

A JUDGE'S GUIDE TO THE SERVICEMEMBERS CIVIL RELIEF ACT

by Mark E. Sullivan

[Mr. Sullivan is a retired Army Reserve JAG colonel, a board-certified specialist in family law and a fellow of the American Academy of Matrimonial Lawyers who practices in Raleigh, NC. The chairman of the Military Committee of the ABA Family Law Section, Sullivan is the author of *The Military Divorce Handbook* (ABA 2006). Comments or questions should be sent to: mark.sullivan@ncfamilylaw.com.]

INTRODUCTION

You may from time to time encounter parties to a lawsuit who are on active duty in the armed forces. This Guide highlights some of the issues related to the impact of military service on civil litigation, financial obligations, mortgages, leases, and other matters. Its specific focus is on the Servicemembers Civil Relief Act (SCRA).

Congress initially passed legislation at the start of World War II called the Soldiers' and Sailors' Civil Relief Act (SSCRA) to provide protection to those called to those in the armed forces. Enacted in 1940, the SSCRA was updated after the Gulf War in 1991 but was still largely unchanged as of 2003. The SCRA was written to clarify the language of the SSCRA, to incorporate decades of court interpretation of the SSCRA and to update the SSCRA to reflect new developments in American life since 1940. The SCRA, signed into law December 19, 2003, not only protects those on active duty; it also affords protection for Reservists and members of the National Guard (when activated under Title 10, United States Code).

The current law is found at 50 U.S.C. App. § 501 *et seq.* Courts have generally construed the SSCRA liberally to protect those in uniform, and the same should be true with the SCRA. The U.S. Supreme Court has said that the statute should be read “with an eye friendly to those who dropped their affairs to answer their country's call.” *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

QUESTIONS & ANSWERS

1. Q. What are the purposes of the SCRA?

A. The Act's purposes are 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.

2. Q. Who is covered under the SCRA?

A. Pursuant to 50 U.S.C. App. § 511, covered servicemembers include

>Those members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1);

>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; and

>Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

A SM is also covered for any period 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 in absent from active duty for one of the above

reasons). Under 50 U.S.C. App. § 516, the protections of the Act are extended to members of the National Guard and Reserve, from receipt of orders to report for duty to the date that they report. Covered individuals under certain sections of the SCRA include a SM's family members (such as a spouse or a child). In addition, if a SM has provided over half of a person's support for the 180 days immediately preceding an application for relief under the Act, that person is considered a dependent also.

3. Q. What tribunals are covered?

A. Under 50 U.S.C. App. § 511(5), any court or administrative agency of the United States, a state or a political subdivision thereof is covered. Does this mean the Michigan Department of Environmental Protection? The Cook County Board of Housing Appeals? The Zoning Commission of San Diego? The U.S. Department of the Interior? The answer is YES to all the above! Criminal proceedings are excluded. 50 U.S.C. App. § 512(b).

4. Q. What does the SCRA say about delay of judicial proceedings when the servicemember has not entered an appearance in the court proceeding?

A. 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. 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]

Go to the DMDC website for SCRA inquiries, <https://www.dmdc.osd.mil/scra>, 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 "Look Up" 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.

If the court determines that the other party is in the military, then the court may not enter a default judgment against the SM without appointing an attorney for him or her. "Default judgment" means any order, ruling or decree which is adverse to the SM's interest. It does not refer solely to a final judgment on the merits for the claim or claims for relief involved in the lawsuit.

Then the court must decide on a stay of proceedings. In cases where the defendant is in military service, the court must stay the proceedings for at least 90 days (upon application of the SM or his attorney or on the court's own motion) if the court determines that:

- >there may be a defense to the action and a defense cannot be presented without the presence of the SM, or
- >after due diligence, counsel has been unable to contact the SM or otherwise determine if a meritorious defense exists.

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 must reopen the judgment to allow the SM to defend if:

- >he was materially affected due to military service in asserting a defense, and
- >he has a meritorious or legal defense to the action or some part of it, so long as
- >the application is filed within 90 days after the end of military service. 50 U.S.C. App. § 521(g).

A flow chart illustrating what happens when there is no appearance by the SM is found at ATCH 1 below. Reopening or vacating the judgment does not impair rights or title acquired by a bona fide purchaser for value under the default judgment.

5. Q. What does Section 522 of the Act say about a SM who has received notice of the action or proceeding?

A. When the SM has received notice of the action or proceeding and has filed an application for a stay (including an application filed within 90 days after the end of military service), 50 U.S.C. App. § 522 states that the court may (upon its own motion) and shall (upon the application of a SM) enter a stay of proceedings for at least 90 days if the motion includes the information required by the statute for the court to determine whether a stay is needed. This “90-day stay” (although it can be for a longer period of time) requires four elements; the checklist below shows the requirements:

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

✓	Elements of a Valid 90-Day Stay Request. Does the request contain...
	<u>A statement</u> 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?
	<u>A statement</u> 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?

Caveat: There is no indication that a request 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.

A request for a stay does not constitute an appearance for jurisdictional purposes or a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).

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).

6. Q. Do I have to appoint an attorney if I deny the additional stay request?

A. 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).

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? There are no answers in the SCRA.

Almost certainly the initial duty of the appointed attorney is to renew the request for a stay of proceedings. It will be virtually impossible for him or her to prepare and present the case without the assistance of the unavailable SM.

When can the judge terminate the appointment? While there is nothing written on this, the logical explanation is that the judge may terminate the appointment when there is no longer a need or a desire for the appointment. And that, in turn, means -

> NO NEED – either the case has concluded and there is no reason to continue the appointment, or else the original need for the appointment [default or denial of additional stay] no longer exists; --OR ELSE --

> NO DESIRE – the servicemember has signed a waiver (in at least 12-point typeface) specifying that he/she waives the appointment or continuation of the appointment.

7. Q. I understand that the initial 90-day stay is mandatory. What about an additional stay – is that in my discretion? What do I have to find in order to grant an additional stay?

A. The additional stay is discretionary; in order to allow the additional stay, the court must find that the member's ability to prosecute or defend is "materially affected" by reason of his or her active duty service. Once this finding of material effect is made, the member is entitled to a stay for such period as is necessary until the material effect is removed. While this is not explicitly stated in the SCRA, it was the rule with the SSCRA and most likely will be the rule under the current Act as well. Finally, 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.

Here are some questions, ideas and comments which may be helpful in evaluating an additional stay request:

>How much leave has the servicemember accrued? Ask for a copy of his LES (Leave and Earnings Statement) to find out.

>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?

>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? The court can expect a letter from the commanding officer stating that the SM’s duty requirements prevent appearance and that he is not authorized

leave. Whenever possible, the court should state on the record what amount of time the proceeding is expected to take. When examining the statement of a commander regarding denial of leave, the court may wish to inquire as to how much leave was requested, what the leave request stated, and what was represented to the commander about the length of time that the court proceeding would require.

>Is the member's presence necessary?

- a. What about video depositions? Use of the Internet? Is anyone truly "unavailable" any more? 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. In *Keefe 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). 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).
- b. What about summary judgment based on affidavits?
- c. Can the matter be resolved on an interim basis with a temporary order? 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. In *Lenser et al. v. McGowan et al.*, 2004 Ark. LEXIS 400, the court granted a stay of proceedings under the SCRA but issued a temporary custody order. The servicemember-father was temporarily caring for the child, there was no custody order, and he placed the child in the care of his own mother when he left Arkansas for Ft. Hood, Texas and subsequent deployment to Iraq. The Supreme Court upheld the trial judge's entry of a temporary custody order while, at the same time, staying the domestic relations case until the SM's return.
- d. 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. For example, perhaps the SM can respond to discovery while he is unavailable for a court appearance.

8. Q. What is "material effect"?

A. There is no one definition of "material effect." The court should make a finding of "material effect" when a military member's ability to prosecute or defend a civil suit is impaired by military duties which prevent the member from appearing in court at the designated time and place, or from assisting in the preparation or presentation of the case. An adverse material effect might also be found when military service impairs substantially the member's ability to pay financial obligations.

9. Q. If the member isn't in court before me, how can I inquire into "material effect"?

A. If the court is not convinced of "material effect," it has the discretion to:

>Require an affidavit setting out all the facts and circumstances, usually executed by the member or the member's commander.

>Ask for a copy of the member's Leave and Earnings Statement (the military equivalent of a pay statement) to show his or her basic pay, Basic Allowance for Housing, Basic Allowance for Subsistence, other pay or

allowances, tax withholdings, voluntary allotments to pay bills or support, and *accrued leave*.

>Request a more specific affidavit detailing the member's efforts to appear in court, for example, and the next court date when he or she would be available.

Some courts require specific 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.¹ 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)?
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 requested 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 your JAG office).

Note that members from all branches of military service, whether buck private or rear admiral, get thirty days of leave annually, accruing at the rate of 2.5 days per month (although military necessity may limit when the leave may be taken).

¹ Hooper, "The Soldiers' 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).

Also keep in mind that members who are going through basic or advanced training may be unable to appear in court due to the training schedule; there are no extra days built into the schedule to accommodate court dates, depositions or family emergencies, and being gone from training frequently means that the trainee will have to repeat the same training program from the beginning.

10. Q. What does a motion for stay look like?

A. Here is an example of one:

.....

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 how 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 his appearance, and
- >that military leave is not authorized for him 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 at Camp Bondsteel in Kosovo. My tour of duty is for 180 days, beginning November 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 February 1, 2009, 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 May 10, 2009.

[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 February 1, 2008.
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]
.....

11. Q. I'm a family court judge. I can't believe that Congress intended this law to allow indefinite delays – or even short ones – with regard to custody, child support and visitation cases. These are often urgent cases requiring immediate decisions.

A. 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).

12. Q. Isn't there some overview of the “stay process” that will help me understand it?

A. Yes. At Question 5 above is a checklist for the initial stay when a SM has entered an appearance. ATCH 1 at the end of this paper is a flow chart for the procedure when the non-moving party has not entered an appearance. ATCH 2 is a flow chart on the “additional stay” issue (after the initial stay). ATCH 3 is a checklist for the judge on SCRA issues generally.

13. Q. Can a default judgment be entered against a servicemember in his absence?

A. Not unless the court follows the procedures set out in the SCRA. As noted above, when the SM *has not made an appearance*, 50 U.S.C. App. § 521 governs. The court must first determine whether an absent or defaulting party is in military service. Before entry of a judgment for the plaintiff, the plaintiff must file an affidavit that states “whether or not the defendant is in military service and showing necessary facts in support of the affidavit.” Criminal penalties are provided for filing a knowingly false affidavit.

14. Q. What if the affidavit shows that the party to be defaulted is in the armed forces?

A. When this happens, no default can be taken until the court has appointed an attorney to represent the member; see Question 4 above. If the court fails to appoint an attorney, then the judgment or decree is voidable. 50 U.S.C. App. § 521(b)(2).

15. Q. What does the court-appointed attorney do?

A. The role of the attorney is to protect the interests of the absent servicemember, much as a guardian *ad litem* protects the interests of a minor or incompetent party. This would include contacting the servicemember to advise that a default is about to be entered and to ask whether he or she party wants to request a stay of proceedings. No provision of the SCRA says who pays the appointed attorney. 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.

16. Q. Can I require a bond to be posted before entry of a default judgment?

A. Yes. 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 set aside later). 50 U.S.C. App. § 521(b)(3).

17. Q. What are the provisions for reopening a default judgment?

A. Servicemembers 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. The SCRA allows a servicemember who has not entered an appearance in the proceeding to seek the reopening of a default judgment. The requirements are as follows:

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

An important requirement of the reopening of a judgment is that the moving party has 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.

18. Q. Are there also provisions for staying the execution of a judgment?

A. Yes. 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. 50 U.S.C. App. § 524.

19. Q. What does the SCRA say about statutes of limitation?

A. The period of military service may not be included in computing any limitation period for filing suit, either by or against any SM. This also includes suit by or against the heirs, executors, administrators, or assigns of the member, when the claim accrues before or during the period of service. Thus this SCRA section tolls statutes of limitation during the military service of any military plaintiff or defendant. The statute does not, however, affect time periods within a suit, such as time periods to avoid motions to dismiss for failure to prosecute an action. Once military service is shown, the period of limitation is automatically tolled for the duration of the service. 50 U.S.C. App. § 526.

20. Q. Can a servicemember get out of a lease or rental agreement?

A. Yes. A substantial change from the old SSCRA is found in 50 U.S.C. App. § 534. Previously the statute allowed a servicemember to terminate a pre-service “dwelling, professional, business, agricultural, or similar” lease executed by or for the servicemember and occupied for those purposes by the servicemember or his dependents. It did not provide help for the SM on active duty who was required to move due to military orders. The new statute remedies these problems. Under the old SSCRA, a lease covering property used for dwelling, professional, business, agricultural or similar purposes could be terminated by a SM if two conditions were met:

>The lease/rental agreement was signed before the member entered active duty; and

>The leased premises had been occupied for one or more of the above purposes by the member or his or her dependents.

The new Act still applies to leases executed into prior to entry on active duty. It adds a new provision, however, extending coverage to leases entered into by active duty servicemembers who subsequently receive orders for a permanent change of station (PCS) or a deployment for 90 days or more.

The SCRA also adds a new provision allowing the termination of automobile leases (for business or personal use) by SMs and their dependents. Pre-service automobile leases may be canceled if the SM receives orders to active duty for a period of 180 days or more. Automobile leases entered into while the SM is on active duty may be terminated if he or she receives PCS orders to a location outside the continental United States or deployment orders for a period of 180 days or more. 50 U.S.C. App. § 535(b)(2).

21. Q. How does the servicemember go about terminating the lease?

A. To terminate the lease, the member must deliver written notice to the landlord with a copy of his military orders. Oral notice is not sufficient. In the case of a motor vehicle lease, the lessee must return the motor vehicle to the lessor and also must provide the above notice and a copy of his orders. The return of the vehicle must be within 15 days after the notice delivery. 50 U.S.C. App. § 535(c).

The effective date of termination for premises rentals is determined as follows:

>For month-to-month premises rentals, termination becomes effective 30 days after the first date on which the next rental payment is due after the termination notice is delivered. For example, if the rent is due on the first of the month and the SCRA termination notice is mailed on 1 August, then the next rent payment would be due on 1 September. Thirty days after that date is 1 October, the effective date of termination.

>For all other premises rentals, termination becomes effective on the last day of the month after the month in which proper notice is delivered. For example: if the lease calls for a yearly rental and notice of termination is given on 20 July, the effective date of termination would be 31 August.

For motor vehicle leases, the termination is effective on the day on which the requirements above for notice delivery, orders and return of the vehicle are met. 50 U.S.C. App. § 535(d).

22. Q. Can a servicemember get a refund of his security deposit or prepaid rent?

A. If the rent was paid in advance, the landlord must refund the unearned portion. The member is required to pay rent only for those months before the lease is terminated. If a security deposit was required, it must be refunded to the member upon termination of the lease.

23. Q. Can I stop an eviction by a landlord?

A. Yes. The old SSCRA provided that, absent a court order, a landlord may not evict a servicemember or the dependents of a servicemember from a residential lease when the monthly rent was \$1200 or less. 50 U.S.C. App. § 531(a) modifies the former eviction protection section by barring evictions without a court order from premises occupied by servicemembers for which the monthly rent does not exceed \$2,400 for the year 2003. The Act also provides a formula to calculate the rent ceiling for future years. Using this formula, the 2007 monthly rent ceiling is \$2720.95. You can easily check this for the current year by doing an Internet search using “Servicemembers Civil Relief Act” and “maximum monthly rental amount” as the search terms.

24. Q. Does the Act apply to time payments or installment contracts?

A. It does. Military members who signed an installment contract for the purchase of real or personal property *before active duty* will be protected if their ability to make the payments is *materially affected* because of their active duty service. Remember--

>The member must have paid, before entry into active duty, a deposit or installment payment under the contract.

>If the member is not able to make payments because of his or her military duty, the SCRA applies.

>The vendor is thereafter prohibited from exercising any right or option under the contract, such as to rescind or terminate the contract or to repossess the property, unless authorized by a court order.

>The court may determine whether a member's financial condition is "materially affected" by comparing the member's financial condition before entry on active duty with his financial condition while on active duty.

25. Q. What about the interest rates on debts and mortgage payments -- do they go down when a person enters military service?

A. Yes. When an obligation was incurred before entry on active duty, the interest rate goes down to 6%, unless the creditor (bank, finance company, credit card issuer, etc.) can prove in court that the member's ability to pay was *not materially affected* by military service. The term "interest" includes service charges.

The new Act clarifies the rules on the 6% interest rate cap on pre-service loans and obligations by specifying that interest in excess of 6% per year *must be forgiven*. 50 U.S.C. App. § 527(a)(2). The absence of such language in the SSCRA had allowed some lenders to argue that interest in excess of 6% was merely deferred.

The SCRA also specifies that a SM must request this reduction in writing and include a copy of his/her military orders. 50 U.S.C. App. § 527(b)(1). Once the creditor receives notice, it must grant the relief effective as of the date the servicemember is called to active duty. The creditor must forgive any interest in excess of six percent with a resulting decrease in the amount of the periodic payment that the servicemember is required to make. 50 U.S.C. App. § 527(b)(2). The creditor may challenge the rate reduction if it can show that the SM's military service has not materially affected his or her ability to pay. 50 U.S.C. App. § 527(c).

26. Q. Are there protections against mortgage foreclosures?

A. The SCRA (50 U.S.C. App. § 533) protects members against foreclosures of mortgages, deeds of trust, and similar security devices, provided the following conditions are met:

- a. The relief is sought on an obligation secured by a mortgage, deed of trust, or similar security on either real or personal property;
- b. The obligation originated prior to entry upon active duty;
- c. The property was owned by the member or dependent before entry on active duty status;
- d. The property is still owned by the member or dependent at the time that relief is sought;
- e. The ability to meet the financial obligation is *materially affected* by the member's military service.
- f. The action is filed during, or within 90 days after, the SM's period of military service.

Courts can stay proceedings until members are available to answer, extend the mortgage maturity date to allow

reduced monthly payments, grant foreclosure subject to being reopened if challenged by a member, and extend the period of redemption by a period equal to the member's military service.

27. Q. Does the SCRA require that a breach have occurred before protections become available?

A. No. The Act doesn't require breach or default before offering protections to covered individuals. The anticipatory relief provision is set out in 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.

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.

28. Q. Can the SM waive his rights?

A. 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. In addition, the waiver should be in writing in at least 12-point type. 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]

29. Q. ARE THERE SCRA RESOURCES ON THE INTERNET?

A. Start with a visit to the home page of the Army JAG School, <http://www.jagcnet.army.mil>. Then click on

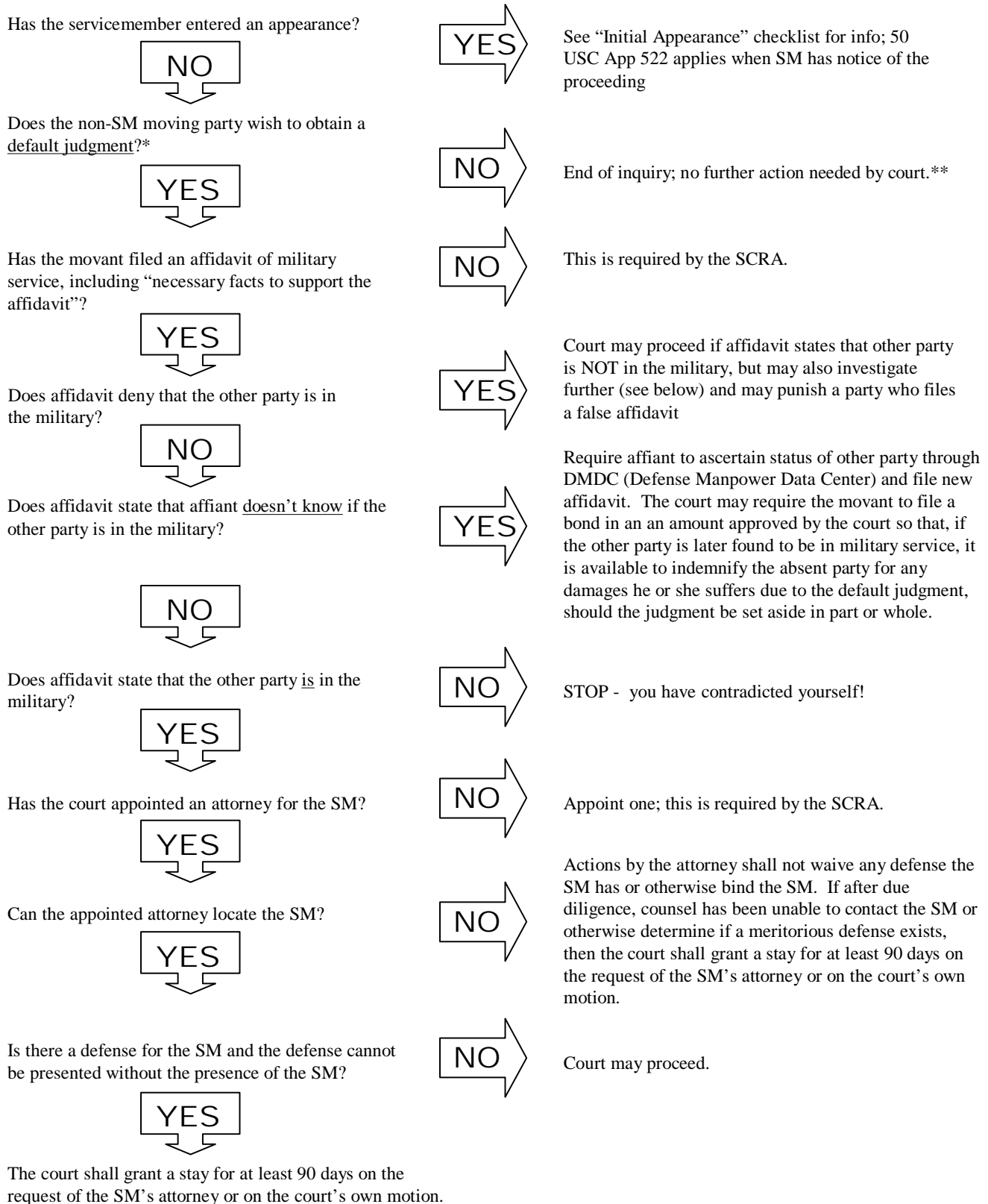
"TJAG Legal Center and School" and, when you get there, choose "TJAGLCS Publications" and go to "The Servicemembers Civil Relief Act Guide," written by the faculty of the Army JAG School in 2006.

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>.

(rev. 6/6/08)

* * *

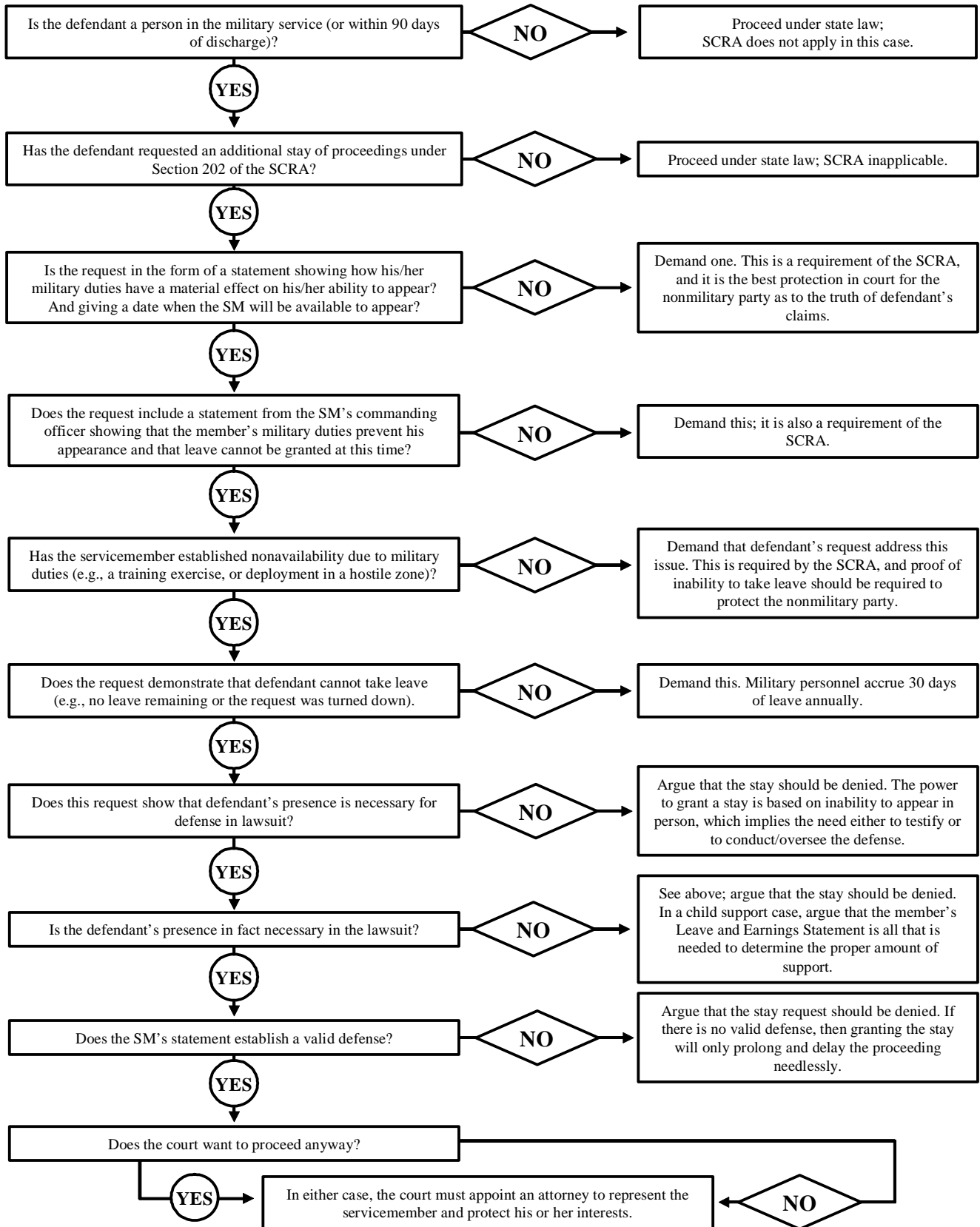
ATCH 1 - SCRA Flow Chart (no appearance by servicemember)



*The non-SM claimant may be either the plaintiff/petitioner or the defendant/respondent. A default judgment means any decree or order granting relief when the other side has not entered an appearance. Whether appearance means a specific appearance in the current proceeding before the court, or the lawsuit itself (irrespective of the stage of proceedings) depends on state law.

** "Court" also means administrative agency.

ATCH 2 - SCRA Flow Chart for "Additional Stay"



The Servicemembers Civil Relief Act: A Judge's Checklist

The SCRA is located 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:

- o Members of the Army, Navy, Air Force, Marine Corps and Coast Guard on active duty under 10 U.S.C. 101(d)(1)
- o 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)
- o Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration

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

- o1. Must require affidavit of military status by moving party (who may check on whether missing party is in military service by requesting check of records by Dept. of Defense *)
- o2. Must appoint an attorney before entry of judgment if the non-moving party is in military
- o3. Must grant a stay of proceedings for at least 90 days when non-moving party is in military 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. § 521(b)(3))

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

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

- o 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 that
 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)?**

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

✓ **Deny additional stay?**

- o Only if you appoint attorney to represent the SM in the action or proceeding (50 U.S.C. App. § 522(d)(2)).
- o 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?**

- o 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.
- o 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

* 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]

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

- o Must stay execution of any judgment, order entered against SM if the 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 (and, in most cases, in 12-point font or larger).

✓ **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. App. § 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.** (50 U.S.C. App. § 531-532, 535)

- o Allow SM to terminate leases upon entry on active duty or receipt of military orders for deployment (not less than 90 days) or transfer to another base.
- o Grant a stay of eviction upon application by SM-tenant who shows that ability to pay rent is materially affected by military service. (50 U.S.C. App. § 531(b))
- 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. App. § 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. App. § 535(h)(1).

* * *