/fax 703-696-4156]

o Must stay execution of any judgment, order entered against SM if SM shows military duties materially affect his/her ability to comply with court decree

o Also vacate or stay any attachment or garnishment of property, money or debts in possession of the SM or third party

✓ **Anticipatory relief** (50 U.S.C. App. § 591)

o Grant relief from obligation or liability incurred by SM before his/her military service

o Also for tax or assessment falling due before or during the SM's military service

✓ **Reopen judgment** (50 U.S.C. App. § 521(g))

o Must reopen order, judgment against SM if –

1. SM was materially affected due to military service in asserting defense, and
2. He/she has meritorious defense

✓ **Are waivers allowed?** (50 U.S.C. App. § 517)

o Only effective if made during period of military service.

o Usually must be in writing.

✓ **Don't penalize SM in stay request.** (50 U.S.C. App. § 522(c))

o Request for stay does not constitute appearance for jurisdictional purposes

o Also doesn't constitute waiver of any defense, substantive or procedural

✓ **Statute of limitations** (50 U.S.C. App. § 526)

o Period of military service may not be included in computing any limitation period for filing suit, either by or against SM.

✓ **Protect against mortgage foreclosure** (50 U.S.C. § 533)

o Court may stay foreclosure proceedings until SM can answer, extend mortgage maturity date to allow reduced monthly payments, grant foreclosure subject to being reopened if challenged by SM, or extend the period of redemption by period equal to the SM's military service.

o Conditions for above: if –

1. Relief is sought on security interest in real/personal property
2. Obligation originated before active duty
3. Property owned by SM or dependent before active duty
4. Property still owned by SM or dependent
5. Ability to meet financial obligation is materially affected by SM's military service
6. Action is filed during (or within 90 days after) SM's military service. (50 U.S.C. App. § 533)

✓ **Protect SM-tenant.**

o If the rent is paid in advance, require landlord to refund unearned portion. The servicemember is required to pay rent only for those months before the lease is terminated. (50 U.S.C. § 535(f))

o It is a misdemeanor for a landlord to seize, hold or detain the security deposit or personal property of a SM or dependent when there is a lawful lease termination under the SCRA, or to knowingly interfere with the removal of said property because of a claim for rent after the termination date. A security deposit must be refunded to the SM upon termination of the lease. 50 U.S.C. § 535(h)(1).

\* \* \*

## LEGAL CONSIDERATIONS IN SCRA STAY REQUEST LITIGATION: THE TACTICAL AND THE PRACTICAL

### Stays of Proceedings

Section 202 of the Servicemembers Civil Relief Act (SCRA), the successor to the Soldiers' and Sailors' Civil Relief Act (SSCRA), allows the servicemember (SM) to obtain an initial stay of at least 90 days upon production of a statement showing how the SM's current military duties materially affect his ability to appear and stating a date when the SM will be available to appear, along with a statement from the SM's commanding officer stating that the SM's current military duty prevents his appearance and that military leave is not authorized for him at the time of the statement. This Section also allows the SM to request an additional stay, based on the continuing effect of his military duty on his ability to appear. He may make this request at the time of his initial request or later on, when it appears that he is unavailable to defend or prosecute. The same information as given above is required. 50 U.S.C. App. § 522.

After the initial mandatory stay, which must be granted upon production of the above statements, the granting of an additional stay is in the discretion of the judge. The U.S. Supreme Court has held that this provision should be "liberally construed to protect those who have been obliged to ... take up the burdens of the nation."<sup>2</sup>

Do the courts have to grant an additional stay? No -- it is merely the purpose of the Act to focus the court's attention on whether a military member's ability to appear is *materially effected* by military service. If the court finds no "material effect," for example, the request for stay should be denied. The court is unlikely to find material effect, for example, when the courthouse is in close proximity to the base or post and the military member has a reasonable amount of annual leave accrued that can be used in trial preparation and attendance.

A finding of "material effect" on the ability to appear is likely, on the other hand, when the member is distant from the courthouse, lacks sufficient leave that may be used for travel, preparation, and attendance in court, or is on an assignment that precludes the granting of leave to take care of one's civil legal affairs. The trial court (federal or state) *must* grant a request for a stay when it finds that the member's military service has a "material effect" on the individual's ability to appear.<sup>3</sup> (See flow chart on stay of proceedings.)

Here are some arguments that may succeed even if the member cannot appear:

- The member's presence at trial is not necessary. In *Keefe v. Spangenberg*<sup>4</sup>, the court denied a stay request to delay discovery and suggested that the servicemember consider a videotape deposition under Federal Rule of Civil Procedure 30(B)(4). In *Jackson v. Jackson*,<sup>5</sup> the court denied an SSCRA stay because under state law the obligor's presence was not necessary in a proceeding to review the amount of support. Finally, in *In re Diaz*,<sup>6</sup> the court stated that "Court reporters may take depositions in Germany including videotape depositions for use in trials in this country."
- The sole issue at trial amounts to uncontested facts, and thus no stay should be

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<sup>1</sup> *Boone v. Lightner*, 319 U.S. 561 (1943).

<sup>2</sup> *Boone v. Lightner*, *supra*.

<sup>4</sup> *Keefe v. Spangenberg*, 533 F. Supp. 49, 50 (W. D. Okla. 1981).

<sup>3</sup> *Jackson v. Jackson*, 403 N.W. 2d 248 (Minn. App. 1987).

<sup>4</sup> *In re Diaz*, 82 B.R. 162, 165 (U.S. Bankruptcy. Cr. 1988).

- granted because no actual prejudice results from the soldier's non-appearance. This result can be obtained in uncontested divorce proceedings.<sup>7</sup>
- The military member is nominally involved but is not a "necessary party" to the contested litigation. In *Bubac v. Boston*,<sup>8</sup> the father was a military member. He was found by the court, however, not to be a necessary party to the litigation, which involved the mother's challenge to the maternal grandmother's retaining custody of the children.
  - There is no "substantial prejudice," to the military member when a temporary order or an interlocutory decree is involved. In *Shelor v. Shelor*,<sup>9</sup> the court stated that, as a general rule, temporary modifications in child support do not materially affect the rights of a military defendant since they are interlocutory in nature and subject to future modification.

### Determining 'Material Effect'

It is up to the trial judge to determine, on a case-by-case basis, what are the boundaries of "material effect." A good example can be found in *Cromer v. Cromer*.<sup>10</sup> In that case the defendant was serving on board a submarine that was scheduled for operations at sea during the period when his child-support case was set for trial. The Supreme Court remanded the case for consideration of the affidavit of the sailor's commanding officer in determining whether his military service and duties had a "material effect" on his ability to defend himself so as to justify a stay of proceedings under the Act.

There is no clear formulation of who has the burden of proof to show a "material effect." As stated by the U.S. Supreme Court in *Boone v. Lightner*:

The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sense to know from what direction their information should be expected to come.<sup>11</sup>

Although it is logical to require the burden of proof to be on the movant (*i.e.*, the service member who is requesting a stay of proceedings), some courts have stated that *both parties* may be required to produce evidence on the issues.<sup>12</sup>

A stay is not forever. Contrary to the popular notion of many servicemembers and some civilian practitioners, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. Military members accrue leave at the rate of 30 days per year, and courts can take judicial notice of this fact.<sup>13</sup> Current overseas postings usually last around three years for an "accompanied tour" (with family members), and much less for unaccompanied tours in such host countries as Turkey, Korea and Iceland.

In fact, the stay is intended to last only as long as the material effect lasts. Once this effect is lifted, the opposing party should immediately request the lifting of the stay of proceedings. In the event

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<sup>7</sup> See, e.g., *Palo v. Palo*, 299 N.W.2d 577 (S.D. 1980).

<sup>6</sup> *Bubac v. Boston*, 600 So. 2d 951 (Miss. 1992).

<sup>7</sup> *Shelor v. Shelor*, 259 Ga. 462, 383 S.E. 2d 895(1989).

<sup>8</sup> *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

<sup>9</sup> *Boone v. Lightner*, *supra*.

<sup>10</sup> *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).

<sup>11</sup> *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

of further resistance by the military member, the court should require submissions upon affidavit for deciding the issue.

The statement of a service member -- and any other proof offered to show “material effect”--will ordinarily be scrutinized by the court to determine whether the member has exercised due diligence to secure counsel or to attend the hearing. In *Palo v. Palo*,<sup>14</sup> a South Dakota divorce and property division case, the parties were both in service, and both were stationed in Germany when the trial was scheduled. The wife had no leave accrued, but she borrowed money and took an advance on future leave to attend the hearing. The husband was absent at the trial and his affidavit stated that he had no money, wished to reconcile with his wife, did not have any remaining leave, and did not wish to take an advance on leave. The appellate court upheld the trial court’s decision not to grant a stay to the husband because the evidence showed that the husband was unwilling, rather than unable, to attend the proceeding. The trial judge found that the husband should not be allowed to take advantage of the SSCRA’s protections where the wife did not do so. The Supreme Court of South Dakota ruled that the husband failed to demonstrate due diligence in trying to attend the proceedings.

### Unwritten Rules

A further rule that is applied by the courts but is not found in the Act is that the stay requested must be for a reasonable period of time. In *Plesniak v. Wiegand*,<sup>15</sup> the defendant requested four stays under the SSCRA between the filing of suit in 1969 and the final trial date in 1973.

When the final stay request was turned down, the court ruled that the service member had not made a reasonable effort to make himself available for trial. The court also ruled that the Act does not require indefinite continuances and that it was incomprehensible why the defendant, a commanding officer, could not take leave to attend trial.

A stay may last for such period as is just; the key is reasonableness. In *Keefe v. Spangenberg*,<sup>16</sup> the court granted a soldier’s stay request for a one-month continuance but denied his request for a stay until his expected date of discharge three years later.

If the unavailability of a servicemember is only temporary and will end at a fixed date in the near future, then the court will usually grant a stay. Such would be the case if the member were a sailor deployed for a six-month mission on a ship or if a soldier were on a field exercise for several weeks. Counsel for the member should avoid requesting stays that are unreasonably long since most courts understand the availability of leave for service personnel, even if they are stationed overseas. The courts will carefully scrutinize *extended unavailability*, particularly when it is *unexplained*. In these cases, the judge will usually demand that a member make some showing that he has attempted to delay his departure for an overseas assignment or to secure leave to return to the U.S. from an overseas duty station.

Be sure to check on whether the servicemember has requested leave to appear in court. If he hasn’t, it will be impossible for him to obtain an initial 90-day stay and very difficult for him to obtain an additional stay since he won’t be able to show the unwritten requirement of “due diligence.” Military policy is to grant leave for the purpose of attending to important matters, which include court appearances. If leave was requested and denied, write to the commander and ask him or her when the member can be allowed to take leave.

In order to solve some of the problems associated with unavailability of military personnel, the Welfare Reform Act of 1996 requires that the military services must promulgate regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child

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<sup>12</sup> *Palo v. Palo, supra*.

<sup>13</sup> *Plesniak v. Wiegand*, 31 I11. App.3d 923, 335 N.E.2d 131 (1975).

<sup>14</sup> *Keefe v. Spangenberg, supra* at note 3.

support hearings. See Pub. L. No. 104-193 § 363, 110 Stat. 2105 (1996) and DOD Dir. 1327.5, “Leave and Liberty,” Change 4 (September 10, 1997). The Directive now states that when a servicemember requests leave to attend paternity or child support hearings, leave “shall be granted” unless the servicemember is serving in a contingency operation or unless “exigencies of service” require that leave be denied.

Counsel for the non-military party should request that the court examine whether the member has acted with “due diligence” and “in good faith.” Most courts hold that a member must exercise due diligence and good faith in trying to arrange to appear in court.<sup>17</sup> When a servicemember demonstrates bad faith in his dealings with the court, no stay will be granted. In *Riley v. White*,<sup>18</sup> a soldier failed to submit to blood tests in a paternity action before going overseas and was aware of the court proceedings, had an attorney to represent him and was previously given a delay by the court to take the tests required; the court’s denial of his stay request was upheld. In *Hibbard v. Hibbard*,<sup>19</sup> a soldier who had been in contempt for three years for refusing to comply with visitation orders was denied a stay in the ex-spouse’s change of custody action. In *Judkins v. Judkins*,<sup>20</sup> a soldier received several continuances because of military duty during the Persian Gulf War, had an attorney, failed to comply with court discovery orders and sought additional stays or continuances after discovery order disobedience; the court denied his stay requests.

An affidavit or statement supporting the stay request should be carefully prepared by counsel with an eye toward the close scrutiny and possible skepticism of the trial court. It must also be prepared with a view toward appeal. A good affidavit will not only state that the defendant cannot be present at trial but also indicate why the defendant is unavailable, what efforts he or she has made to attend trial, and when the member will probably be able to be present.

### Questions for the Servicemember

Some courts require more of such information whenever a stay application does not contain sufficient facts. One example is the set of questions used by the courts in Monterey County, California, to get information from the defendant’s commander.<sup>21</sup> The author has added several additional inquiries, and these are formatted as interrogatories to the defendant (as opposed to questions by the court):

1. What have you done to obtain ordinary and/or emergency leave to attend any necessary hearings and/or trial in this court?
2. What results did these efforts produce?
3. How much leave did you request?
4. When did you request this leave?
5. Give the name, rank, title, address and commercial telephone number (if available) of the individual who denied your leave request.
6. Have you taken any leave in the last three months?
7. If so, how much and for what purpose?
8. How much leave do you currently have as reflected on your latest Leave and Earnings Statement (LES)?

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<sup>15</sup> See e.g., *Boone v. Lightner*, 320 U.S. 809, 64 S. Ct. 26, 88 L. Ed. (1943), *Plesniak v. Wiegand*, 31 Ill. App. 3d 923, 927-30, 335 N.E. 2d 131 (1975), *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E. 2d 905 (1982), *Palo v. Palo*, 299 N.W. 2d 577 (SD S. Ct. 1980), and *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994).

<sup>16</sup> 563 So. 2d 1039 (AL App. 1990).

<sup>17</sup> 230 Neb. 364, 431 N.W. 2d 637 (1988).

<sup>18</sup> *Judkins v. Judkins*, *supra* at note 15.

<sup>19</sup> Hooper, “The Soldier’s and Sailors’ Civil Relief Act of 1940 as Applied in Support Litigation: A Support Attorney’s Perspective,” 112 MIL. L. REV. 93, 95-96 (1986).

9. Provide a copy of your last three Leave and Earnings Statements with your responses to these questions.
10. What have you done to obtain a transfer to a military installation near this court on either a temporary or permanent basis?
11. What results did these efforts produce?
12. When were you assigned to the present duty station?
13. When are you due to be transferred on normal rotation or reassignment?
14. To what station will you probably be transferred?
15. (If the SM is an enlisted person) What is the date of your present enlistment contract?
16. When does the enlistment expire?
17. Do you intent to re-enlist?
18. Does your service record contain a bar to re-enlistment?
19. Is there any likelihood that you will obtain an early release from active duty and, if so, when is this expected to occur?
20. State any and all reasons why you cannot respond to written interrogatories in this case.
21. State any and all reasons why you cannot respond to written document requests in this case, so long as the documents request are readily available to you.
22. State any and all reasons why you cannot respond to written requests for admissions in this case.
23. Give the location (and distance) of the nearest legal assistance office (JAG office or staff judge advocate office) to you.
24. State your duty hours during the week.
25. State your duty hours on weekends.
26. State what means of communication are available between you and this court, specifically including telephone, e-mail, regular mail and videoteleconference (both individually and through you JAG office).

### **Default Judgments**

Members are further protected from default judgments under the SCRA. The purpose of this is to protect those in the military from having default judgements entered against them without their knowledge and without a chance to defend themselves.<sup>22</sup> The SCRA allows a member who has not received notice of the proceeding to seek the reopening of a default judgment. The requirements are as follows:

- The member must apply to the trial court that rendered the original judgment of order.<sup>23</sup>
- The default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter.
- The member must apply for reopening the judgment while on active duty or within 90 days thereafter.
- The member must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.<sup>24</sup>
- The member must show that there is a meritorious or legal defense to the initial claim.

<sup>20</sup> *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).

<sup>21</sup> *Davidson v. GFC*, 295 F. Supp. 878 (N.D. Ga. 1968).

<sup>22</sup> *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).

An important requirement of the reopening of a judgment is that the moving party have a meritorious or legal defense. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of effort and resources in opening default judgments in cases where servicemembers have no defense to assert. As part of a well-drafted motion or petition to reopen a default judgment or order, the SM should clearly delineate his claim or defense so that the court will have sufficient facts upon which to base a ruling.

The North Carolina Courts of Appeals most recently dealt with the "meritorious defense" issue in *Smith v. Davis*.<sup>23</sup> In that case, plaintiff served defendant with a complaint that charged him with nonsupport and requested an order of child support. In response, the member sent a letter to plaintiff's attorney asking that the attorney recognize his rights under the SSCRA. Defendant failed to appear at the hearing and the court, without appointing an attorney to represent the defendant, entered an order that defendant pay child support to plaintiff on behalf of the minor child.

Defendant then filed a motion to set aside the decree under several provisions of the SSCRA. The affidavit attached to the motion alleged that defendant was on active duty in the Marine Corps in California, that his military obligations prevented his attendance at the hearing, and that he was having "pay problems"-- he had not been paid in four months. On appeal, the order was set aside because "[d]efendant has alleged facts which at the time of the child support hearing were sufficient to constitute a legal defense to plaintiff's petition."<sup>26</sup>

How do you take a default judgment in a military case if you want to safeguard it against reopening? There must be an affidavit or other verified pleading which supports the default judgment. It must be prepared and filed by the plaintiff (or the moving party) and it must state sufficient facts to give the court a reasonable basis to determine whether the defendant/respondent is in the military.<sup>27</sup> The effect of failure to file such an affidavit is that no entry of judgment is allowed until a judge determines that the defendant is not in the military and has not requested a stay.

The court is not required to set aside a default judgment if there was no prejudice by reason of service in the armed forces. A New York court, for example, refused to set aside a default separation decree against a servicemember when he was fully advised of the tendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of his trial. The court in this instance held that he was not prejudiced due to his military service in defending the action.<sup>28</sup> In a California case, the court ruled that if a member against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, then his military service didn't prejudice him.<sup>29</sup>

## **Meritorious Defense**

When representing a servicemember, it is important to state early and clearly the meritorious defense that is involved. In cases where a servicemember has been sued, this is usually done in a pleading under Rule 8 of the Federal Rules of Civil Procedure (or the local jurisdiction's equivalent), giving adequate notice to the plaintiff of any defenses upon which defendant will rely.

One particular area where valid defenses will usually be difficult to assert is in cases involving the initial determination of child support. A copy of the military pay tables is available from most recruiters and also from the website of the Defense Finance and Accounting Service, [www.dfas.mil](http://www.dfas.mil). The

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<sup>23</sup> *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

<sup>24</sup> *Id.*, 364 S.E.2d at 159.

<sup>25</sup> *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).

<sup>26</sup> *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., October 17, 1962).

<sup>27</sup> *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

laws of all states and territories require “expedited process” in child support determinations.<sup>30</sup> Ordinarily a preliminary determination of child support must be made within 60 days of filing suit. The child support guidelines usually prescribe a formula for child support based on the incomes of one or both parents.

Even if the military member does not show up in court for the hearing due to military duties elsewhere, the trial judge can easily determine his or her income for input into the child support guidelines. Most judges add the servicemember’s taxable gross base pay to the nontaxable basic allowance for housing (BAH) and the nontaxable basic allowance for subsistence (BAS) in order to arrive at the member’s gross pay. With airborne troops, an additional component termed “jump pay” is added; for aviators, this is called ‘flight pay.’

Base pay, BAS and BAH can all be found on the published military pay tables. A recent leave-and-earnings statement of the member will contain an accurate picture of the total entitlements, statutory deductions, voluntary deductions and year-to-date totals. In addition, it will contain a category describing total leave accrued and leave time remaining, which are invaluable pieces of information for the trial court. These pay statements are easily available to every servicemember.

With all these tools available for an expedited and straightforward determination of child support (at least on a temporary basis), it is hard to see how the trial court would grant an additional stay at this stage of the proceedings absent a very good showing by military members of their “valid defense” requiring personal attendance at court for preparation and trial of the matter.

On the other hand, some valid defenses do exist in enforcement proceedings, as shown in *Smith v. Davis*. As a general rule, “[a]bsence when one’s rights or liabilities are being adjudged is usually *prima facie* prejudicial.”<sup>31</sup> In *Smith v. Davis*, the Court of Appeals held that it was reversible error to proceed with the trial without the defendant, and that his military service did prejudice his ability to defend the child-support action.<sup>32</sup>

A servicemember’s defense could be based, for example, on any one of the following:

- ❑ Death or emancipation of the child;
- ❑ Transfer of physical or legal custody of the child;
- ❑ Prior payment of child support (but failure of the court, agency or custodial parent to credit same); or
- ❑ Military financial error (resulting in no paycheck or substantially reduced pay).

A personal appearance for testimony would probably be essential for each of these issues. In any of the above enforcement-defense cases, a clear statement of the defense which is sufficient to give notice of same to the other side, made under oath, should be sufficient to persuade the trial court to grant a stay for a reasonable period of time.

Three additional protections may help the servicemember. The Act requires the filing of an affidavit whenever judgment is taken by default. 50 U.S.C. App. § 521(b)(1). It contains provisions for the appointment of an attorney for the absent servicemember. 50 U.S.C. App. § 521(b)(2). It also provides for the posting of a bond, in the discretion of the court, by the party requesting a default judgment. 50 U.S.C. App. § 521(b)(3).

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<sup>28</sup> N.C. Gen. Stat. § 50-32.

<sup>29</sup> *Boone v. Lightner*, 319 U.S. at 575; see also *Chenausky v. Chenausky*, 128 N.H. 116, 509 A.2d 156 (1986).

<sup>30</sup> *Smith v. Davis*, *supra* at note 23.