A Trial Lawyer's Guide to the Servicemembers Civil Relief Act

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Introduction

During any period of active-duty deployments and Reserve/Guard mobilizations, there will undoubtedly be many plaintiffs or defendants who are on active duty in the armed forces. The skilled trial lawyer needs to know how to navigate the reefs and shoals of the single most important law covering all aspects of litigation and military personnel – the Servicemembers Civil Relief Act.

The Servicemembers Civil Relief Act (SCRA) took effect on December 19, 2003. It was a complete revision of the statute known as "The Soldiers' and Sailors' Civil Relief Act," or SSCRA. Its most significant provisions deal with defaults and delays.

Who's Covered?

Those who are serving in the armed forces – the Army, Navy, Air Force, Marine Corps and Coast Guard – are covered by the statute. The SCRA also applies to members of the Reserves when serving on active duty. In the past, the law applied to members of the National Guard only if they were serving in "Title 10 status" (that is, activated by the Defense Department under Title 10, U.S. Code rather than pursuant to a call-up by the state governor). Effective December 6, 2002, the law's protections were extended to members of the National Guard called to active duty for 30 days or more pursuant to a contingency mission specified by the President or the Secretary of Defense.[1]

Stay of Proceedings – Statutory Provisions

There are several provisions in the SCRA regarding the ability of a court or administrative agency to enter an order to stay the proceedings. This is one of the central points in the SCRA – the granting of a continuance, which halts the case. The first such provision comes in the section dealing with defaults.

50 U.S.C. App. § 521 governs when the SM has made no appearance. When a judgment, order or adverse ruling is sought against a party who has not made an appearance, it is the duty of the court to determine whether that party is in the military. The SCRA states that either side or the court may apply for information as to military service to the Department of Defense (DOD), which must issue a statement as to military service.[2] 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]

Alternatively, visit the Defense Manpower Data Center (DMDC) website for SCRA inquiries, https://www.dmdc.osd.mil/appj/scra/welcome.xhtml and enter the individual's last name and Social Security number. 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 in the "Help" section of the website.

To execute a report, fill in requested data and then click on the "LookUp" button, which will open up a second window containing 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.

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[1] 50 U.S.C. App. § 511(2)(A)(ii).
[2] 50 U.S.C. App. § 582.

The website allows one to check the active duty status of a servicemember (SM) based on a specific date, called the "Date of Interest." This may be any date later than September 30, 1985. The default Date of Interest is the current date. This is helpful if one needs to determine whether John Doe was on active duty on June 1 of last year, even though he might not be on active duty today, to see whether the SCRA applies to his failure to answer the complaint at that time and the subsequent default judgment which was entered by the court. DMDC will check:

(1) The individual's active duty status on the Date of Interest;

(2) Whether the individual left active duty within 367 days preceding the Date of Interest;

(3) Whether the individual or his/her unit received notification to report for active duty on the Date of Interest.

If DMDC does not have information as to whether the individual is on active duty, the generated report will list only 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 individual's 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 to the DMDC at the address above in this case.

Stay of Proceedings – Duties of the Court

Where Sergeant Doe has not entered an appearance, the SCRA requires a court to grant a stay of at least 90 days when the applicant is in military service and --

a. the court decides that there may be a defense to the action, and such defense cannot be presented in John Doe's absence, or

b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

When SGT Doe has actual notice of the proceeding, a similar mandatory 90-day stay (minimum) of proceedings applies upon his request.[3] The conditions for an SM obtaining a continuance (called a "stay of proceedings" in the Act) for 90 days or more are:

- Elements of a Valid 90-Day Stay Request -

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 appearance…
- and stating that military leave is not authorized for the SM at the time of the statement?

There are no "technical requirements" for the request. It can be in an e-mail or a letter, on an affidavit or the back of a cocktail napkin, in a phone call or through a Western Union telegram. It does not have to be on "the appropriate court form" – after all, some of these requests may be written while Sergeant Doe is getting on the plane for a deployment at the "Green Ramp" at Ft. Bragg, or from primitive conditions at Forward Operating Base Cobra. The application does not have to be notarized, it doesn't have to be witnessed, and it is not required to have the court and case heading on the document (IF a document is used).[4]

An application for an additional stay may be made at the time of the original request or it can be submitted to the court at a later date. 50 U.S.C. App. § 522 (d)(2). If the court refuses to

[3] 50 U.S.C. App. § 522.

[4] For a sample motion for stay of proceedings, go to www.nclamp.gov > Resources > " '*Are We There Yet*?' – A Roadmap for Appointed Counsel under the Servicemembers Civil Relief Act."

grant an additional stay, then the court *must appoint counsel* to represent the SM in the action or proceeding. 50 U.S.C. App. § 522(d)(2).

TIPS FOR THE TRIAL LAWYER

Query: What is the appointed attorney supposed to do – tackle the entire representation of the SM, whom she has never met, who is currently absent from the courtroom and who is likely unavailable for even a phone call or a consultation if he is on some distant shore in harm's way? And, by the way, who pays for this? There are no answers in the statute.

An application for a stay does not constitute an appearance for jurisdictional purposes. Nor does it constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction).[5]

Stay of Proceedings – The Practical and the Tactical

The court's decision on whether or not to grant a delay must be based on the specific reasons and military exigencies advanced by the SM's lawyer who is requesting a stay. Here are some practical pointers as to the stay provisions:

- A SM who is a party, not a witness, in civil judicial proceedings may request and obtain a stay of proceedings if the specified conditions above are met.
- The request for a stay can be a motion by the SM or on the court's own motion. It may also be in the form of a communication from the SM, his commander or first sergeant, the chaplain, his wife or his mother – anyone who has knowledge of the situation, so long as the terms above for a request are met.
- After the initial "90-day stay" (actually, the statute states that this is for a minimum of 90 days and may be longer), the lawyer should allege and prove that the SM's ability to prosecute or defend is "materially affected" because of his or her active duty service if a

[5] 50 U.S.C. App. § 522(c).

further stay is to be granted.

- Once the court makes this finding of *material effect*, the member is entitled to a stay for such period as is necessary until the material effect is removed.
- Since courts are reluctant to grant long-term stays of proceedings, they can and should require members to act in good faith and be diligent in their efforts to appear in court.

The Issue of "Material Effect"

Aside from the initial 90-day stay, any additional stay will usually revolve around the effect military service has on the member's ability to participate in the preparation and trial of his case. If a court finds there is a material effect on the ability to defend or participate in the litigation, then the court *must* order a stay.

A stay cannot last forever.[6] The period of the stay, according to the SCRA, may be for the period of the SM's military service or any part of that period.[7] A stay ordinarily is tailored to last until the end of the impairment or until the material effect is removed. If a stay is denied, the judge *must* make findings of fact about lack of material effect and ensure that there is sufficient evidence in the record to warrant a denial.

What is "material effect"? There is no one definition of this term. The court should make a finding of "material effect" when specific facts show that a member's ability to prosecute or defend a civil suit is impaired by military duties, such as inability to obtain leave to appear in court at the designated time and place, or to assist in the preparation or presentation of the case.

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[6] In *Ensley et al. v. Carter*, 245 Ga. App. 453, 538 S.E.2d 98 (2000), counsel for the SM wrote to opposing counsel, "This case will be stayed until Slade Ensley is discharged from the military, whenever that date occurs. If my memory is correct, Slade and I discussed in past conversations that he intends to make a career of military service. Therefore, this case will probably be in a posture for trial sometime in the next 30 to 40 years." In another letter the same attorney noted that his client "expressed a desire to have a long term career in the military. Unfortunately, it appears that this case will not be tried until we are well into the 21st century." 245 Ga. App. at 455, 538 S.E.2d at 100. Needless to say, the court did not grant a 30-year stay. In light of the earlier depositions of the plaintiffs (one of whom was the SM) and the lack of evidence that the SM-plaintiff sought military leave to attend the trial, no stay was allowed. 245 Ga. App. at 456, 538 S.E.2d at 100.

The impairment can be geographic, logistical, legal or economic. A *geographic* effect might be location in a faraway assignment, which makes it impossible to attend trial. A *logistical* problem might be the member's inability to receive and send mail or e-mail due to the nature of the assignment, or his "24/7" duties, leaving no free time to devote to the litigation. A *legal* impairment might be involved if a SM has classified orders, which may not be lawfully released to the court for a determination of her availability. An *economic* disability would be the inability of the servicemember to hire an attorney or retain an expert. An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations, such as child support or alimony.

Material Effect – An Example

An illustration of what should be considered "material effect" is found in a 1981 N.C. Supreme Court case, *Cromer v. Cromer*.[8] In that case, the sailor was ordered to pay increased child support in November 1979. Prior to that hearing, he tried to obtain a stay under the SSCRA, the Soldiers' and Sailor' Civil Relief Act. His commander wrote a letter to the judge stating that operational requirements prevented him from taking leave until January 1980. He subsequently signed an affidavit and sent it to the district court, stating that Jack Cromer, the defendant, was "Chief of the Boat," the sole interface between enlisted men and officers on the nuclear submarine *USS Skate*, that operations at sea were scheduled for the last two weeks in November 1979, and that Mr. Cromer would not be permitted to take leave.

Now the mystery begins. For some reason, the letter and affidavit only showed up as part of the petition for discretionary review in the Supreme Court (after the Court of Appeals had upheld the trial court's increase in child support and order of garnishment). They were not part of the

[7] 50 U.S.C. App. § 525.
[8] *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

record on appeal. They did not appear in any lower court file. And counsel for the defendant, in oral argument before the Supreme Court, explained that he was unaware of these documents at the time the orders were entered in the trial court.

Regardless of this irregularity -- or perhaps because of it -- the Court reversed the judge's orders, stating that "the trial court might have proceeded in another manner had it been aware of these documents."[9]

TIPS FOR THE TRIAL LAWYER

This case shows that *it's never too late*, that the stay application can still help the SM in the appellate process to show "material effect" of military service. It also shows the value of a detailed and specific affidavit and motion requesting only a limited stay, for about two months in this case. Although not stated as such by the Supreme Court, the facts in the affidavit clearly demonstrate the *material effect*, which military duties had on Jack Cromer's defense.

Inquiring into "Material Effect"

Nothing in the Act requires the court to grant a stay motion without a hearing. The non-moving party is entitled to his day in court and an opportunity to challenge the request. Perhaps he can establish that the information provided is false. Perhaps he wants to challenge a stay letter which is not signed by the commanding officer or which does not contain the necessary statements. If the SM's request applies to the initial 90-day stay, the non-moving party may want to show that the member has exaggerated the length of time he would need for the trial in order to ensure that his leave request will be denied, or that in some other way his allegation of "material effect" is false. Whatever the situation, the court should afford the non-moving party an opportunity to be heard in determining whether there is an adverse material effect caused by military duties.

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[9] *Id.*, 303 N.C. at 311, 278 S.E.2d at 520.

TIPS FOR THE TRIAL LAWYER

Be aware that the court may inquire into the nature of the material effect to ensure that justice is done for all parties. This can be done by allowing some discovery by the non-moving party for the limited purpose of uncovering facts to determine the nature and effect of the claimed material effect. The non-moving party, for example, might request copies of the SM's current LES (Leave and Earnings Statement), his military orders, any leave request submitted by the SM to his commander, and the response thereto.

As a condition of granting a stay, the judge can require the SM to submit a detailed statement as to how his military service has a material and adverse effect on his ability to prosecute or defend, such as an affidavit setting out all the facts and circumstances of the alleged disability. This would be executed by the SM since he would have the best knowledge of his disability, limitations and constraints in participating in the lawsuit. The court needs to know, for example, whether the member is on duty every day, including weekends, having no time for personal affairs, or whether his duties are from 7:30 to 4:30, the normal "military day," with most weekends free. Mere conclusory statements, such as "I request a stay because my military service has a material effect on my ability to participate in this lawsuit," are worth little in determining material effect. Such statements should be supported by facts, reasons and details of "how" and "why."

Military Leave

In weighing a request for a stay, the court should keep in mind that members from all branches of military service, from the lowest sailor or airman to the highest-ranking general or admiral, are entitled to thirty days of leave each year, accruing at the rate of 2.5 days per month. The court can take judicial notice of this fact.[10] Military leave must be requested, and a commander may turn down a leave request when military necessity so dictates. Current overseas

postings usually last around three years for an "accompanied tour" (with family members), and less than that for unaccompanied tours in such host countries as Turkey, Korea and Iceland. This information regarding leave is important in most cases where the SM is claiming nonavailability.

When in doubt as to whether Sergeant John Doe has shown material effect due to military service, which prejudices him in participating in the litigation, the judge has the discretion to request a more specific statement from him, detailing and explaining his efforts to appear in court, for example, and the next court date when he would be available. Such an affidavit should also detail SGT Doe's attempts to obtain the assistance of counsel. In addition, it should describe just what the leave request contained; if the SM were to request two weeks of leave, effective immediately, to attend a child support hearing, the commander would probably turn it down, even though no such amount of time would be needed in reality. In order to judge the SM's good faith, the court should inquire into what was contained in the leave request, rather than relying on broad generalities, such as "My commander denied me any leave to attend this hearing." It would be a good idea to ask for a copy of the leave request. In one case, the SM said that he needed a month's leave to attend a hearing; naturally, his commanding officer refused the leave request.

TIPS FOR THE TRIAL LAWYER

Keep in mind that SMs who are going through basic or advanced training may be unable to appear in court due to the training schedule. No extra days are built into the schedule to accommodate court dates, depositions or family emergencies. When a trainee is absent from the training program, this frequently means that he or she must repeat the same training program all over again.

[10] *Underhill v. Barnes*, 161 Ga. App. 776, 288 S.E.2d 905 (1982).

Additional Time, Length of the Stay

After the initial 90-day stay, a further stay of proceedings may last for such period as is just, up to and including the remaining term of service of the member. The duration of the stay may be the period of service plus 60 days. But the key is reasonableness. In *Keefe v. Spangenberg*,[11] 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. Some judges will grant a limited of three or four months, after which the court will review the facts again to determine whether a further stay is needed.

If Sergeant John Doe's unavailability 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 servicemember were a sailor deployed for a six-month mission on a ship or a soldier on a field exercise for several weeks. The courts will carefully scrutinize *extended unavailability*, particularly when it is *unexplained*. In these cases, the judge will usually demand that SGT Doe 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. If there is no reasonable and substantiated request for leave, it may be difficult for him to establish "due diligence."[12]

Diligence, Good Faith

A servicemember must exercise due diligence and good faith in trying to arrange to appear in

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[11] *Keefe v. Spangenberg*, 533 F. Supp. 49 (W.D. Okla. 1981).

[12] To solve some of the problems associated with unavailability of military personnel, the Welfare Reform Act of 1996 required the armed forces to issue regulations to facilitate the granting of leave for servicemembers to appear in court and for administrative paternity and child support hearings.12 Department of Defense Directive 1327.5, "Leave and Liberty," 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.

court.[13] In *Judkins v. Judkins*,[14] the wife filed a domestic lawsuit in August 1988. The defendant was an Army lieutenant colonel stationed at Ft. Bragg. After numerous continuances due to his military duties, he was finally given a trial date of August 31, 1992. When he failed to respond to discovery, failed to complete the pretrial order and moved for a continuance on August 31, adding (apparently for the first time) a motion for a stay under the SSCRA, the judge's patience was at an end. The trial court found that he had failed to exercise good faith and proper diligence in appearing and resolving his case and then denied the motions of defendant.

The Court of Appeals framed the issue as whether the trial judge had erred in denying the defendant's motion for a stay. It stated that:

- The only evidence of defendant's unavailability was a letter from the Army stating that he was to depart for Southeast Asia on August 30, 1992 for about 46 days;
- There was no evidence in the record as to whether the SM had at any time requested leave or whether leave was likely to be granted upon request; and
- The defendant made no showing as to how his defense would be prejudiced or his rights materially affected by his absence.

The Court of Appeals accepted the trial court's determination that the SM had failed to exercise good faith and due diligence.

TIPS FOR THE TRIAL LAWYER

A stay will not be granted without a showing of good faith and proper diligence, and courts will usually need to see a statement from the SM as to whether leave was available and had been requested. A stay is not forever. Contrary to the popular notion, a stay of proceedings is not meant to outlast the natural life of the lawsuit or, for that matter, the presiding judge. The stay is, in fact, intended to last only as long as the material effect lasts. Once this effect is removed, the opposing party should immediately request the lifting of the stay of proceedings. In the event of

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[13] *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).

[14] *Judkins v. Judkins*, *supra* note 5.

further resistance by the military member, the court should require supporting affidavits.

Dealing with Default

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves.[15] The SCRA allows a member who has not received notice of the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order.[16] In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter.[17] Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment.[18]

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service.[19] In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. Such a requirement avoids a waste of judicial 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 dealt with the "meritorious defense" issue in *Smith v.*

[15] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).
[16] *Davidson v. GFC,* 295 F. Supp. 878 (N.D. Ga. 1968).
[17] 50 U.S.C. App. § 521(g).
[18] 50 U.S.C. App. § 521(h).

Davis.[20] 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."[21]

Requirements for the Moving Party

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.[22] 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

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[19] *Bell v. Niven*, 225 N.C. 395, 35 S.E.2d 182 (1945).
[20] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[21] 364 S.E.2d at 159.
[22] *Millrock Plaza Associates v. Lively*, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).

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 pendency 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.[23] 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 did not prejudice him.[24]

Execution of Judgments

What happens when the attorney for the SM gets involved late in the lawsuit? This is typically at the stage where the court has entered an order to seize and sell the member's beautiful Pontiac Trans Am or to attach his bank account. Even when a court order or judgment has already been entered and the court is ready to proceed with execution or attachment, it is still not too late for the SM. 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) –

- stay the execution of any judgment or order entered against him, and
- vacate or stay any attachment or garnishment of property, money or debts in the possession of the SM or a third party regardless of whether it is before or after judgment.[25]

Opposing a Stay Request

It is clear from the above explanation that there are abundant protections which are afforded

[23] *Burgess v. Burgess*, 234 N.Y.S. 2d 87 (N.Y. Sup., 1962).
[24] *Wilterdink v. Wilterdink*, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

to the SM by the SCRA. However, domestic attorneys will be quick to recognize that these protections, especially the stay of proceedings, can work a hardship in many family law cases.[26] Delays in discovery, unpaid support, custody or visitation problems – all of these and more may confront the lawyer for the nonmilitary party. What are the tools and resources available to her to challenge the SCRA's protections, to oppose the request for a stay of proceedings? For the practitioner who wants to contest a stay request, here are some questions, suggestions and strategies.

Be sure to ask 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, North Carolina or Ft. Lewis, Washington (so that others may deploy overseas), working a comfortable day shift with weekends off? Counsel for the non-moving party will sometimes hit paydirt by challenging the explanation (or lack of explanation) of military necessity.

Has the SM specified a reason why he cannot participate in the lawsuit? In *Power v. Power*,[27] the Texas Court of Appeals affirmed the trial court's denial of a stay motion for lack of evidence that the SM's military service required a stay of proceedings. The SM, responding to a motion to increase child support, filed a "plea in abatement" which stated basically that he was a major in the U.S. armed forces, he was stationed in Germany for the next three years, and that he was asserting his rights under the SSCRA and requesting that the court abate the action.

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[25] 50 U.S.C. App. § 524.

[26] Query: How does this provision affect the custodial dad who suddenly stops receiving child support when his ex-wife is called up to active duty from the Guard or Reserve, leaving behind her "day job" and the monthly wage garnishment for support of their children? How does this provision affect an action for custody by the non-custodial dad when mom, who has custody, gets mobilization orders and takes off for Afghanistan, leaving the parties' child with her mother in Florida? Note that Congress made no restrictions as to domestic cases in writing and passing the SCRA. And in January 2008, it passed the 2008 National Defense Authorization Act which emphasized that custody is included in the cases covered by Section 521 (basically, all "default cases," where the SM has not entered an appearance) and those involving an initial stay request (for at least 90 days).

Noting that the Act was not to be used to delay the prompt resolution of lawsuits when the SM's rights would not be materially affected, the Court of Appeals stated that the trial has wide discretion in deciding whether a stay should be granted under the circumstances of a particular case and which party should bear the burden of proof as to prejudice. The Court added that "[s]uch latitude in fixing the burden of proof based on the facts of the case is especially appropriate where the trial court has the duty to protect the interest of children."[28]

The Court of Appeals pointed out that the SM "at all times appeared by counsel, yet he presented no admissible evidence in support of his plea."[29] Except for the bare allegation that he was in the armed forces and stationed in Germany for the next three years, he offered no proof to assist the court in the exercise of its discretion in determining whether a further stay should be granted. We note that during the 10 month pendency of appellee's motion to increase child support, appellant never presented proof that he was unable to obtain leave in order to appear at trial, or that his defense was otherwise adversely affected by reason of his military service."[30]

The Court of Appeals found that the trial court acted within its discretion in placing, under the facts of this case, the burden of proof on the SM, "who had greater access to the evidence supporting his position."[31] The SM's appeal was denied and the trial court's order, granting an increase in child support for the two children from $375 to $900 a month, was affirmed.

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[27] *Power v. Power*, 720 S.W.2d 683 (Tex. App. 1986).

[28] *Id.* at 684.

[29] *Id.*

[30] *Id.* at 684-685. The Georgia Court of Appeals in *Vlasz v. Schweikhardt et al.,* 178 Ga. App. 512, 343 S.E.2d 749 (1986) took the opposite approach: "When the application is made it is imperative that the stay be granted unless it is made to appear further, by relevant evidence touching the question of impairment to prosecute or defend resulting from military service, that there is no material impairment…. An applicant might well rest his request for a stay upon the bare statement that he is at the time actively in the military service, and, with nothing more appearing as evidence touching the question of his impairment by virtue of his service, the trial judge would be required, as a matter of law, to grant the stay." 178 Ga. App. at 513, 343 S.E.2d at 750, quoting from *Gates v. Gates*, 197 Ga. 11, 15-16, 28 S.E.2d 108 (1943).

Default Protections

If a default decree is entered against a SM, whether the judge complies with the terms of the SCRA or not, the Act provides protections. The purpose of this is to protect those in the military from having default judgments entered against them without their knowledge and without a chance to defend themselves. The SCRA allows a member who has not entered an appearance in the proceeding to move to reopen a default judgment. To do so he must apply to the trial court that rendered the original judgment of order. In addition, the default judgment must have been entered when the member was on active duty in the military service or within 60 days thereafter, and the SM must apply for reopening the judgment while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g). Reopening or vacating the judgment does not impair right or title acquired by a bona fide purchaser for value under the default judgment. 50 U.S.C. App. 521(h).

To prevail in his motion to reopen the default decree, the SM must prove that, at the time the judgment was rendered, he was prejudiced in his ability to defend himself due to military service. In addition, he must show that there is a meritorious or legal defense to the initial claim. Default judgments will not be set aside when a litigant's position lacks merit. This requirement avoids a waste of judicial 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.

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[31] *Id.* at 685.

Prior to the passage of the SCRA, the North Carolina Courts of Appeals dealt with the "meritorious defense" issue in *Smith v. Davis*.[32] In that case, plaintiff served defendant, the child's father, 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 Soldiers' and Sailors' Civil Relief Act (SSCRA), the forerunner to the SCRA. The defendant failed to appear at the hearing and the court, without appointing an attorney to represent him, entered an order requiring him to pay child support to plaintiff on behalf of the minor child.

The defendant then filed a motion to set aside the decree under several provisions of the SSCRA. The affidavit attached to the motion stated that the 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." [33]

Procedural rights and substantive ones may be pleaded as an issue when raising a meritorious defense claim. As a general rule, "[a]bsence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial."[34] In *Smith v. Davis*, the appellate court 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.[35]

[32] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).
[33] *Id., 364 S.E.2d at 159.*
[34] *Boone v. Lightner*, 319 U.S. at 575; *see also Chenausky v. Chenausky*,128 N.H. 116, 509 A.2d 156 (1986).
[35] *Smith v. Davis, supra* at n. 32

Substantive issues may provide the framework for a claim of "meritorious defense." A servicemember's defense in a child support case could be based, for example, on any one of the following:

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

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.

Conclusion and Resources

Handling cases involving the Servicemembers Civil Relief Act can tax the practitioner's patience, comprehension and research capabilities. Some provisions of the SCRA may seem illogical or counter-intuitive. Many sections cannot be understood without reference to other parts of the act. A wise attorney will associate competent co-counsel and reach out to written materials that cover the terms of the SCRA in readily understandable language.

There are several resources which will help in explaining the SCRA:

- Start with "Servicemembers Civil Relief Act Guide," written by the faculty of the Army JAG School. Go to www.jagcnet.army.mil > TJAG Legal Center and School. Then click on Publications and then look for the Guide, which is JA 260.

- You should also visit the Servicemember's Civil Relief Act information center at the public preventive law page of the Army Judge Advocate General's Corps, found at http://www.jagcnet.army.mil/legal.

- "A Judge's Guide to the Servicemembers Civil Relief Act" gives a detailed explanation of the statute and includes a two-page checklist for judges to use in applying the terms and protections in the Act. Get it from the website of the North Carolina State Bar's military committee, www.nclamp.gov – click on "Resources." You'll also find there " '*Are We There Yet*?' A Guide for the Appointed Attorney under the Servicemembers Civil Relief Act."

- There are two articles published by the North Carolina State Bar which explain the intricacies of the Soldiers' and Sailors' Civil Relief Act and its successor, the SCRA. Many of the terms of the prior Act are carried over to the new statute. These articles are "The Soldiers' and Sailors' Civil Relief Act," North Carolina State Bar Journal, Spring 2002, and "The New Servicemembers Civil Relief Act," North Carolina State Bar Journal, Summer 2006.