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MATERIAL EFFECT: SHIFTING THE BURDEN OF PROOF FOR GREATER PROCEDURAL RELIEF UNDER THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

I. INTRODUCTION

The Soldiers' and Sailors' Civil Relief Act of 1940¹ provides civil relief to military personnel serving on active duty by suspending legal proceedings in which they are parties. The courts in many cases have extended the full protection of the act to those who are within its scope in order to fully promote the intent of Congress.

The participation of the United States in the Persian Gulf War has recently revived an interest in the Soldiers' and Sailors' Civil Relief Act. The Act provides not only substantial protection from financial hardships but also relief from pending judicial proceedings in which active servicemembers are parties. Parties to lawsuits may seek civil relief from courts while one litigant actively serves in the armed forces and for short periods of time after the litigant's discharge.² As servicemembers return home to find lawsuits pending against them, or even already adjudicated in their absence, the protections afforded by the Soldiers' and Sailors' Civil Relief Act may be employed to assure the rights of these individuals. This comment will analyze the procedure for applying for relief from judicial proceedings under the Soldiers' and Sailors' Civil Relief Act, and recommend that the burden of proof shift to servicemembers' opponents to provide greater procedural relief.

Equally as important as the application procedure is the allocation of the burden of proof since this burden directly affects whether courts will grant relief. Most sections of the Act affording relief to servicemembers require servicemembers to show that their ability to appear in court or comply with a judgment is "materially affected" by their military service. To provide the relief envisioned by Congress, the burden of showing that the servicemembers' ability to appear in court or comply

1. Soldiers' and Sailors' Civil Relief Act, ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. app. § 501 (1988), *amended by* the Soldiers' and Sailors' Civil Relief Act Amendments of 1991, Pub. L. No. 102-12, 105 Stat. 34).

2. Each section of the Act provides the time period during which courts may grant certain types of relief to servicemembers.

with a judgment is "materially affected" by military service should shift from servicemembers to their opponents. Specifically, courts should find that servicemembers have established a prima facie case "materially affecting" their ability to defend their interests when the servicemembers produce evidence that they are serving on active duty in the United States military. Consequently, the burden should then shift to opposing parties to show that the servicemembers' duty does not materially affect their ability to engage in the proceedings or comply with judgment orders.

II. HISTORY

Throughout history servicemembers have enjoyed relief from civil obligations during times of war.³ As early as the nineteenth century, many states enacted statutory moratoriums barring enforcement of plaintiffs' rights against servicemembers.⁴ At the federal level, the United States Congress enacted its first moratorium on civil actions against servicemen during the Civil War⁵ by closing courts to plaintiffs seeking legal redress against servicemembers.⁶ These laws were too restrictive as they prevented creditors from filing lawsuits against servicemembers for the duration of their military service. Instead of providing relief for servicemembers, these measures actually caused greater difficulties for servicemembers. For example, creditors often declined to extend credit to enlisted persons as they feared being barred from any relief from servicemembers who defaulted on their obligations and then invoked the moratorium provision. Congress modified this harsh approach with the passage of the Soldiers' and Sailors' Civil Relief Act.

In 1918, Congress drafted the first federal statute, the Soldiers' and Sailors' Civil Relief Act of 1918,⁷ to provide relief for the vast number of servicemembers in World War I.⁸ The advent of the war disrupted all of

3. See Garth K. Chandler, *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act*, 102 MIL. L. REV. 169 (1983).

4. DEP'T OF ARMY, PAMPHLET NO. 27-166, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 11 (1962).

5. Act of June 11, 1864, ch. 118, 13 Stat. 123 (current version at 50 U.S.C. app. § 501 (1988)) cited in Timothy J. Grendell, *The Soldiers' and Sailors' Civil Relief Act: A Hurdle or a Wall?*, 1 COMPLEAT LAW. 49, 53 n.2 (1984).

6. DEP'T OF ARMY, PAMPHLET NO. 27-166, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 11 (1962).

7. Act of Mar. 8, 1918, ch. 20, 40 Stat. 440 (1917-1919).

8. DEP'T OF ARMY, PAMPHLET NO. 27-166, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 11 (1962).

America's activities and adversely affected the legal rights and responsibilities of those servicemen called to serve in the war. Absent from home, World War I servicemembers could not pursue and protect their legal interests. As a result, Congress enacted the 1918 Act to protect the civil rights of persons in the military both during and immediately after their terms of service⁹ and to allow them to "devote their entire energy to the military needs of the nation."¹⁰ Noting the problems inherent in complete moratoriums, Congress greatly modified the forms of relief from civil proceedings afforded servicemembers. Instead of a complete moratorium on legal actions against servicemembers, the Act of 1918 provided for the exercise of judicial discretion in determining whether the servicemembers' ability to protect their rights was deterred by their active duty in the armed services. The 1918 Act, which expired after World War I, suspended legal actions during the time of service if the court determined that the serviceman's ability to protect his rights was deterred by his active duty. In lieu of prohibiting all actions against servicemembers, Congress provided the courts with wide discretion in determining whether to stay proceedings.¹¹

The Act of 1940 is very similar to the original Act of 1918.¹² Courts remained open to suits against servicemembers. Although the Act maintained a forum for hearing cases against servicemembers, it also provided for suspensions until servicemembers could protect their interests.

By 1942, with the war in Europe escalating, Congress saw the need to revise the 1940 Act.¹³ The Soldiers' and Sailors' Civil Relief Act Amendments of 1942 clarified the intent of the Act and added some provisions.¹⁴ Congress broadened the purpose of the Act to prevent courts from interpreting the Act too narrowly.¹⁵ Subsequent amendments to the Act focused on specific shortcomings which Congress sought to ameliorate.¹⁶

Congress originally intended to protect servicemembers from judgments entered in their absence for the duration of the Second World

9. Act of Mar. 8, 1918, ch. 20, 40 Stat. 440 (1917-1919).

10. *Clark v. Mechanics' Am. Nat'l Bank*, 282 F. 589, 591 (8th Cir. 1922).

11. *Boone v. Lightner*, 319 U.S. 561, *reh'g denied*, 320 U.S. 809 (1943).

12. DEP'T OF ARMY, PAMPHLET No. 27-166, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 12 (1962).

13. *Id.*

14. The Soldiers' and Sailors' Civil Relief Act Amendments of 1942, Ch. 581, § 1, 56 Stat. 769 (1942) (current version at 50 U.S.C. app. §§ 501-591). The 1942 amendments included new tax provisions which were later amended in 1944.

15. *Id.*

16. *Id.*

War.¹⁷ The Act was to terminate six months after the war ended.¹⁸ However, Congress passed a subsequent provision which extended the Act until such time as it is repealed.¹⁹ Since Congress has not yet repealed the Act, it is still in effect today. Due to the Persian Gulf War, Congress has been considering more than fifty bills which would provide additional relief to Americans serving on active duty in the military.²⁰

III. PURPOSE

Congress enacted the Soldiers' and Sailors' Civil Relief Act of 1940²¹ to suspend certain civil legal responsibilities of enlisted members of the armed forces on active duty.²² Congress sought to protect the civil

17. 50 U.S.C. app. § 584 (1988) (amended 1991). Section 584 provided that:

This Act . . . shall remain in force until May 15, 1945: *Provided*, That should the United States be then engaged in a war, this Act . . . shall remain in force until such war is terminated by a treaty of peace proclaimed by the President and for six months thereafter: *Provided further*, That wherever under any section or provision of this Act . . . a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided with respect to military service performed prior to the date herein fixed for the termination of this Act . . . such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of such proceeding, remedy, privilege, stay, limitation, accounting, or other transaction.

Id.

18. *Id.*

19. 50 U.S.C. app. § 464 (1988) (amended 1991). Section 464 extended the Act by its language: "[A]ll of the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended . . . shall be applicable to all persons . . . inducted into the armed forces pursuant to this title . . . until such time as the . . . [Act] . . . is repealed or otherwise terminated by subsequent Act of the Congress . . ." See also ROBERT T. KIMBROUGH & JUDSON B. GLEN, *AMERICAN LAW OF VETERANS* § 845, at 603 n.3 (William E. Shipley ed., 2d ed. 1954).

20. Francesca L. Kritz, *When Breadwinners Go Off to Fight*, U.S. NEWS & WORLD REP., Feb. 25, 1991, at 69.

21. 50 U.S.C. app. § 501 (1988). The Soldiers' and Sailors' Civil Relief Act is divided into seven Articles. *Id.* §§ 501-91. Article I specifies the purpose, definitions, forum, persons protected, and procedures for invoking the Act's relief. *Id.* §§ 510-17. Article II articulates the relief available including stay of proceedings, and stay or vacation of execution of judgments. *Id.* §§ 520-27. Articles III, IV, and V delineate various causes of action through which persons within the scope of the Act may obtain relief. Article III describes benefits available to servicemembers and dependents. *Id.* §§ 530-36. Article IV prevents a forfeiture on commercial life insurance policies. *Id.* §§ 540-48. Article V explains the servicemember's rights regarding taxes, and mining or public land claims. *Id.* §§ 560-74. Article VI prohibits unjust utilization of the Acts provisions. *Id.* §§ 580-584. Article VII provides financial relief with a stay of enforcement of obligations. *Id.* at §§ 590-91.

22. *Id.* § 510. The purpose of the Act is to:

provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force.

rights of Americans who were called to the armed services and to ensure that they would not be distracted from their service duties by concern over their legal obligations at home.²³ The court in *Bowsman v. Peterson*²⁴ described the goals of the Act:

[F]irst, the maintenance in the armed forces of a reasonable measure of that unbothered serenity and security in respect of personal responsibilities which effectively promotes military efficiency and the national defense; and secondly, the assurance that in the field of individual justice no advantage in judicial proceedings by or against a soldier or sailor will result from his absorption in his country's defense.²⁵

Congress passed the current Soldiers' and Sailors' Civil Relief Act in 1940²⁶ when the United States anticipated upcoming world conflict.²⁷ It provided protection to American servicemembers against commencement or continuance of legal proceedings when servicemembers could not be present to protect their interests due to their military service.²⁸ At least one court has recognized that the Act may protect servicemembers, but unfortunately may also slightly disadvantage opposing parties who must wait until the servicemember is available to defend the suit.²⁹ This disadvantage to plaintiffs, however, is a necessary side effect of promoting the goals of Congress.³⁰

Id.

23. See KIMBROUGH, *supra* note 19, at 602 n. 2.

24. 45 F. Supp. 741 (D. Neb. 1942).

25. *Id.* at 743. Other courts have also expressed patriotic fervor. The paternal policy of the Act and "[t]he broad spirit of gratitude" towards persons in the Military Service of the United States, which prompted the Act, "should control the courts in enforcing it." *Benedict v. Higgins*, 151 N.Y.S. 42, 44 (N.Y. App. Div. 1915). The court in *Patrikes v. J.C.H. Serv. Stations*, 41 N.Y.S.2d 158, 166 (N.Y. City Ct. 1943) declares that "[s]o construed, the amendment accomplishes the purpose for which it was enacted, and leaves the soldier disentangled to pursue his fight for our material and spiritual heritage, and free to devote his entire energy to the defense needs of the nation."

26. Soldiers' and Sailors' Civil Relief Act, ch. 888, 54 Stat. 1178 (1940) (codified as amended at 50 U.S.C. app. §§ 501-591 (1988)).

27. L. Sue Hayn, *Soldiers' and Sailors' Civil Relief Act Update*, 27-50-194 ARMY LAW. 40 (1989).

28. H.REP. NO. 3001, 76th Cong., 3d Sess., (1940). According to House Report No. 3001, the purpose of the statute is to free those who have been removed from their ordinary lifestyle "from harassment and injury in connection with their civil affairs during their terms of service and thus enable them the more successfully to devote their entire energies to the military needs of the Nation." *Id.*

29. *Bowsman*, 45 F. Supp. at 744. In *Bowsman* the court recognized that:

It may be granted that a continuance will probably operate at least temporarily and perhaps permanently to the disadvantage of the plaintiff. That result is unfortunate. But it is a reasonable exaction by society from one of its members for its own preservation; a proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to "provide for the common Defence."

30. "[I]t is a reasonable exaction by society from one of its members for its own preservation; a

Congress did not enact the Soldiers' and Sailors' Civil Relief Act to completely relieve servicemembers from their legal obligations. The goals of the Act were threefold: to suspend civil judicial actions until servicemembers could appear in court;³¹ to provide peace of mind to servicemembers fighting in World War II for the duration of their active duty; and to maintain the status quo during the war by allowing legal actions to be delayed for the duration of the conflict until servicemembers could return home to appear and defend their endangered interests.³² In *Holtzman's Furniture Store v. Schrapf*,³³ the Court of Appeals of Louisiana reasoned that Congress did not intend the Act itself to constitute a defense that servicemembers would assert in response to plaintiffs' claims.³⁴ It did, however, provide temporary relief from civil proceedings needed by servicemembers on active duty.

IV. SCOPE OF THE ACT

Section 511³⁵ defines the scope of the Soldiers' and Sailors' Civil Relief Act. According to this section, the Act applies to "persons in the military service"³⁶ which includes "the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy."³⁷

Under the Act, the term "military service" signifies active military service to the federal government with any military branch listed in section 511.³⁸ The Act applies to those currently serving in the military as well as to those persons in "training or education under the supervision of the United States preliminary to induction into the military service."³⁹ Moreover, the term "active service" in section 511(1) is broadly defined to include the time a servicemember is absent due to "sickness, wounds,

proper imposition by the state upon an individual citizen in the course of its discharge of its constitutional obligation to provide for the common Defence." *Id.*

31. 50 U.S.C. app. § 510 (1988) (amended 1991). According to § 510, "[T]he following provisions are made for the temporary suspension of legal proceedings and transactions." *Id.*

32. Hayn, *supra* note 27, at 40.

33. 39 So. 2d 450 (La. Ct. App. 1949).

34. *Id.* at 452.

35. 50 U.S.C. app. § 511 (1988) (amended 1991).

36. Congress used the phrase "person in the military service" throughout the Act.

37. 50 U.S.C. app. § 511(1) (amended 1991).

38. *Id.*

39. *Id.*

leave, or other lawful cause."⁴⁰ In addition to those enlisted in an active branch of the service, the Act also applies to any Enlisted Reserve Corps members who have been ordered to report to active duty.⁴¹

Certain protections afforded by the Act extend beyond enlisted persons to cover their dependents as well. Dependents of military servicemembers may invoke the protection of the Act for some benefits.⁴² For example, dependents may, upon application to the court, receive benefits provided by sections 530-536 of the Act which include relief with respect to eviction for nonpayment of rent,⁴³ installment sales contracts,⁴⁴ mortgages,⁴⁵ trust deeds,⁴⁶ leases,⁴⁷ nonpayment of life insurance policies,⁴⁸ and enforcement of storage liens.⁴⁹ Additionally, dependents are entitled to relief from the sale of property to collect taxes.⁵⁰ Courts may grant any such relief if it determines that the dependent's ability to comply with the obligation has been "materially impaired by reason of the military service of the person upon whom the applicants are dependant."⁵¹

In addition to protection of servicemembers and their dependents, some provisions may even apply to persons secondarily liable on a servicemember's obligation.⁵² When courts have granted relief to the person in the military service, they may, in their discretion, stay, postpone or suspend proceedings or orders against persons secondarily liable on obligations of servicemembers.⁵³ Courts may also vacate or set aside judgments against third parties whether primarily or secondarily liable.⁵⁴ Furthermore, courts may not enforce provisions of a criminal bail bond

40. *Id.* Servicemembers who have been court-martialed may not be considered on active duty. In *Mantz v. Mantz*, 69 N.E.2d 637 (Ohio C.P. 1946), a soldier was confined under court-martial for five years and then dishonorably discharged. The court found he was not on active duty for the purposes of invoking the Act.

41. 50 U.S.C. app. § 516 (amended 1991). The Act applies to those who enlist of their own volition, as well as to those who are drafted. See *Hanebuth v. Patton*, 142 P.2d 1010 (Colo. 1943). See also *Hanebuth v. Scott*, 142 P.2d 1008 (Colo. 1943).

42. 50 U.S.C. app. § 536 (1988).

43. *Id.* § 530 (amended 1991).

44. *Id.* § 531 (amended 1991).

45. *Id.* § 532 (amended 1991).

46. *Id.*

47. *Id.* § 534 (amended 1991).

48. *Id.* § 535 (amended 1991).

49. *Id.*

50. *Id.* § 560.

51. *Id.* § 536.

52. *Id.* § 513 (amended 1991). A stay, postponement, or suspension may be granted to "sureties, guarantors, endorsers, accommodation makers, and others . . ." *Id.* § 513(1)

53. *Id.*

54. *Id.* § 513(2).

when the sureties are unable to enforce attendance of the principal due to the principal's military service.⁵⁵

However, courts will not often extend the Act to protect non-military persons such as their co-defendants or business partners. In *Gilbride v. City of Algona*,⁵⁶ the Iowa Supreme Court clearly stated that "the Soldiers' and Sailors' Civil Relief Act is for the benefit of the party in service only."⁵⁷ The court in *Gilbride* refused to grant a stay of condemnation proceedings against property owners, including two enlisted defendants who each owned a minor interest in the property.⁵⁸ The owners of the remaining interests were not allowed to invoke the protection of the Act to delay proceedings.⁵⁹ Although the servicemembers were unable to appear, the court found the rights of the servicemembers were not materially affected by absence due to military service because their interests would be adequately represented by the other parties.⁶⁰

Similarly, in *Patrikes v. J.C.H. Service Stations*,⁶¹ the trial court did not allow the business partners of a servicemember called to service to invoke the Act to avoid a lease agreement.⁶² Holding that only the servicemember could be relieved of liability on the lease and the remaining partners who were not servicemembers were still liable, the court reasoned that business partners do not enjoy the same status as dependents under the Act because they do not look to servicemembers for "support and maintenance . . . for the reasonable necessities of life."⁶³ The courts in *Gilbride* and *Patrikes* made one point very clear: non-servicemembers cannot easily invoke the Act to gain protection from litigation.

Nonetheless, a plaintiff should request leave of the court to proceed against any other defendant who is not serving in the military.⁶⁴ Although such co-defendants may not invoke the Act for their own protection, they may request the court to stay the proceeding against all defendants on the grounds that proceeding on the matter may materially

55. *Id.* § 513(3). The surety may be required to show unsuccessful efforts to enforce the defendant's appearance. *Cumbe v. State*, 367 S.W.2d 693 (Tex. Crim. App. 1963).

56. 20 N.W.2d 905 (Iowa 1945).

57. *Id.* at 908.

58. *Id.*

59. *Id.*

60. *Id.*

61. 41 N.Y.S.2d 158 (N.Y. City Ct. 1943), *aff'd*, 46 N.Y.S.2d 233 (N.Y. App. Div. 1943).

62. *Id.* at 167.

63. *Id.* The court further stated, "The soldier's status does not operate to release partners who are not called to service." *Id.* Similarly, in *Grimes v. State*, 377 P.2d 847 (Okla. Crim. App. 1963), a defendant was not entitled to relief under the act where his attorney, a member of the armed services, was unable to appear with the defendant.

64. 50 U.S.C. app. § 524 (1988).

prejudice the interest of the absent defendant on active military duty.⁶⁵

V. RELIEF FROM JUDICIAL PROCEEDINGS

The Soldiers' and Sailors' Civil Relief Act provides three means of relief from judicial proceedings for servicemembers while they are on active duty.⁶⁶ Servicemembers may request a stay of proceedings, a reopening of a default judgment against the servicemember, or a stay of execution of judgment.⁶⁷ To invoke the Act's provisions for relief, servicemembers must show that duty in the service has materially affected their ability to protect their legal rights in the case.⁶⁸

A. *Stay of Proceedings*

Courts may grant stays of civil proceedings when they find it necessary to protect the rights of servicemembers. Section 521 of the Act states:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.⁶⁹

A court in its discretion may determine whether a stay should be granted based upon the facts of the particular case. Again, a court should look to the purpose of the Act to aid in rendering its decision. On one hand, the purpose of the Act is to protect and promote the well-being of servicemembers by suspending civil actions temporarily.⁷⁰ On the other hand, a court must limit such protection if necessary to prevent a party from abusing the Act's provisions.

To this end, servicemembers must show that their defense is "materially affected" by their military duties. Furthermore, servicemembers must also show they acted with due diligence to appear in court. In *Palo*

65. See *Lanham v. Cline*, 44 F. Supp. 897 (D. Idaho 1942). See also *McArthur v. Shaffer*, 139 P.2d 959 (Cal. Ct. App. 1943).

66. *Grendell*, *supra* note 5, at 49.

67. See *supra* note 21 and accompanying text.

68. *In re Estate of Ehlke*, 27 N.W.2d 754, 757 (Wis. 1947).

69. 50 U.S.C. app. § 521 (1988).

70. See *supra* notes 21-34 and accompanying text.

v. *Palo*,⁷¹ the court heard divorce proceedings between two servicemembers.⁷² The plaintiff wife managed to appear by requesting excess leave from service and borrowing money for the trip.⁷³ The defendant husband made no such efforts.⁷⁴ Since the husband did not act with due diligence, the court refused the husband's request for a stay.⁷⁵

Similarly, other courts have considered various circumstances in finding that a servicemember had not acted with due diligence to appear in court. For example, in *Underhill v. Barnes*,⁷⁶ the court denied the defendant's request for a stay taking judicial notice of the fact that the defendant had fifty days of accrued leave but failed to appear.⁷⁷ Additionally, in *Keefe v. Spangenburg*,⁷⁸ the court noted that the servicemember was serving voluntarily during peacetime when requesting a stay, and refused to grant a stay.⁷⁹

The procedure for requesting a stay under the Soldiers' and Sailors' Civil Relief Act is unique. Requesting a stay pursuant to the Act is not the same as is required under the Federal Rules of Civil Procedure for this type of motion.⁸⁰ The primary distinction for a motion to stay under the Act is that the stay may be requested at any time during the proceedings as long as it is within the party's "period of . . . service or within sixty days thereafter."⁸¹ Accordingly, the precise language of section 521 dictates that a party's contention that a motion for continuance is untimely should fail.⁸²

B. *Reopening Default Judgments*

Under section 520(4) of the Act, servicemembers may request courts to set aside judgments entered against them and reopen cases against them if the servicemembers did not obtain stays of proceedings.⁸³ This section of the Act provides relief in accordance with the purposes of the

71. 299 N.W.2d 577 (S.D. 1980).

72. *Id.*

73. *Id.* at 578.

74. *Id.*

75. *Id.*

76. 288 S.E.2d 905 (Ga. Ct. App. 1982).

77. *Id.*

78. 533 F. Supp. 49 (W.D. Okla. 1981).

79. *Id.*

80. Compare 50 U.S.C. app. § 521 (1988) with FED. R. CIV. P. 62.

81. 50 U.S.C. app. § 521 (1988).

82. *Semler v. Oertwig*, 12 N.W.2d 265, 269-70 (Iowa 1943).

83. 50 U.S.C. app. § 520(4) 1988.

Act by insuring that servicemembers have the opportunity to appear to defend their rights against opposing parties.

The procedure for reopening a default judgment begins with an application to the trial court. Servicemembers or their counsel must observe two time limitations which apply to this procedure. First, the judgment must have been rendered during the servicemember's term of service in the military or within thirty days after discharge.⁸⁴ Second, the servicemember must seek to reopen the judgment while still on active duty or within ninety days of discharge.⁸⁵

In order to reopen a default judgment, a servicemember must *not* have appeared in the proceeding. The court will determine what constitutes an appearance. This requirement may be rather difficult to satisfy if servicemembers are aware of actions against them and attempt to protect their interests despite the hardships of also serving on active duty.

Courts have found appearances in cases where defendants themselves never actually appeared. In *Blankenship v. Blankenship*,⁸⁶ the court found that a defendant appeared when his counsel appeared in court to request that the complaint and service be quashed.⁸⁷ Likewise, in *Vara v. Vara*,⁸⁸ the court deemed a motion for postponement an appearance. Further, some courts have declared letters from legal aid attorneys requesting stays to be appearances.⁸⁹

However, servicemembers may use several means to avoid making appearances in court. A servicemember may simply choose not to make any contact with the court. In practice, this may often be the case where a remote defendant cannot come to the courthouse to appear and does not know the alternatives for entering an appearance.

If servicemembers wish to notify a court that they will be unable to appear, their commanding officers may send some limited communication to the court, such as a letter or telegram. Also, servicemembers may notify opposing counsel in writing of their intent to receive protection under the Soldiers' and Sailors' Civil Relief Act.

Few members of the bar have consistently fulfilled the requirements

84. *Id.*

85. *Id.*

86. 82 So. 2d 335, 340 (Ala. 1955).

87. *Id.*

88. 171 N.E.2d 384, 392 (Ohio 1961).

89. See *Skates v. Stockton*, 683 P.2d 304, 306 (Ariz. Ct. App. 1984); *Artis-Wergin v. Artis-Wergin*, 444 N.W.2d 750, 753-54 (Wis. Ct. App. 1989). See also *Soldiers' and Sailors' Civil Relief Act Notes*, 27-50-194 ARMY LAW., 39 (1989). But see *Kramer v. Kramer*, 668 S.W.2d 457 (Tex. Ct. App. 1984) (letter from legal aid attorney deemed not an appearance).

of section 520 of the Act which requires plaintiffs to file an affidavit with the court stating the military status of the defendants. Before a court may enter a default judgment, opposing counsel will have to disclose a servicemember's status in an affidavit to the court.⁹⁰ Accordingly, the court should then be aware of a military defendant who may be able to invoke the Act. An affidavit of military service is required only when the Soldiers' and Sailors' Civil Relief Act is applicable,⁹¹ and only when there is no appearance by the defendant servicemember.⁹² As the affidavit requirement is only for the servicemember's benefit,⁹³ only servicemembers may seek to enforce compliance with the requirement.⁹⁴ Furthermore, a plaintiff's failure to comply with this requirement will not result in a dismissal of the action,⁹⁵ but a default judgment without this type of affidavit is voidable.⁹⁶

When a court realizes a defendant is a member of the armed forces, the court must appoint a lawyer to represent the servicemember's interests under the Soldiers' and Sailors' Civil Relief Act.⁹⁷ Counsel appointed for this purpose does not act to represent the servicemember's interests in the case at bar, but acts only within the Act's provisions.⁹⁸ Thus, the appointed attorney is generally limited to requesting a stay of proceedings under section 521.⁹⁹ The appointment of an attorney for an absent defendant servicemember likely does not constitute an appearance by the servicemember. The attorney may not waive any of the servicemember's rights.¹⁰⁰ However, a servicemember may explicitly grant to an attorney the power to represent the servicemember's interests in the

90. 50 U.S.C. app. § 520(1) (1988). Section 520(1) of the 1988 version of the Act provides in pertinent part:

In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service.

91. See *State ex rel. McGaughy v. Grayston*, 163 S.W.2d 335, 340-41 (Mo. 1942).

92. *Hilts v. Taft*, 200 A.2d 483 (Conn. 1964).

93. *Hynds v. City of Ada*, 158 P.2d 907, 909 (Okla. 1945).

94. See *id.* See also *Snapp v. Scott*, 167 P.2d 870, 873 (Okla. 1946).

95. See *Oliver v. Oliver*, 12 So. 2d 852, 854 (Ala. 1943). See also *Wiltse v. Wiltse*, 47 A.2d 540 (Pa. Super. Ct. 1946).

96. See *Davidson v. General Fin. Corp.*, 295 F. Supp. 878, 881 (D. Ga. 1968). See also *Snapp*, 167 P.2d 870; *Hynds*, 158 P.2d 907.

97. 50 U.S.C. app. § 520(1) (1988). The court may also require that the plaintiff file a bond to assure protection of the defendant servicemember should the judgment later be set aside. *Id.*

98. *Id.* § 520(3).

99. *In re Estate of Ehlke*, 27 N.W.2d 754, 757 (Wis. 1947).

100. 50 U.S.C. app. § 520(3) (1988).

suit, thus waiving the protection of the Soldiers' and Sailors' Civil Relief Act. In this event, because the servicemember is deemed adequately represented, the case would proceed as if the defendant were present.

In order to reopen a judgment, defendant servicemembers bear the burden of establishing two points. First, the servicemembers must show that at the time of judgment their ability to protect their interests was prejudiced by reason of their military service.¹⁰¹ Second, defendant servicemembers must show that they had meritorious defenses to the actions against them.¹⁰² This final requirement prevents the waste of judicial time by unnecessarily reopening judgments for which the defendant has no chance of prevailing.

C. *Stay of Execution of Judgment*

Another form of relief available to servicemembers against whom a judgment has been issued is a stay or vacation of the execution of the judgment.¹⁰³ This relief may be invoked in suits which have been commenced before, during, or within sixty days after the end of the period of service.¹⁰⁴ A servicemember, another person acting on a servicemember's behalf, or a court may, *sua sponte*, move for the stay or vacation of execution on a judgment. A court may stay an execution of judgment against a servicemember¹⁰⁵ or "vacate or stay any attachment or garnishment of property, money, or debts . . ." ¹⁰⁶ Again, as in section 521 for stays of proceedings, a servicemember must show that servicemember's ability to comply with the judgment is materially affected by military service.¹⁰⁷

VI. MATERIAL EFFECT

At issue in stays of proceedings, the reopening of default judgments, and stays of execution of judgment is the servicemembers' ability to protect the rights or interests being materially affected by their service in the armed forces. Merely meeting the definitional requirements and following the correct procedures is not sufficient to invoke the Act's protection. Defendant servicemembers must also show that the military service has

101. *Id.* § 520(4).

102. *Id.*

103. *Id.* § 523.

104. *Id.*

105. *Id.* § 523(a).

106. *Id.* § 523(b).

107. *Id.* § 523.

had a "material effect" on their ability to prosecute or defend their rights in the case. This factual issue must be determined by the trial court in each case.¹⁰⁸

Courts may in their discretion determine whether a material effect exists in a case.¹⁰⁹ Several cases illustrate circumstances in which courts have used their discretion to determine whether the servicemembers' ability to protect their rights was materially affected by their military service. Courts tend to protect this right. In *Gilbride v. City of Algona*,¹¹⁰ the court determined that two soldiers who each owned a one/fourteenth interest in a tract of land did not have their rights materially affected by their service when the city began condemnation proceedings.¹¹¹ Although they were not present for the proceedings, the co-defendants in the case, who were close relatives of the servicemembers, pursued the same legal interests as the servicemembers.¹¹² The Supreme Court of Iowa affirmed the decision of the trial court, holding that it was within the trial court's discretion to determine "whether or not the party would be materially affected in his ability to prosecute or defend an action by reason of his military service."¹¹³

Similarly, in *Tabor v. Miller*,¹¹⁴ the appellant was serving on active duty in the U.S. Air Force in Alabama when he was involved in an auto accident.¹¹⁵ In a personal injury case brought against the servicemember, the servicemember's counsel twice asked a Pennsylvania court to indefinitely postpone the proceeding before trial, stating that the Air Force pilot was stationed in Alabama while the court was in Pennsylvania.¹¹⁶ Denying the requests, the United States Court of Appeals Third Circuit sustained the trial court's decision, noting that the defendant did not say it was "impossible" for him to appear.¹¹⁷ Neither the serviceman nor his counsel suggested that the trial be held while the serviceman was on Christmas leave, or that the court schedule a weekend session for his testimony.¹¹⁸ The appellate court found that the trial

108. DEP'T OF ARMY, PAMPHLET NO. 27-166 SOLDIERS' AND SAILORS' CIVIL RELIEF ACT 12 (1962).

109. *Boone v. Lightner*, 319 U.S. 561, 564-65. (1943).

110. 20 N.W.2d 905 (Iowa 1945).

111. *Id.* at 906-07.

112. *Id.*

113. *Id.* at 907.

114. 389 F.2d 645 (3d Cir.), *cert. denied*, 391 U.S. 915 (1968).

115. *Id.* at 646.

116. *Id.*

117. *Id.* at 647.

118. *Id.*

court had adequately exercised its discretion in denying the stay.¹¹⁹

As in *Tabor*, the appellant in *Hackman v. Postel*,¹²⁰ a servicemember on active duty in the U.S. Navy, sought a stay of proceedings in a case stemming from an auto accident.¹²¹ The servicemember's insurance carrier provided counsel to represent him in the case.¹²² Like the Air Force pilot in *Tabor*, the servicemember in *Hackman* failed to convince the court that his service in the military materially affected his ability to appear in court.¹²³ The court denied the stay, reasoning that the servicemember neither asserted that he was unable to attend the trial nor provided any evidence that he had tried to obtain leave from his duties in order to appear.¹²⁴ The court also took into account the fact that the serviceman was being represented by his insurance company's counsel.¹²⁵

In order to meet Congress' goal of protecting servicemembers, courts should grant relief under the Act whenever possible without providing the means by which litigants could abuse the judicial system. Logically, courts have allowed litigants to invoke the protections of the Act most often in times of national crisis.¹²⁶ Equally so, they have refused protection during times of peace when the servicemembers could have more easily obtained leave to appear in court.¹²⁷

VII. ANALYSIS

The Act's purpose is to prevent the full adjudication of actions involving servicemembers in their absence.¹²⁸ Additionally, Congress wanted to ensure that servicemembers would not be distracted from their duties by these concerns. Congress, however, did not address which

119. *Id.*

120. 675 F. Supp. 1132 (N.D. Ill. 1988).

121. *Id.*

122. *Id.* at 1333.

123. *Id.*

124. *Id.* at 1134.

125. *Id.* at 1132. The court in *Hackman* noted:

Where it is reasonable to infer that an insurance company is attempting to use § 521 as a means of postponing and perhaps defeating liability and that the defendant serviceman will not be materially benefitted [sic] by a stay, the trial court is justified in refusing to injure the plaintiff for the sole advantage of the insurance company.

Id. at 1134.

126. This is evident by the requests for relief under the Act which were granted during and immediately after World War II.

127. See *Tabor v. Miller*, 389 F.2d 645 (3d Cir. 1968). See also *Hackman*, 675 F. Supp. at 1132. But see *Gilbride v. City of Algona*, 20 N.W.2d 905 (Iowa 1945).

128. See *supra* notes 21-34 and accompanying text.

party bears the burden of showing that a servicemember's ability is materially affected by military service. The most reasonable way to carry out the intent of Congress is for courts to shift the burden of proving material effect from the servicemember to the opposing party. Servicemembers meet their initial burden by producing evidence of their active-duty service in the armed forces.¹²⁹ At this point, the burden of proving that military service does not materially affect servicemembers' ability to participate in civil proceedings or to fulfill the requirements of a judgment should shift to the servicemembers' opponents. As a result, servicemembers will be more adequately protected and freed to carry out their military duty. Furthermore, it enhances courts' ability to apply the Act with uniformity and certainty, increasing the possibility of consistent relief for members of the armed forces.¹³⁰

The goal of the Act is to protect servicemembers from the distractions and anxiety which may be associated with their civil obligations. The same obligations which materially affect servicemembers' ability to participate in legal proceedings or fulfill legal obligations also hinder the servicemembers' ability to prove they are materially affected by their military service. If courts continue to require servicemembers to prove exhaustively that their service materially affects their ability to appear and defend an action, the purpose of the Act will be defeated: servicemembers would still be concerned with the possibility and consequences of failing to meet this burden.

Courts have inconsistently allocated the burden of proving whether prejudice to a servicemember will result from not invoking the Soldiers' and Sailors' Civil Relief Act's protections. In some instances courts have placed the burden of proof on the servicemember requesting the stay,¹³¹ and in other instances on the party resisting the stay.¹³² The United States Supreme Court held in *Boone v. Lightner*¹³³ that the onus of proving prejudice to the absent servicemember is on the party who should be qualified to make such proof under all the facts and circumstances.¹³⁴

129. Sufficient evidence could be a sworn affidavit from the servicemember, counsel, or other interested persons.

130. See Kathleen H. Switzer, *Mortgage Defaults and the Soldiers' and Sailors' Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL EST. J. 171, 174 (1989).

131. See *Pope v. United Fidelity & Guar. Co.*, 20 S.E.2d 618 (Ga. Ct. App. 1942) and *Elkind v. Elkind*, 41 N.Y.S.2d 820 (1943). See also *Hackman*, 675 F. Supp. at 1133.

132. *Bowsman v. Peterson*, 45 F. Supp. 741, 743 (D. Neb. 1942); *Reynolds v. Haulcroft*, 170 S.W.2d 678, 680 (Ark. 1943).

133. 319 U.S. 561 (1943).

134. *Id.* at 569-70.

The Court "refrain[ed] from declaring any rigid doctrine of burden of proof in this matter, believing that courts will usually have enough sound sense to know from what direction their information would be expected to come."¹³⁵

In *Boone* the Supreme Court did not establish a uniform allocation of the burden of showing whether servicemembers' ability to defend actions is materially affected by their military service.¹³⁶ Instead, the Court deferred to the trial court's discretion in determining which party bears the burden of proof on this issue.¹³⁷ In so holding, the Court looked to the language of the Act and noted that:

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 sound sense to know from what direction their information should be expected to come We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.¹³⁸

"Material effect" is an equitable concept which is central to the Act.¹³⁹ The term "material effect" may refer to the effect on servicemembers' participation in legal proceedings, or fulfillment of financial obligations caused by their service in the military.¹⁴⁰ As to stays of proceedings or reopening of default judgments, "material effect" refers to servicemembers' ability to appear in court for the civil proceedings.¹⁴¹ Regarding stays of execution of judgment, "material effect" refers to servicemembers' ability to fulfill the requirements of the judgment, whether legal or equitable relief for the prevailing party.

Courts have not consistently placed the burden of proving material effect on one party. In some instances the court has placed the burden on

135. *Id.* at 569.

136. *Id.* at 569-70.

137. *Id.*

138. *Id.*

139. *See supra* notes 109-28 and accompanying text.

140. *See supra* notes 109-28 and accompanying text.

141. To oppose a stay of proceedings, a party must show that: (1) the servicemember is deliberately and willfully attempting to avoid the ultimate determination of the issues; (2) the servicemember is not acting in good faith; (3) the servicemember has had adequate time and opportunity to prepare his case; and (4) the servicemember is wrongfully invoking the Act as a shield. *Id.* *See also* J. D. Bucky Allshouse, *Overcoming the Obstacles of the Soldiers' and Sailors' Relief Act*, 3 FAM. ADVOC. 36 (1981).

servicemembers; in others the burden rests with the opposing parties. In still others, the court has placed a minimal burden on servicemembers to state they are in the armed forces. The burden then shifts to the opposing party to prove that service in the military does not materially affect servicemembers' ability to protect their interests.

Cases which have placed the burden on servicemembers include *Plesniak v. Wiegand*¹⁴² and *Pope v. United Fidelity & Guaranty Co.*¹⁴³ In *Plesniak*, the court clearly placed the initial burden on the servicemember and provided relevant factors to be considered by the court to decide if the servicemember was "materially affected."¹⁴⁴ In *Pope*, an initial review also placed the burden on the servicemember to prove material effect.¹⁴⁵

In *Plesniak*, the defendant sought to invoke the Act to stay proceedings to determine liability in a case concerning an automobile collision.¹⁴⁶ The court held that servicemembers may be entitled to stays of proceedings under section 521 if they establish they are on active duty in the military; they are not or will not be present for the trial; their absence during the trial would materially affect their ability to prosecute or defend; and their military status is the proximate cause of their inability to be present for trial.¹⁴⁷

The court in *Plesniak* examined several cases and determined that a number of factors are relevant to a court in deciding whether a party's absence is due to military duty. The relevant factors courts should consider include:

- (1) [W]hether the movant had made some statement as to when he could be available for the trial;
- (2) whether the movant had attempted to apply for leave from the military;
- (3) the length . . . between the original filing of the suit and the movant's final motion for a stay; and
- (4) the length of time during which the movant had notice of the upcoming trial date.¹⁴⁸

Thus, the court not only clearly placed the burden of proving material effect on the servicemember, it provided the elements to be shown and the factors to be considered. In *Plesniak*, the party did not indicate when he could be available for trial in the future, or that he had tried to get

142. 335 N.E.2d 131 (Ill. App. Ct. 1975).

143. 20 S.E.2d 618 (Ga. Ct. App. 1942).

144. *Plesniak*, 335 N.E.2d at 136-137.

145. *Pope*, 20 S.E.2d at 621.

146. *Plesniak*, 335 N.E.2d at 133.

147. *Id.* at 135.

148. *Plesniak*, 335 N.E.2d at 136-37 (citations omitted).

leave from duty in Georgia and Colorado to appear at trial.¹⁴⁹ The servicemember had previously been granted three stays during the four and one half years since commencement of the suit.¹⁵⁰ Additionally, the trial had been scheduled for a time when the servicemember had indicated that he would be in town and had received adequate notice.¹⁵¹ The soldier, as a result, failed to meet the burden which the court had set out.

In contrast to the court's placement of the burden on the servicemember in *Plesniak*, the court in *Pope* initially placed the burden on the servicemember but subsequently shifted the burden.¹⁵² In *Pope*, the petitioner sought relief from judgment execution and garnishment proceedings.¹⁵³ The servicemember, a lieutenant-colonel serving at Fort Jackson, South Carolina, filed a petition stating that he was on active duty and a defendant in the proceeding.¹⁵⁴ He alleged that as a result of these two factors he was entitled to suspension of proceedings under the Act.¹⁵⁵ After the court stayed the proceedings for thirty days, the servicemember again petitioned the court for the same relief under the same petition.¹⁵⁶ This time, however, the opposing party, USF & G responded with its contentions as to why the procedural relief should not be granted to the servicemember.¹⁵⁷

Unlike the servicemember's first request, the court refused his second request.¹⁵⁸ The servicemember's second petition alleged no reasons why he should be granted a stay, other than he was in the Army.¹⁵⁹ He offered no further evidence in support of his application for the stay and abatement of the proceedings.¹⁶⁰ USF & G, on the other hand, filed a verified answer alleging that the servicemember drew a salary and subsistence allowance totalling six to seven thousand dollars per year.¹⁶¹ USF & G's answer further alleged that the servicemember did not seek relief in good faith because, *inter alia*, of his ability to pay the debt.¹⁶²

149. *Id.* at 134-35.

150. *Id.* at 134.

151. *Id.*

152. *Pope*, 20 S.E.2d 618, 619 (Ga. Ct. App. 1942).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 620.

160. *Id.*

161. *Id.*

162. The answer also alleged that when the servicemember had initially sought a stay he had

The Georgia Court of Appeals found that the trial court had properly denied the request for a stay because the servicemember did not state any reason for a stay except that he was in the service.¹⁶³ Nothing in the record showed that the servicemember's ability to comply with the judgment was materially affected by reason of his service in the Army.¹⁶⁴ The court in *Pope* placed a burden on servicemembers to show that their duty in the armed forces materially affected their ability to comply with a judgment order. Consequently, the servicemember failed to show the requisite material effect under sections 521 and 524 of the Act.

In contrast with *Plesniak* and *Pope*, other courts have placed the burden of proving material effect on the litigant who is not engaged in military service. This ensures full protection of the Act. Courts have aimed at fulfilling the goals of the Act via liberal interpretations of section 524 of the Act. Cases so holding include *Bowsman v. Peterson*,¹⁶⁵ *Meyers v. Schmidt*,¹⁶⁶ and *Reynolds v. Haulcroft*.¹⁶⁷

In *Bowsman v. Peterson*, the court held that the party resisting an application for a stay carries the burden of proving the absence of material effect.¹⁶⁸ *Bowsman* concerned a plaintiff's action to recover for personal injuries and property loss resulting from an automobile collision.¹⁶⁹ The defendant servicemember sought a stay of proceedings pursuant to section 521 of the Act for the remainder of his military service.¹⁷⁰ The court, examining the language of section 524 regarding stays of proceedings, acknowledged that the language is permissive.¹⁷¹ Nonetheless, the court construed section 524 to mean that upon application for a stay, courts have no discretion to deny a motion unless a party's ability to conduct his defense is not materially affected.¹⁷² The court then placed the burden of showing lack of material effect on the opposing party.¹⁷³

represented to the court that he only desired a short time to negotiate a settlement on the judgment. He then failed to make any effort to settle with USF&G. *Id.*

163. *Id.* at 620-21.

164. *Id.*

165. 45 F. Supp. 741 (D. Neb. 1942).

166. 46 N.Y.S.2d 420 (1944).

167. 170 S.W.2d 678 (Ark. 1943).

168. 45 F. Supp. at 741 (D. Neb. 1942).

169. *Id.* at 742.

170. *Id.*

171. *Id.* at 743.

172. *Id.*

173. "That language of the Act appears to the court to impose upon the party resisting the application for stay the burden of satisfying the court of the absence of material impairment by military service of the defendant's ability to defend himself." *Id.*

The court in *Bowsman* further justified placing this burden on servicemembers' opponents based on the purpose of the Act.¹⁷⁴ The court noted that few instances warrant denial of relief to servicemembers requested under the Act.¹⁷⁵ It is important to note that this case was decided in a time of war and perhaps the court would have rendered a contrary decision in peace time. This consideration was certainly part of the decision to allow a stay.¹⁷⁶

The defendant in *Meyers v. Schmidt*¹⁷⁷ received even greater protection under the Act. The defendant, Schmidt, was serving on active duty in the armed forces.¹⁷⁸ Although Schmidt knew of the foreclosure proceedings and had asked for a chance to contact an attorney,¹⁷⁹ neither the court nor Schmidt's attorney knew his whereabouts when the proceeding began.¹⁸⁰ At that time, Schmidt's attorney was unable to inform the court of whether the servicemember's ability to comply with the mortgage terms was materially affected by reason of his military service.¹⁸¹ The court held that although Schmidt had no defense to the action, he was still entitled to the protection of the statute.¹⁸² By providing protection despite the faults in Schmidt's defense, the court resolved any doubt as to whether servicemembers are entitled to a stay of proceedings under the Act.

The court in *Meyers* also allowed full protection of the Act by placing the burden on the servicemember's opponent to show that the servicemember was not materially affected. Before the court would enter its judgment, the plaintiff was required to show that the defendant's military

174. *See id.*

175. *See id.*

176. "The soldier or sailor in *seasons of war* has neither time nor mental aptitude for litigation." *Id.* (emphasis added). The court also cites previous statutes from the Civil War and the Soldiers' and Sailors' Civil Relief Act of 1918 which were temporary enactments. The Soldiers' and Sailors' Civil Relief Act of 1940 was a temporary provision for the period of World War II. *See supra* note 31 and accompanying text.

177. 46 N.Y.S.2d 420 (N.Y. County Ct. 1944).

178. *Id.* at 421.

179. The servicemember had sent a letter to the judge indicating that he was going to "try to straighten the mess out." *Id.* He stated that he had received "a copy of the motion and affidavit for the foreclosure of the mortgage—that a large part of them are false . . . I am going to ask you as a favor to set this motion aside so that I will be able to get in touch with the legal department of the Navy." *Id.*

180. *Id.* at 421-22. Schmidt failed to respond to letters from both the court and his appointed attorney which were mailed to the address on the letter Schmidt sent to the judge. *Id.*

181. *Id.* at 422.

182. *Id.* Compare the relief of a stay under § 521, which does not require an absent party to assert a valid defense in order to seek the reopening of a default judgment, with § 520, which requires a servicemember to show that he has a meritorious or legal defense.

service did not materially affect his ability to meet his obligation.¹⁸³ Since the plaintiff did not meet his burden, the court stayed the proceedings for sixty days and the servicemember's attorney was ordered to try to locate the defendant.¹⁸⁴

Similarly, in *Reynolds v. Haulcroft*,¹⁸⁵ the Arkansas Supreme Court held that a stay under the Act is mandatory unless the party resisting the stay satisfies the court by clear and convincing evidence that there is no impairment of the servicemember's rights.¹⁸⁶ Reynolds was a member of the United States Navy when the plaintiff filed suit against him.¹⁸⁷ He sought relief under the Act but the trial court denied his request.¹⁸⁸ The Supreme Court of Arkansas reversed the trial court for abuse of discretion holding that the language of section 521 should be interpreted so that "the burden is on the party resisting a stay of proceedings of satisfying the trial court, by clear and convincing evidence, that the rights of the soldier or sailor would not be impaired, while in such military service, by denying the stay of proceedings."¹⁸⁹ The court reasoned that "[a] most liberal construction must always be given to the provisions of this Act to the end that all rights and interests of anyone serving in the armed forces may be fully protected and safeguarded."¹⁹⁰

Placing the burden on the opposing parties is beneficial to the servicemembers and fulfills the purposes of the Act.¹⁹¹ Yet this allocation does not allow servicemembers to take unfair advantage of the Act's intended protection.

The best means of protecting servicemembers without unfairly prejudicing opposing parties is described in *Parker v. Parker*.¹⁹² In *Parker*, the court held that an applicant should be granted a stay of judicial proceedings "upon the bare statement that he is at the time actively in military service; and unless something appears sufficient to show that his rights, as a litigant, will not be materially affected by a determination of the pending litigation, it is mandatory that the application be

183. According to the court in *Meyers*, "[a] reading of that statute . . . will . . . show that the burden is on the plaintiff to show before judgment can be entered, that military service does not materially affect the defendant's ability to meet his obligation." *Meyers*, 46 N.Y.S.2d at 422.

184. *Id.* at 423.

185. 170 S.W.2d 678 (Ark. 1943).

186. *Id.* at 680.

187. *Id.* at 679.

188. *Id.*

189. *Id.* at 680.

190. *Id.*

191. See *supra* notes 21-34 and accompanying text.

192. 63 S.E.2d 366 (Ga. 1951).

granted.”¹⁹³

In *Parker*, a husband servicemember brought a divorce proceeding against his wife, who filed a counterclaim.¹⁹⁴ As a result of his wife's counterclaim, the plaintiff husband then sought a stay of proceedings under the Act through his counsel of record.¹⁹⁵ Although the record showed that plaintiff was serving on active duty in the Korean conflict, no evidence indicated that his rights would not be materially affected if the court denied his request for a stay of proceedings.¹⁹⁶

Analogous to *Parker*, *La Face v. Incorvia*¹⁹⁷ held that once an affidavit is filed stating that a party is in the military service, the burden shifts to the adverse party to show lack of material effect.¹⁹⁸ Unfortunately, the court provided no reasoning for its holding. It simply stated that after extensive examinations of the Act and cases arising thereunder, it was of the opinion that “upon the filing of the affidavit, a stay of proceedings becomes mandatory, unless a sufficient showing can be made by the adverse party that the ability of the party in military service to prosecute or defend his action is not materially affected by reason of his military service.”¹⁹⁹ After a guardian ad litem filed an affidavit that the defendant was in the military service, the court placed all burden on the opposing party to refute the presumption of military duty materially affecting an ability to participate in proceedings.²⁰⁰ This presumption arises upon the filing of an affidavit stating the party is serving in the military.²⁰¹

Shifting the burden of proving material effect best effectuates the purposes of the Act. The cases which have granted relief to servicemembers upon the filing of an affidavit stating a party is an active servicemember have freed servicemembers to carry out their duties as required by the military. They need not concern themselves with what the courts will require to show material effect. The party opposing the stay, who is not under the demands of military duty, will then have to prove that the servicemembers' abilities to meet legal obligations are not materially affected by military service. The times which servicemembers would be required to support the issue of material effect would likely be

193. *Id.* at 367-68.

194. *Id.* at 367.

195. *Id.*

196. *Id.* at 367-68.

197. 113 N.E.2d 128 (Ohio C.P. 1952).

198. *Id.* at 129.

199. *Id.*

200. *Id.*

201. *Id.*

the times that they are free to do so. Courts should require servicemembers to make this showing only when the opposing party has proven that the servicemembers are not materially affected by their military service.

VIII. CONCLUSION

Most cases interpreting the Act were decided during times of war. Current interest in the Act stems from a war in which the United States deployed many troops and called many reserve servicemembers to active duty. For this reason, Congress has also directed its attention toward meeting the needs of servicemembers by seeking to provide even greater relief through amendments to the Soldiers' and Sailors' Civil Relief Act. It will be the duty of the courts to continue to protect the interests of American service personnel as they act to protect the interests of the United States.

When a servicemember is materially affected by his military service and is unable to participate in proceedings or fulfill obligations of a judgment, he is also prejudiced in his ability to furnish evidence to meet the burden of proving that his active duty is materially affecting his abilities. This prejudice would be inconsistent with the purpose and goals of the Act to require the servicemember to meet the burden of proving material effect. It is thus recommended that courts place an initial burden on servicemembers to allege that they are materially affected by their military service. Opposing parties may then counter this assertion if they establish that the servicemembers' ability to defend actions is not materially affected by military service. Such use of evidentiary burdens is consistent with the purposes of the Act.

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