Veteran Borrowers in Delinquency

Quick Reference Sheet

General Guidance

The US Department of Veterans Affairs urges all veterans who are encountering problems making their mortgage payments to speak with their servicers as soon as possible to explore options to avoid foreclosure. Contrary to popular opinion, servicers really do *not* want to foreclose because foreclosure costs a lot of money, Depending on a veteran's specific situation, servicers may offer any of the following options to avoid foreclosure:

- Repayment Plan – The borrower makes regular installment each month plus part of the missed installments.
- Special Forbearance – The servicer agrees not to initiate foreclosure to allow time for borrowers to repay the missed installments. An example of when this would be likely is when a borrower is waiting for a tax refund.
- Loan Modification - Provides the borrower a fresh start by adding the delinquency to the loan balance and establishing a new payment schedule.
- Additional time to arrange a private sale – The servicer agrees to delay foreclosure to allow a sale to close if the loan will be paid off.
- Short Sale – When the servicer agrees to allow a borrower to sell his/her home for a lesser amount than what is currently required to payoff the loan.
- Deed-in-Lieu of Foreclosure - The borrower voluntarily agrees to deed the property to the servicer instead of going through a lengthy foreclosure process.

Servicemembers Civil Relief Act

Veteran borrowers may be able to request relief pursuant to the Servicemembers Civil Relief Act (SCRA). In order to qualify for certain protections available under the Act, his or her obligation must have originated prior to the current period of active military service. SCRA may provide a lower interest rate for up to one year, and provide forbearance, or prevent foreclosure or eviction up to nine months from period of military service.

Assistance to Veterans with VA-Guaranteed Home Loans

When a VA-guaranteed home loan becomes delinquent, VA provides supplemental servicing assistance to help cure the default. The servicer has the primary responsibility of servicing the loan to resolve the default. However,in cases where the servicer is unable to help the veteran borrower, Loan Guaranty has Loan Technicians in eight Regional Loan Centers and two special servicing centers who take an active role in interceding with the servicer to explore all options to avoid foreclosure.

Veterans with VA-guaranteed home loans can call **(877) 827-3702** to reach the nearest Loan Guaranty office where loan specialists are prepared to discuss potential ways to help save the loan.

For more information go to www.homeloans.va.gov, or call (877) 827-3702

Veteran Borrowers in Delinquency

Quick Reference Sheet

(cont'd)

Assistance to Veterans with non-VA Guaranteed Home Loans

For a veteran or service member who may have obtained a conventional or sub-prime loan, VA has a network of eight Regional Loan Centers and two special servicing centers that can offer advice and guidance. Borrowers may visit VA's Loan Guaranty website at **www.homeloans.va.gov** or call toll free **(877) 827-3702** to speak with a VA Loan Technician. However, unlike the case of a veteran or service member with a VA-guaranteed home loan, VA does not have the legal authority or standing to intervene on the borrower's behalf. Therefore, it is imperative that a borrower contacts his/her servicer as quickly as possible.

VA Refinancing of a non-VA Guaranteed Home Loan

Veterans with conventional home loans now have new options for refinancing to a VA-guaranteed home loan. These new options are available as a result of the Veterans' Benefits Improvement Act of 2008, which the President signed into law on October 10, 2008. Veterans who wish to refinance their subprime or conventional mortgage may now do so for up to 100 percent of the value of the property, which is up from the previous limit of 90 percent.

Additionally, Congress raised VA's maximum loan amount for these types of refinancing loans to $729,750 depending on where the property is located (this limit is significantly higher in Guam, Alaska, and Hawaii). These changes will allow more qualified veterans to refinance through VA, allowing for savings on interest costs and avoiding foreclosure. A VA refinancing loan may help a veteran who is facing a big payment increase.

Other Assistance for Delinquent Veteran Borrowers

If VA is not able to help a veteran borrower retain his/her home (whether a VA-guaranteed loan or not), the HOPE NOW Alliance may be of assistance. HOPE NOW is a joint alliance consisting of servicers, counselors, and investors whose main goal is to assist distressed borrowers retain their homes and avoid foreclosure. They have expertise in financial counseling, as well as programs that take advantage of relief measures that VA can not. HOPE Now provides outreach, counseling and assistance to homeowners who have the willingness and ability to keep their homes but are facing financial difficulty as a result of the crisis in the mortgage market. The HOPE NOW Alliance can be reached at **(888) 995-HOPE (4673)**, or by visiting **www.hopenow.com**.

Servicemember's Civil Relief Act.

Introduction.

If the defaulting borrower is in military service, the lender and attorney must always consider whether the Servicemember's Civil Relief Act, *50 App. U.S.C.A. §501-596,* or *Public Law No. 108-109*, effective Dec. 19, 2003 applies.

Beginning with the first Soldier's and Sailor's Civil Relief Act of 1918, which was "enacted in contemplation of the hardship imposed on persons suddenly drafted into military service," *Conroy v. Aniskoff, 507 U.S. 511, 113 S.Ct. 1562, 123 L.Ed. 2d 229 (1993),* the policy of the United States toward soldiers and sailors who have dropped their affairs to defend the nation has been:

> "Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against soldiers will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service." *Boone v. Lightner, 319 U.S. 561, 63 S.Ct 1223, 87 L.Ed. 1587 (1943).*

Because it succinctly analyzes and articulates reasons for most issues that arise under the Act, *Boone v. Lightner, 319 U.S. 561, 63 S.Ct 1223, 87 L.Ed. 1587 (1943)*, is the most quoted opinion in cases dealing with the Act. Before researching any SCRA question, the *Boone* opinion should be read.

The purpose of the SSCRA is to prevent the collection of debts from servicemembers whose call to active duty materially affected the default. The Act does not extinguish a borrower's debts, it merely suspends a creditor's collection rights while the servicemember is on active duty and for three months after discharge from active duty.

Citing the legislative history of the 1918 Act, the Court held that the 1940 version of the SSCRA carried forward the idea of "avoiding arbitrary and rigid rule making" by allowing a trial judge to determine whether military service materially affected the soldier's or sailor's ability to defend their civil rights or meet their financial obligations. The Court said, "[t]he discretion as to dealing out even handed justice between the creditor and the soldier . . . rests largely, and in some cases entirely, on the breast of the judge who tries the case."

The Texas Supreme Court cited with approval the *Boone* holding and agreed that the trial court should be given wide discretion to determine whether the rights of a party in military service, whether plaintiff or defendant, were materially affected by serving in the armed forces. *Womack v. Berry, 156 Tex. 44, 291 S.W. 2d 677 (1956).*

The SCRA is always construed in favor of those "who dropped their affairs to answer their country's call." *LeMaistre v. Leffers, 333 U.S. 1, 68 S.Ct. 371, 92 L.Ed. 429 (1948).*

- **Military Status.**

Foreclosures and default judgments require knowing whether the borrower is in military service. Information pertaining to the military status of a defendant can be obtained from the U.S. Department of Defense Manpower Data Center ("DMDC") military verification service to prepare the affidavit required by *50 U.S.C. App. § 521(b)*. After receiving more than 30,000 requests for military status each week, the DMDC developed a twenty-four-hour website that allows anyone to print a document containing the Department of Defense seal and the signature of the Director of the DMDC attesting to the status of the defendant.

Access to the DMDC website, at *www.dmdc.osd.mil/scra/owa/home*, no longer requires a password. But the DMDC website requires a Social Security number for the servicemember that, with the focus on financial privacy, may be difficult to obtain without the loan origination file. Commercial firms advertise on the Internet claiming they can provide military status confirmation without the necessity of a Social Security number.

The Act at *50 U.S.C. App. § 582* also describes a procedure for obtaining a certificate signed by the Secretary concerning certain facts related to the military status of a person to include whether the person has been in the military and, if so, the place and date the person entered and left military service, rank, and military pay. If the military status of the person is unknown, a request for the certificate must be sent to each branch of service. The charge for the SCRA certificate as of Feb. 21, 2002, was $5.20, and checks had to be made payable to the Treasurer of the United States. The address of the locator service for each of the military services is listed below:

Army: Worldwide Locator Service Enlisted Records and Evaluation Center 8899 E. 56th St. Indianapolis, IN 46249-5031 [All requests must be in writing.]	**Navy:** Bureau of Navy Personnel PERS-312E 5720 Integrity Dr. Millington, TN 38055-3120 901.874.3351
Air Force: Air Force Manpower and Personnel Center ATTN: Air Force Locator/MSIMDL 550 C St. W., Ste. 50 Randolph Air Force Base, TX 78150-4704 Locator Service: 210.652.5775	**Marine Corps:** Commandant of the Marine Corps Headquarter, U.S. Marine Corps (MMSB 10) 2008 Elliot Rd., Ste. 201 Quantico, VA 22134-5030 Locator Service: 703.784.3941 through 3944
[Note: this address can change without notice.]	

- **Courts and Administrative Proceedings.**

The Act applies to all judicial or administrative proceedings commenced in any court or by any agency in the United States, in each of the States, including all their political

subdivisions, and in all territories subject to the jurisdiction of the United States. *50 U.S.C. App. §§ 512(a)* and *(b)*.

A huge expansion of coverage under the SCRA was created when the definition of "court" in *50 U.S.C. App. § 511(5)* was changed to include "any administrative agency of the United States or of any State including any political subdivision of any State, whether or not a court or administrative agency of record." According to many JAG officers and legal commentators, most agencies, whether federal, State, or local political subdivisions, have no idea that the SCRA applies to their proceedings.

- **Person Covered.**

Persons covered by the Act include any member of the "uniformed service," as defined in *10 U.S.C. § 101(a)(5)*, which means the Army, Navy, Air Force, Marine Corps, and Coast Guard, as well as the commissioned corps of the National Oceanic and Atmospheric Administration and the Public Health Service. A member of the Reserves who is ordered to report for military service is also entitled to the protection under *50 U.S.C. App. § 516(a)*.

Prior to the 2003 SCRA amendments, unless a member of the National Guard was called to active duty for more than thirty consecutive days in a military operation involving hostilities against an enemy of the United States, National Guardsmen were not covered by the Act. National Guardsmen are now entitled to protection under the SCRA if they are called to active service "by the President or the Secretary of Defense for a period of more than thirty consecutive days under *32 U.S.C. § 502(f)*, for the purposes of responding to a national emergency declared by the President and supported by Federal funds." *50 U.S.C. App. § 511(2)(A)(ii)*.

Upon proper application, dependents can claim in their own right all the protections of Title III dealing with evictions, installment contracts for purchase or lease, mortgages and deeds of trust, and motor vehicle leases. *50 U.S.C. App. §§ 531-538*. "Dependents" are defined as the servicemember's spouse, child (as defined in *38 U.S.C. 101(4)*), or an individual for whom the servicemember provides more than one-half of the individual's support for 180 days.

A surety, guarantor, endorser, accommodation maker or co-maker, or any other person who is or may be primarily or secondarily liable on an obligation or liability owed by a servicemember may also obtain a stay, postponement, or suspension given of the joint obligation. *50 U.S.C. App. § 513(a) and (b)*.

- **Significant SCRA Provisions.**

SIGNIFICANT SCRA PROVISIONS			
SCRA Provision	**Pre-Service Obligation**	**Service Obligation**	**Post-Service**
6% Interest Cap § 527	Yes.	No.	No.
Civil Court Stay § 522	No. (Only applies active duty)	Yes.	Yes. Up to 60 days.
Reopen Default	No.	Yes.	Yes. Judgments up to 30 days

Judgment § 521			from discharge. Reopen up to 90 days from discharge.
Statute of Limitations § 526	No.	Yes. Civil & Administrative Actions	No.
Evictions § 531	No.	Yes. Rent <$2,465/month	No.
Termination of Leases § 535	Yes. Residential, and Auto.	No.	No.
Mortgages and Deeds of Trust § 533	Yes. Obligation was pre-service.	No.	No.
Storage Liens § 537	Yes.	Yes.	Yes. Up to 3 months from discharge.
Fines & Penalties § 523	No.	Yes.	No.
Waiver § 517	Yes.	Yes.	No.

- **Creditors Rights.**

The rule is simple when a creditor seeks to enforce a note or security instrument when the SCRA is in effect. The creditor can never foreclose, repossess, or take any other enforcement or collection action against a person covered by the SCRA without a court order from a court of competent jurisdiction. The term "court order" appears in all the sections of the Act where the civil rights of a person covered by the SCRA may be materially affected by military service. Contrary to popular belief, however, a creditor can file an application in Federal or State court to obtain the necessary court order. The Act provides in *50. U.S.C. App. § 512(c)*:

> "When under this Act any application is required to be made to a court in which no proceeding has already been commenced such application may be made to any court which would otherwise have jurisdiction over the matter."

- **Materially Affected.**

The term "materially affected" is used seventeen times in the Act. A court or administrative agency must decide whether military service "materially affected" the servicemember's circumstances in such a way that the servicemember's civil rights were prejudiced before any stay, postponement, suspension, or other relief is granted to a career servicemember, Reservist, or National Guardsman.

The "materially affected" determination has three elements. The first is the servicemember's ability or availability to timely attend a court or administrative proceeding; the second is the financial effect of military service on the servicemember's

circumstances; and the third is whether the person's obligations were in default prior to military service.

The first element takes into consideration the person's assignment and duty station and the difficulty of travel to the court to prosecute or defend his or her case. In *Plesniak vs. Wiegand, 31 Ill. App. 3d 923, 335 N.E. 2d 131 (1975)*, the Court described several additional factors:

1. When will the servicemember be available for trial;
2. What was the time period between filing suit and an application for stay;
3. How long did the servicemember have notice of the trial date; and
4. Did the servicemember attempt to obtain military leave.

Whether a servicemember requests leave is important in an availability determination. By law, military personnel are entitled to thirty days of paid leave each year to use however they wish. Even if a military person has used up their thirty days of annual leave, the commanding officer can authorize an advance of days of leave that will accrue in the future. Though leave may be earned, it cannot be taken automatically because it is subject to the commander's discretion based on a unit's mission. Therefore, a person on a nuclear submarine may have difficulty in obtaining leave, while a finance clerk stationed in the United States would not.

Today, the availability question is less important with advanced technology, such as real-time conference calls and videotaped depositions, lessening the need for a servicemember's physical presence in a court or administrative proceeding to protect his or her interests.

The second element of the materially affected inquiry concerns the financial impact of military service and generally affects only Reservists and National Guardsmen called to active duty or a high school or college student recently inducted into the service. This inquiry compares the servicemember's financial condition prior to entering active duty with their financial situation while in the military. *Brown Services Ins. Co. v. King, 24 Ala. 311, So. 2d 219 (1945)*. When the court found that a sailor earned more money in the Navy than as a civilian, the court held the sailor failed to prove that military service impaired his ability to meet his obligations. *Harvey v. Homeowner's Loan Corp., 189 Misc., 67 N.Y.S. 2d 586 (N.Y.Sup. 1946)*.

The third factor considered in the materially affected analysis is whether there was a pattern of failing to comply with financial obligations before military service. For example, the court allowed a soldier's car to be repossessed because he failed to make car payments long before he was required to report to active duty. *Reese v. Bacon, 176 S.W. 2d 971 (Tex.Civ.App.-Eastland, 1974 reh. den.)*.

Proof of Facts checklists, model affidavits, and examples of discovery requests used to prove whether a servicemember is entitled to relief under the SCRA can be found at *35 Am.Jur. Proof of Facts 3d. 323*.

- **Six Percent Cap § 527.**

The six percent cap on interest that can be charged on a servicemember's contractual obligation while in military service is found in *50 U.S.C. App. § 527*. The term "interest"

includes both service and carrying charges, but not bona fide insurance charges. *50 U.S.C. App § 527(d).*

Because the Act requires that the obligation must exist before active-duty service, the six percent interest cap generally affects only Reservists, National Guardsmen, and recent recruits, if military service materially affected their ability to pay.

For example, an 18-year-old who joins the Air Force and gets a paycheck for the first time in his or her life is not materially affected by military service. The opposite is true of a Reservist or National Guardsman who leaves a well-paying civilian job and suffers a substantial pay cut.

Upon a showing that military service did not materially affect the servicemember's ability to pay, a creditor may be able to convince the court the servicemember can pay the contract rate, or some lesser amount, that exceeds the six percent interest rate cap. *50 U.S.C. App. § 527 (c).*

When they were advised of its applicability, it appears that most creditors try to abide by the six percent interest cap. However, creditors have been sued for failing to comply with the six percent interest cap. *Moll v. Ford Consumer Finance Co., Inc., 1998 WL 142411 (N.D.Ill. 1998).*

An interesting question arises when a married person is called to active duty and his or her income increases but, because the nonmilitary spouse had to quit his or her job to maintain the joint household, the couple's joint income decreases. Has military service materially affected their ability to pay? If the nonmilitary spouse was not obligated for the debt, the creditor should argue that the nonmilitary spouse's income is irrelevant because credit was extended solely to the military member.

Prior to 2003, a contentious issue was what to do with the difference between the contract rate of interest that exceeded the six percent cap. Was the difference to be forgiven or accrued? Because of judicial inconsistency, statutory ambiguity, and, probably more importantly, perceived creditor abuse, the 2003 Act provides that any pre-service obligation that exceeds six percent interest is forgiven. *50 U.S.C. App. § 527(a)(2).* The SCRA further provides that all installment payments must reflect the reduction of the contract interest rate to six percent. *50 U.S.C. App § 527(a)(3).* Only government-guaranteed student loans are immune from the six percent interest cap.

One of the more important additions to the SCRA was clarifying how the six percent interest cap could be obtained. Beginning Dec. 19, 2003, a servicemember must send a written notice and a copy of his or her orders to the creditor no later than 180 days after the servicemember is released or terminated from service. On receipt of the notice, the creditor must change the contract interest rate to six percent effective as of the date the servicemember was called to military service — not when the creditor received the notice. *50 U.S.C. App. § 527 (b)(2).*

- **Mortgage Foreclosures § 533.**

From a creditor's perspective, any real or personal property that serves as a security for a mortgage cannot be foreclosed or repossessed without a court order from a court of competent jurisdiction. *50. U.S.C. App. § 533(c).* However, the obligation in question must have originated before the servicemember was called into military service. *50 U.S.C. App. § 533(a).*

From a servicemember's perspective, *50 U.S.C. App. § 533* allows the soldier, sailor, or airman to obtain a stay or adjustment of the mortgage obligation at any time during military service and ninety days after release or termination from service. *50 U.S.C. App. § 533(b).*

The court can stay the enforcement of a mortgage or adjust the terms of the obligation, but only if military service materially affected the servicemember's ability to perform his or her obligation. *50 U.S.C. App. § 533(b).*

If a creditor knowingly forecloses, repossesses, or seizes a servicemember's property without a court order, criminal penalties consisting of a fine or imprisonment for a year, or both, can be imposed. *50 U.S.C. App. § 533(d)(1).* In addition, the criminal penalties do not preempt the borrower from seeking damages for wrongful foreclosure or conversion or consequential and punitive damages *50 U.S.C. App. § 533(d)(2).*

- **Waiver of SCRA Rights § 517.**

A servicemember can waive any of the rights and protections provided by the Act. However, the waiver must be in writing and must be in a document that is separate from the document that contains the terms and conditions of the obligation or liability to which the waiver applies if the waiver modifies, terminates, or cancels a contract, or lease, or any obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage. *50 U.S.C. App. § 517(b).* The waiver is effective only if it was executed during or after the servicemember's period of military service. The written waiver must specify the legal instrument to which the waiver applies and, if the servicemember is not a party to the instrument, the name of the servicemember. *50 U.S.C. App § 517(a).*

Public Law No. 108-454 added two new requirements to the waiver rule. Effective Dec. 10, 2004, a waiver must be in twelve-point type and the waiver instrument must be separate from the obligation or liability to which the waiver applies. *50 U.S.C. App. §§ 517(b)(2)(B)* and *517(a)*, respectively.

- **The "Heart of the Act" § 522.**

If a servicemember makes an appearance or files an answer in a court or administrative proceeding that might affect his or her civil rights, the servicemember can obtain a stay or modification of any obligation if military service materially affected the servicemember's circumstances adversely. *50 U.S.C. App. § 522.* The stay is authorized whether the servicemember is the plaintiff or defendant and applies to all military personnel whether career military, Reservists, or National Guardsmen. The stay may be obtained at any time while the servicemember is on active duty or within sixty days after release or termination from military service.

However, a civil action or proceeding is only stayed if, in the opinion of the court, the ability of the servicemember to prosecute an action or conduct his or her defense is not materially affected by reason of military service. *Strong v. Pontiac Leasing, 722 S.W. 2d 479 (Tex.App.-Dallas 1986, no writ).*

Though a court may stay its proceedings on its own motion, litigants are not advised to rely on a trial court to initiate the stay. Courts are generally unsympathetic to SCRA arguments raised for the first time in a collateral attack or in any post-trial proceeding where the military litigant had the opportunity to request a stay prior to trial but did not.

The Supreme Court in *Boone v. Lightener, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed 1587 (1943),* concluded that placing discretion in the hands of the trier of fact to determine whether a stay should or should not be granted was the "very heart of the policy." The court in *Boone* also held that "the Act cannot be construed to require a continuance on a mere showing that the defendant was in military service." See also *Power v. Power, 720 S.W. 2d 683 (Tex.App.-Houston [1st Dist.] 1986, writ dism'd).*

Over the years, several general rules seem to have evolved when it comes to the burden of proof for the materially affected test: (1) the burden of proof lies with the party resisting the stay; (2) the military litigant must show "something more" than merely being in the military; (3) the military litigant has to show actual unavailability at time of trial; and (4) the subject matter of the controversy can determine who has the burden to prove whether the servicemember's rights are materially affected.

The Supreme Court found that there was no guidance in the SSCRA as to who had the burden of proof in *Boone v. Lightener, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed 1587 (1943).* Therefore, the Court concluded "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 sound sense to know from what direction their information should be expected to come."

In World War II-era cases, Texas courts suggested that once a party demonstrated he or she was in the military they were entitled to a stay. Then the burden shifted to the opposing side to show whether the servicemember's ability to prosecute or defend was materially affected by military service. In *Womack v. Berry, 156 Tex. 44, 291 S.W. 2d 677 (1956)*, the Texas Supreme Court endorsed the *Boone* reasoning that places the discretion to determine who should have the burden of proof on the trial court.

Denied stay requests usually deal with situations where there is liability insurance or the military defendant has little or no financial risk of loss. *Hackman v. Postel, 675 F.Supp.1132 (N.D.Ill. 1988).* Accordingly, when the opposing party agrees to look only to an insurance policy for payment of a claim, a stay under the SCRA will usually be denied. *Underhill v. Barnes, 161 Ga.App. 776, 288 S.E. 2d 905 (Ga.Ct.App. 1982 cert den.).*

It appears that in Texas the success of obtaining a stay is directly related to the reasonableness of the request. The more reasonable the request, the more likely it is to be granted. *Bond v. Bond, 547 S.W. 2d 43 (Tex. Civ. App.-Eastland 1977, writ ref'd n.r.e.).* Unreasonable requests, or repeated requests for a stay, may indicate the litigant is attempting to utilize the Act as part of litigation strategy to shield wrongdoing or lack of diligence. *Runge v. Fleming, 181 F.Supp. 224 (N.D. Iowa 1960),* and *In re Burrell, 230 B.R. 309 (Bankr. E.D. Tex. 1999).*

In the past, contentious issues arose around whether a letter to the court requesting a stay would be deemed an appearance and subject the servicemember to the jurisdiction of the court. This issue was addressed in the SCRA, and *50 U.S.C. App. § 522(c)* provides that a request for a stay does not constitute an appearance for jurisdictional purposes and does not constitute a waiver of any substantive or procedural defenses.

An application for stay can be contained in a letter or other communication to the court setting forth facts why current military duty requirements materially affect the servicemember's ability to appear. However, the application must state a date when the

servicemember will be available to appear. *50 U.S.C. App. § 522 (b)(2)(A)*. The servicemember's commanding officer can also communicate in a letter or other means of communication that the servicemember's current military status prevents an appearance and that military leave is not currently authorized for the servicemember. *50 U.S.C. App. § 522 (b)(2)(B)*.

- **Default Judgments § 521.**

Any attorney who has prepared a default judgment is familiar with the affidavit that must be filed with the court that alleges whether the defendant is or is not in military service or whether the plaintiff was unable to determine whether the defendant was in the armed forces. *50 U.S.C. App. § 521(b)(1)*.

The purpose behind the affidavit is to prevent prejudicial default judgments that would require significant court resources and time when the defendant seeks to set aside or vacate a default judgment. For this reason, if any defendant fails to answer, the plaintiff must file an affidavit attesting to the military status of the defendant, whether known or unknown.

The Act is clear that the default judgment procedures apply to all court and administrative proceedings. *50 U.S.C. App. § 521(a)*. If there is a default, the plaintiff must file an affidavit under penalty of perjury stating whether or not the defendant is in the military service or state facts to support the conclusion why the plaintiff was unable to determine whether the defendant was in the armed forces. *50 U.S.C. App. § 521(b)(1)(B)*. The affidavit must contain more than a mere statement that the defendant is not in military service. *U.S. v. Simmons, 508 F.Supp. 552 (D.C.Tenn. 1980)*.

Failure to file an affidavit means the court "shall not" grant a default judgment until the affidavit is filed. *50 U.S.C. App. § 521(b)(1)*. If an affidavit is not filed, the default judgment is voidable and can be reopened by the defendant. *Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999)*.

If the court is unable to determine whether the defendant is in military service, the court can require the plaintiff to post a bond to indemnify the defendant against any loss if the judgment is set aside. The bond remains in effect until the time for an appeal to set aside the judgment is final. *50 U.S.C. App. § 521(b)(3)*. The court can also issue any other order it deems necessary to protect a non-appearing defendant. *50 U.S.C. App. § 521(b)(3)*.

Failure to appoint an attorney, if the court cannot determine whether the defendant is in military service, renders the judgment voidable. *Smith v. Davis, 88 N.C.App. 557, 364 S.E.2d 156 (1988)*. If the court determines the non-answering defendant is in military service, the court must grant a stay for at least ninety days to determine whether the defendant has a meritorious defense. *50 U.S.C. App. § 521(d)*. Proof of a meritorious defense is also required to reopen a default judgment, if the servicemember was in military service when the default judgment was entered. *50 U.S.C. App. § 521(g)*.

If it appears the defaulting defendant is in military service, the attorney appointed by the court is responsible for trying to locate the servicemember and cannot waive any of the defendant's rights or bind the defendant in any way. *50 U.S.C. App. § 521(b)(2)*. At a minimum, appointed counsel should: (1) attempt to locate or contact the servicemember to determine whether he or she has a defense or wants to explore settlements; (2) ensure

that the service of process was proper on the defendant servicemember; (3) ensure that the court has personal and subject matter jurisdiction; and (4) make sure that the plaintiff's petition is not defective on its face. Even so, it appears that *50 U.S.C. App. § 521* does not appear to obligate the appointed attorney to do anything more than ensure entry of a default judgment was proper.

Compensation for an attorney appointed by the court is not discussed in the Act. Many courts take the position that it is the appointed counsel's patriotic duty to represent the servicemember without compensation, especially if the servicemember is serving on the battlefield. *Davison v. Lynch, 103 Misc. 311, 171 N.Y.S. 46 (1918)*. However, in probate matters, appointed counsel can generally obtain compensation where such allowances are commonly awarded to *attorney ad litems*. *In re Ehkle's Estate, 250 Wis. 583, 28 N.W. 2d 884 (1947)*.

Bad press and publicity deter most lenders from considering foreclosure if the borrower is covered by the Act. Fannie Mae and Freddie Mac as well as the Department of Veteran's Affairs have detailed procedures in their guidelines on servicing loans owed by servicemembers covered by SCRA.