

NEW JERSEY LAWYER

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MILITARY LAW

**Military Legal Assistance
for the New Jersey Reservist**

**Military Medical Malpractice
Rights and Remedies**

**How to Assist the Deploying
Military and Their Family**

**What to do When Employees
Return From Active Military Duty**

Courts Martial Process and Procedure

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Service of Process and Default in Military Cases

by Brian D. Winters and Amy B. Hansel

Practitioners who are faced with a matter that includes a litigant who is an active member of the United States military service must understand that unique laws will govern the case, particularly at the onset of litigation. The starting point is the Servicemembers Civil Relief Act (SCRA),¹ which is the federal statute intended to protect the rights of service members who are served with process while on active duty.² Signed into law on Dec. 19, 2003, the SCRA updated and replaced the previously applicable Soldiers' and Sailors' Civil Relief Act of 1940.

The SCRA's purpose is to restate, clarify and revise the 1940 act, and "to provide for, strengthen, and expedite the national defense through protection extended by this Act to servicemembers of the United States to enable such persons to devote their entire energy to the needs of the Nation[.]"³ This is accomplished

defendant, provided they are stationed in the United States, *i.e.*, pursuant to the procedures set forth in the Court Rules.⁵ If the military member is deployed overseas, the service of process may be difficult, but not impossible. A request can be made that the military authorities serve the active duty member; however, service is only allowed with the active duty member's consent,⁶ and the commanding officer is not required to act as a process server.⁷ In most cases, however, service is not an issue: either the service member will be stationed in the United States; the service member will accept service through his or her commanding officer; or, in the worst case scenario, a litigant will have to apply to the court for constructive service.⁸

Under the SCRA, no court may enter default judgment against a service member unless the safeguards contained in the act are followed.

through the "temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service."⁴ Indeed, certain stay provisions contained in the act are the chief way in which service members are protected.

Service of Process

When a defendant is in the military, the first step in initiating legal action is service of process. In most instances, a service member may be served in the same way as any other

Default Provisions Under the SCRA

Under the SCRA, no court may enter default judgment against a service member unless the safeguards contained in the act are followed. Obviously, this means that the court must first determine whether a defendant is in the military. In New Jersey, this is easy since Court Rules require filing of an affidavit of non-military service.⁹ Similarly, under the SCRA, a plaintiff must file an affidavit stating whether a defendant is or is not in the military service before judgment may be entered.¹⁰ Criminal penalties are set forth in the act for filing a knowingly false affidavit.¹¹

In order to fulfill the affidavit requirement, a litigant may request information from the Department of Defense, either

through the mail at: Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Attention Military Verification, Arlington, VA 22209-2593; by calling 703-696-6762 or -5790; faxing 703-696-4156; or through the Defense Manpower Data Center (DMDC) website at: <https://www.dmdc.osd.mil/scra>. On the website, the individual's last name and Social Security number are mandatory entries.

If, through the filing of the affidavit of non-military service, it comes to the attention of the court that a defendant is a member of the military, under the SCRA "the court may not enter a judgment until after the court appoints an attorney to represent defendant."¹² Although the act is silent in terms of what the court-appointed attorney's duties are, presumably the attorney should act in the service member's best interest by contacting him or her, informing the service member of his or her rights (including seeking a stay of the proceeding as discussed below), and/or representing the party in defense of the suit. Ultimately, default may be entered against a service member, but only after he or she is "protected" through the appointment of counsel.

Stay Provisions Under the SCRA

Under the SCRA, the court shall stay judicial proceedings for a minimum period of 90 days upon application of counsel or on the court's own motion, but only if the application demonstrates that "there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists."¹³

When the service member enters an appearance, slightly different rules apply. In such a case, the SCRA states that the court may, upon its own motion, or shall, upon the motion of

the service member, enter a stay for a minimum of 90 days, provided the applicant or service member demonstrates: a) that his or her current military duty materially affects his or her ability to appear; b) that the applicant state a starting date when the service member will be available to appear; c) that the application provide a statement from the service member's commanding officer; d) that the service member's duties prevent his or her appearance; and e) stating that military leave is not authorized for the service member at the time of the statement.¹⁴

The original Soldiers' and Sailors' Civil Relief Act of 1940 was intended to serve the end of "protect[ing] those who have been obliged to drop their own affairs to take up the burdens of the nation."

The service member may apply for an additional discretionary stay provided he or she pleads a continuing material affect of military duty on his or her ability to appear.¹⁵ The same information required for the initial 90-day stay is required in the application for the additional stay.¹⁶

Setting Aside or Vacating Default Judgment

Since the SCRA contains provisions relating to vacating default judgments, it is plain that judgment by default can indeed be entered, *i.e.*, once the appointment of attorney and stay requirements have been exhausted. At

the same time, the SCRA grants military personnel certain rights to vacate default. In order to vacate a default judgment, a service member must apply to the court that originally entered the judgment or order, the default judgment must have been entered when the service member was in the military service or within 60 days thereafter, and the service member must apply for reopening the judgment while on active duty or within 90 days thereafter.¹⁷

The service member's application to vacate or set aside the default judgment should demonstrate that the service member was materially affected by reason of the military service in making a defense to the action, and that the service member has a meritorious or legal defense to the action or some part of it.¹⁸

Other Provisions

Under the SCRA, the primary way in which a service member is protected is through the procedures discussed above; namely, the appointment of counsel and stay provisions. However, the act does provide for certain additional protections, including those related to protections against evictions, mortgage foreclosures, automobile leases, etc.¹⁹ Further discussion regarding these matters is beyond the scope of this article.

Open Issues Under the SCRA

The original Soldiers' and Sailors' Civil Relief Act of 1940 was intended to serve the end of "protect[ing] those who have been obliged to drop their own affairs to take up the burdens of the nation."²⁰ Stated otherwise, as set forth by the Supreme Court, that statute should be read "with an eye-friendly to those who dropped their affairs to answer their country's call."²¹ As previously referenced, the newly enacted SCRA was meant to incorporate those goals and clarify the applicable procedures.²² Despite its best efforts, the act

leaves certain unanswered questions. For example, the act provides for the appointment of counsel to represent the service member, but is silent regarding the precise duties and responsibilities of that attorney. Moreover, the act does not specify how the attorney is to be selected or compensated.

There also appears to be an open issue with respect to the applicability of the 90-day stay provision in emergent situations, including those in a family law setting. Consider, for example, the following scenario:

The husband has primary residential custody of the parties' two children; ages five and nine years. Immediately prior to his being shipped off to Iraq, he makes arrangements to have the children stay with his mother who, in the opinion of the wife, is an unfit guardian. The wife serves the husband with an application seeking a transfer of custody.

Query: Do the provisions of the SCRA serve as a bar to the non-custodial spouse's seeking of relief prior to the expiration of the 90-day stay period?

What if the above example is changed to a fact pattern involving a military member custodial parent against whom there are allegations of abuse sufficient to warrant the Division of Youth and Family Services (DYFS) initiating proceedings aimed at obtaining protective custody of children deemed at risk? Can a service member delay, thereby effectively temporarily defeat such an application, by relying upon the stay provisions of the SCRA?

Although there is no explicit answer contained in the SCRA, one must assume that the court may grant interim or temporary relief, notwithstanding the stay provisions contained in the SCRA, where "the best interests of the child" are implicated. There is some out-of-state authority on this approach, albeit, in cases that arose under the old Soldiers' and Sailors' Civil Relief Act of

1940.²³ There is no direct precedent in New Jersey.

Conclusion

Born of laudable purpose, the SCRA protects members of the military (and disaffects those who wish to bring legal action against them) in the same ways—chiefly by providing for the appointment of counsel and by providing for a minimum 90-day stay in all cases in which proper application is made. It appears to the authors that, from a plaintiff's perspective, the best way to approach cases in which the SCRA applies is to be both patient and vigilant. In other words, stay the course; it may take awhile to effectuate service, but it can be done. It may take awhile before the court appoints counsel and that attorney makes application to the court, but it will (eventually) happen.

Most importantly, plaintiff's attorneys should respectfully, yet forcefully, challenge or move to limit the stay provisions and/or push for default where applicable. For instance, if the case involves collection of monies owed pursuant to a promissory note, plaintiff's counsel should push for a default judgment as soon as possible, notwithstanding that the military member is serving abroad and merely alleges a meritorious defense. After all, common sense must prevail. The SCRA affords a service member an opportunity to aid in his or her own defense to a lawsuit, but the act cannot be used to defeat a lawsuit through indefinite delay. ⚖️

Endnotes

1. 50 U.S.C. App. §501 *et seq.*
2. The SCRA applies not only to active members of the military, but also members of the National Guard and Reservists. 50 U.S.C. App. §516.
3. 50 U.S.C. App. §502.
4. *Id.*
5. R. 4:4-3 and R. 4:4-4.
6. Manual of the Judge Advocate Gen-

eral §0616 (a)(2).

7. *Id.* at §0616(a).
8. R.4:4-4(b).
9. R. 1:5-7.
10. 50 U.S.C. App. §521(b).
11. 50 U.S.C. App. §521(c).
12. 50 U.S.C. App. §521 (2).
13. 50 U.S.C. App. §521(d).
14. 50 U.S.C. App. §522(b). It is important to note that neither the initial application for a 90-day stay, nor an application for an extension of the stay constitutes an appearance for jurisdictional purposes, nor does it constitute a waiver of any defense, substantive or procedural. 50 U.S.C. App. §522(c).
15. 50 U.S.C. App. §522(d)(1).
16. *Id.*
17. 50 U.S.C. App. §521(g).
18. *Id.* Note here that if a court vacates or sets aside a default judgment, and the vacating, setting aside or reversal is because of a provision of the act that action shall not impair the right or title acquired by a *bona fide* purchaser for value under the default judgment. 50 U.S.C. App. §521(h).
19. 50 U.S.C. App. §531 *et seq.*
20. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).
21. *LeMaistre v. Leffers*, 333 U.S. 1, 6 (1948).
22. 50 U.S.C. App. §502.
23. *In re Marriage of Grantham*, 698 N.W. 2d 140; *Lackey v. Lackey*, 278 S.E. 2d 811 (Va.1981).

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