ATCH-4

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."1[1]

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.1[2] (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, supra, 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,1[3] 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,1[4] 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 granted because no actual prejudice results from the soldier's non-appearance. This result can be obtained in uncontested divorce proceedings. See, e.g., Palo v. Palo, supra.
- The military member is nominally involved but is not a "necessary party" to the contested litigation. In Bubac v. Boston,1[5] 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,1[6] 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*.1[7] 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.1[8]

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.1[9]

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.1[10] 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 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*,1[11] 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,*11[12] 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,1[13] the court granted a solder'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 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.1[14] When a servicemember demonstrates bad faith in his dealings with the court, no stay will be granted. In Riley v. White,1[15] 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,1[16] 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,1[17] 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.1[18] 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 intend 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 video teleconference (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 judgments entered against them without their knowledge and without a chance to defend themselves.1[19] 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.1[20]
- 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.1[21]
- The member 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 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*.1[22] 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."1[23]

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.1[24] 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.1[25] 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.[1[26]]

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. The laws of all states and territories require "expedited process" in child support determinations.[1][27] 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."1[28] 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.1[29]

A servicemember's defense 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, 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).

---

[1] *Boone v. Lightner,* 319 U.S. 561 (1943).

[2] *Boone v. Lightner, supra.*

---

[3] 403 N.W. 2d 248 (Minn. App. 1987).

[4] 82 B.R. 162, 165 (U.S. Bankruptcy. Crt. 1988).

[5] 600 So. 2d 951 (Miss. 1992).

[6] 259 Ga. 462, 383 S.E. 2d 895(1989).

[7] *Cromer v. Cromer*, 303 N.C. 307, 278 S.E.2d 518 (1981).

[8] *Boone v. Lightner, supra.*

[9] *Gates v. Gates*, 197 Ga. 11, 25 S.E.2d 108 (1943).

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

[11] *Palo v. Palo,* 299 N.W.2d 577 (S.D.1980).

[12] *Plesniak v. Wiegand,* 31 I11. App.3d 923, 335 N.E.2d 131 (1975).

[13] 533 F. Supp. 49, 50 (W. D. Okla. 1981).

[14] *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, supra at note 7.

[15] 563 So. 2d 1039 (AL App. 1990).

[16] 230 Neb. 364, 431 N.W. 2d 637 (1988).

[17] Judkins v. Judkins, supra at note 7.

[18] 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).

[19] *Roqueplot v. Roqueplot*, 88 Ill. App. 3d 59, 410 N.E.2d 441 (1980).

[20] *Davidson v. GFC,* 295 F. Supp. 878 (N.D. Ga. 1968).

[21] *Bell v. Niven,* 225 N.C. 395, 35 S.E.2d 182 (1945).

[22] *Smith v. Davis*, 88 N.C. App. 557, 364 S.E. 2d at 156 (1988).

[23] *Id,.* 364 S.E.2d at 159.

[24] Millrock Plaza Associates v. Lively, 153 Misc. 2d 254, 580 N.Y. S. 2d 815 (1990).

[25] Burgess v. Burgess, 234 N.Y.S. 2d 87 (N.Y. Sup., October 17, 1962).

[26] Wilterdink v. Wilterdink, 81 Cal. App. 2d 526, 184 P.2d 527 (1947).

[27] N.C. Gen. Stat. § 50-32.

[28] *Boone v. Lightner,* 319 U.S. at 575; *see also Chenausky v. Chenausky,*128 N.H. 116, 509 A.2d 156 (1986).

[29] *Smith v. Davis, supra.*