

Servicemembers Civil Relief Act

Decided Cases
(Current to April 13, 2009)

Thomas E. Digan
Naval Legal Service Office
North Central Detachment

SCRA in General

Henderson v. Henderson, 207 Ala. Civ. App. LEXIS 495 (Ala. Civ. App. July 27, 2007) – Wife of Coast Guard member sought to remove her children from Alabama to husband’s new duty Station in Alaska. Wife sought coverage under an Alabama law allowing active duty military to remove children when receiving PCS orders, contending in part that SCRA classified her as a “dependent” and that she should be given protection without citing any particular provision under the SCRA. Court found that none of the protections of the SCRA had been invoked or were at issue and that Alabama statute on removal was clear on its face, limiting protected class to active duty military members and not their dependents.

Donahou v. Presidential Limousine and Auto Sales, 2007 U.S. Dist. LEXIS 30257 (W.D. Ark. Apr. 24, 2007) – Service member Plaintiff enlisted in a Delayed Entry/Enlistment Program (DEP) in Jan. 2006 and entered into an installment contract to buy a truck in June 2006. After the service member reported for active duty in Aug. 2006, he failed to make the remaining payments and the Defendants reposed the truck without a court order as required by the SCRA. Defendants argued that they did not need a court order because the Plaintiff entered DEP in Jan. and the SCRA only applies to contracts entered into before military service. Interpreting the SCRA term “military service” to mean “full-time active duty” and not mere enlisted me in a DEP, the Court granted summary judgment for the Plaintiff.

Boylston v. Our Lady of Bellefonte, 2008 U.S. Dist. LEXIS 95344 (E.D. Ky. November 21, 2008) – Physician entered into a service agreement with a hospital he was then mobilized and left his practice. The hospital sent him a notice stating that he was in breach of their agreement by closing his office. Upon return from active duty, he went to work for a different hospital. Physician then brought an action seeking to enjoin the hospital from determining that he was in breach and seeking monetary damages. The physician alleged a general violation of the SCRA without citing a specific section or right. The court found no applicable provision under the SCRA and held that the hospital was entitled to a judgment as a matter of law. (Reserve physician should have probably filed under the Uniform Services Employment and Reemployment Rights Act “USERRA”).

Kethley v. Kethley, 961 So. 2d 559 (La. Ct. App. June 20, 2007) – Attorney sought to invoke protections of SCRA because he was recalled to active duty and one of his cases was dismissed for abandonment during the period of his active duty. The Court held that SCRA only applies to the litigants in a proceeding, not to their attorneys, even if that attorney could later face malpractice claims. Parties always have the option of hiring other attorneys or having the case handled by an associate.

Price v. McBreath, 989 So. 2d 444 (Miss. Ct. App. August 19, 2008) – Concurring judge wrote to express concern that SCRA was not followed in a case where biological father was seeking to obtain custody of child away from soldier mother. Chancellor did not require an affidavit of military service or appoint an attorney under Section 521 before entering a default judgment. After she appeared and the case was reopened, the Chancellor failed to stay proceedings for the service member under Section 522. The soldier ultimately elected to appear *pro se* thereby waiving any further protections under the SCRA and a decision that the initial court decision should be upheld. The concurring Judge noted that Mississippi law had since been changed to provide additional protections for military parents.

Matz v. Frank, 2007 U.S. Dist LEXIS 33518 (E.D. Wis. May 3, 2007) – When lawsuit could not move forward against multiple Defendants while one Defendant served on active-duty in Iraq, the Plaintiff moved to strike the active-duty Defendant. Court granted the motion and the lawsuit continued against the other Defendants.

Koenig v. Waukesha State Bank, 2006 U.S. Dist. LEXIS 97047 (E.D. Wis. Aug. 10, 2006) – A member of the Army Reserves, Plaintiff sued the Defendant bank, a creditor to his business, for assessing late-payment charges during the period of his activation, for refusing to negotiate the debt, and for making an adverse credit report after Plaintiff's failure to pay the debt. The Court found the bank's late payment charges did violate Section 537 of the SCRA because the late-payment fees exceeded the maximum interest rate of six percent per annum. However, the Court found the bank remedied this violation by waiving other late-payment charged. The Court also rejected Plaintiff's argument that Section 591 obligates creditors to negotiate settlement of a service member's debts. Rather Section 591 just empowers courts to stay creditor enforcement actions. Finally, the Court found that while Section 518 prohibited the Defendant bank from using the request for a stay itself as a basis for an adverse credit report, the bank could adversely report that Plaintiffs failed to satisfy his obligation within the stay period.

In re Adoption of CF, 120 P.3d 992 (Wyo., November 15, 2007) – Mother of child in adoption proceeding claimed error because the trial court did not grant grandfather's SCRA stay motion. Grandfather had dismissed his appeal, so Court found no prejudice personal to the mother from the denial of grandfather's motion. The issue belonged to grandfather and was mooted by his dismissal.

511 – Definitions

Gutridge v. Suburban Steel Supply, 2008 Ohio 3902 (Ohio Ct. App. July 30, 2008) – National Guard soldier sought SCRA Section 526 statute of limitations tolling protection, basing it upon their National Guard annual training and mobilization in support of Hurricane Katrina. The court examined the definition of "military service" under Section 511(2) and found that the term did not include full-time National Guard duty. The Court then noted that "full-time National Guard duty" means training or other duty, other than active

duty, as a member of the National Guard of a State. Since the annual training was conducted for National Guard purposes, it did not fit the definition of “military service” for SCRA purposes and therefore, the Section 526 tolling provision did not apply. The court did not address whether the mobilization for Hurricane Katrina was active duty for SCRA purposes because it would not have impacted the outcome of the case.

HUD v. McClenan, 798 N.Y.S.2d 348 (N.Y. Civ. Ct. Sept. 22, 2004) – Service member did not show up in DoD online database. The service member was away from military service in the hospital during the applicable period and fell within the coverage of 511(2)(c) and was able to avail herself of the protections of the Act.

513 – Protection of Persons Secondarily Liable

In re Cockerham, Debtor, 336 B.R. 592 (Bankr. S.D. Ga. June 24, 2005) – Estranged wife of soldier sought extension of automatic bankruptcy stay under SCRA. Soldier had requested that the automatic stay be lifted so creditor could recover the vehicle. Court held that although co-debtors can gain protection under Section 513, they should not gain any higher protections than the service member. Because the court did not provide any protections to the service member, it would not do so for the co-debtor.

514 – Protections for Citizens Serving with Allied Forces

In re Gaddy, Debtor, 2004 Bankr. LEXIS 1392 (Bankr. Kan. Apr. 12, 2004) – Employee of private contractor working for DoD in Iraq sought protection under SCRA. Court denied relief, holding that civilian contractor was neither on active duty or serving in an allied nation’s military.

521 - Default Judgment

Motion Picture Industry Pension Plan v. BZ Com Marketing, Inc., 2008 U.S. Dist. LEXIS 84442 (C. D. Ca. October 3, 2008) – Compliance with SCRA one of the requirements for obtaining a default judgment.

Hall v. Zavaras, 2009 U.S. Dist. LEXIS 4583 (D. Colo. January 23, 2009) – Court notes in its recitation of the facts that default judgment was initially denied because no affidavit of military service was filed.

In re Front Range Pipe & Supply, Inc. v. Prop Plumbing & Heating, 2007 Bankr. LEXIS 2825 (Bankr. D. Colo. Aug. 9, 2007) – No protection against default judgment for a Limited Liability Company because it was not an individual.

The Erikson Group v. Berman, 2007 Conn. Super. LEXIS 2963 (Conn. Super. Ct. Nov. 1, 2007) – Counterclaim plaintiffs did not file SCRA affidavit against counterclaim defendant before obtaining Default Judgment. Court stated that the judgment was voidable, not

void and may not be challenged by a defendant not in the military service at the time of its entry.

Lespier-Badill v. Santigata, 2007 Conn. Super. LEXIS 270 (Conn. Super. Ct. Jan. 30, 2007) – Plaintiff entitled to Default Judgment because defendants not in military service. Although no military connection, the Court nevertheless discussed procedures under Section 521.

In re Dorsey, Debtor, 2008 Bankr. LEXIS 2093 (Bankr. N.D. Ga. April 18, 2008) – Default judgment denied because no affidavit of military service filed.

In re Berke, Debtor, 2004 Bankr. LEXIS 605, (Bankr. N.D. Ga. Apr. 27, 2004) – Default judgment denied because no affidavit of military service filed.

U.S. v. Payton-Hubbard, 545 F. Supp. 2d 1 (C.D. Ill. Mar. 25, 2008) – United States sought to foreclose on a Dept. of Agriculture loan and obtained a default judgment. Defendants seek to vacate, contending that property had been deeded to grandson, an active duty service member. United States responded that the court should appoint an attorney to represent grandson for the limited purpose of determining if grandson was on active duty at the time of foreclosure and whether he had a meritorious claim or defense to the foreclosure action. The Court agreed that was the most prudent course, and appointed an attorney.

Seton v. United Gold Network LLC, 2008 U.S. Dist. LEXIS 35440 (U.S. Dist. Ct. D. Md., April 30, 2008) – Plaintiff was unable to determine whether defendants were in military service. Plaintiff testified that she contacted authorities at Dept. of Defense, Andrews AFB and Fort Meade, but could not determine whether they were in the military. Because Plaintiff had not actually filed an affidavit as required by SCRA, she was unable to obtain a default judgment.

In re Templehoff, Debtor, 339 B.R. 49 (Bankr. S.D. N.Y. Aug. 2, 2005) – Attorney seeking default judgment was brought into court on a Rule to Show Cause for submitting a false affidavit under SCRA when debtor was clearly listed in court documents as in military and deployed to Iraq. Court held that default affidavits under Bankruptcy Court Rules must also comply with SCRA and provide factual support for statement. Attorney avoided sanctions because they had searched DoD Database, and had showed that the creditor (GMAC) had not coded the case as military related as in its normal course of business.

Heritage East-West, LLC v. Chung, 785 N.Y.S.2d 317 (N.Y. Civ. Ct. Nov. 5, 2004) – Attorney sanctioned for false affidavits of military service prepared by his non-lawyer assistant, but submitted by him to obtain a default judgment.

Merril v. Beard, 2007 U.S. Dist. LEXIS 9210 (N.D. Ohio, Feb. 7, 2008) – Service member Defendant successfully filed a motion for relief from default judgment because Plaintiffs obtained default judgment without filing an affidavit attesting whether Defendant was in the military service.

Estate of Owensby v. City of Cincinnati, 2005 U.S. Dist. LEXIS 33811 (S.D. Ohio Sept. 1, 2005) – The Court in *dicta* stated that it had not previously taken any action against one of the defendants because he had been mobilized and sent to Iraq. The Court noted that now that he was back, it could proceed as with the other defendants.

United States v. Smith, 2006 U.S. Dist. LEXIS 37532 (W.D. Okla. Aug. 10, 2006) – Defendant, an active duty soldier, requested a stay under Section 521 (he had previously requested a stay under Section 522 but was denied because he failed to explain how his currently military duties materially affected his ability to defend in the suit). While the court doubted if Section 521 actually applied, the judge granted a limited stay because counsel represented that there might be a defense in the case, that the defense could not be presented without the defendant, and that after due diligence counsel was unable to determine if a meritorious defense existed.

Nationwide Property v. Janis, 2009 U.S. Dist. LEXIS 52998 (M.D. Penn. July 11, 2008) – Default judgment denied because no affidavit of military service filed.

Mayeaux v. Clear Creek Independent School District, 280 Fed Appx.. 341 (5th Cir. May 30, 2008) – Trial court entered a summary judgment against plaintiff and denied a stay request under Section 522. Circuit Court upheld denial without specifically addressing SCRA or its requirements instead finding that service member plaintiff had not suffered any harm or prejudice.

Batie v. Subway Real Estate Corp., 2008 U.S. Dist. LEXIS 102539 (N.D. Tex. March 12, 2008) – District Court granted service members motion to reconsider dismissal of claims of violation of SCRA. In motion to reconsider service member plaintiff cited several cases allowing private right of action, convincing Court that right did exist allowing military member to continue with his claims.

Batie v. Subway Real Estate Corp., 2008 U.S. Dist. LEXIS 11458 (N.D. Tex. Feb. 15, 2008) – Military member leased property from Subway for 2 franchises. While deployed to Afghanistan, lease payments were not made and Subway obtained a judgment from TX State Court. Member alleged SCRA section 521 was not complied with and sought a Declaratory Judgment in Federal Court including that Subway violated SCRA protections and asked for compensatory and punitive damages for the SCRA violation. Federal court required service member to exhaust State remedies before seeking assistance from a federal court and that SCRA does not contain a private cause of action to enforce violations, therefore, no monetary relief could be had based upon a SCRA claim alone.

In Re Saddle Brook West Apartments, 2008 Tex. App. LEXIS 3708 (Tex Ct. App. 10th Dist, May 21, 2008) – Trial court granted a 522 Stay in a breach of contract case and apartment complex was seeking a writ of mandamus from the appellate court to compel the trial court to set aside the stay. Request was denied because in Texas, mandamus relief is not available to review the granting of continuances.

Bank of Nova Scotia v. James, 2009 U.S. Dist. LEXIS 28644 (D. V.I. March 31, 2009) – The Court denied default judgment because no affidavit of military service filed. The Bank had provided a print out from the Department of Defense Manpower Data Center, but the court stated that the print out needed to be accompanied by an affidavit or other certification of its authenticity.

Flagstar Bank, FSB v. Deducca, 2008 U.S. Dist. LEXIS 67914 (D. V.I. September 5, 2008) – Default judgment denied because no affidavit of military service filed.

Bank of Nova Scotia v. Brown, 2008 U.S. Dist. LEXIS 32777, (D. V.I. Apr. 17, 2008) – Default judgment denied on foreclosure because bank did not submit an affidavit of military service (no indication in case that defendants had military connection).

Bank of Nova Scotia v. George, 2008 U.S. Dist. LEXIS 11786 (D. V.I. Feb. 15, 2008) – Bank sought reconsideration of the court's denial of default judgment due to its failure to submit a SCRA affidavit. Bank stated that it now was submitting an affidavit stating that Defendants were not in active military service. Motion was denied and no default was granted. A bald assertion that Defendants are not in military service was not sufficient, the affidavit must include facts that support the assertion.

Sprinkle v. Skagit Bonded Collectors, 472 F.Supp.2d 1235 (W.D. Wash. Sept. 18, 2006.) – Plaintiffs, husband (member of National Guard) and wife, sued Defendants, a collection agency and an attorney, alleging violations of the Fair Debt Collection Practices Act and the SCRA. While husband was on duty in Saudi Arabia, Defendants attempted to garnish his wages. Plaintiffs asserted that Defendants violated the FDCPA by failing to file a SCRA affidavit at any time during the proceedings. Because the parties agreed that no SCRA affidavit was ever filed by Defendants, the Court granted Plaintiffs' motion for summary judgment.

Krutke v. Krutke, 693 N.W.2d 147 (Wis. Ct. App. 2005) – Father appealed the decision of a trial court awarding child support to mother. The father had been unable to attend the hearing because he had been deployed in the military and the trial court denied his motion for a stay. The appellate court affirmed the trial court's decision because any defense the father might have had, could have been presented without his actual presence at the hearing, taking into account that he already had several months to gather materials, he appeared by telephone, and he was represented by counsel at the hearing. (The case should probably have referred to SCRA section 522 if the service member had made an appearance).

522 – Stay in Proceedings

Norman v. Norman, 984 So. 2d 427 (Ala. Civ. App., October 12, 2007) – Mother sought increase in child support and active duty father stationed in Guam brought a motion to stay under SCRA that was granted until his return to the U.S. whether temporarily or permanently. Mother filed a motion to reconsider that was denied then appealed. Appellate court stated that the order denying motion to reconsider was not a final appealable order so it could not be heard. Mother could have filed a writ of mandamus, but she missed the filing deadline so the appeal was dismissed and the stay was upheld. No real analysis of SCRA in opinion.

Teas v. Ferguson, 2007 U.S. Dist. LEXIS 86901 (W.D. Ark. Nov. 16, 2007) – Defendant sent court copy of his military orders to Great Lakes, Illinois for basic training and requested a stay in proceedings. Motion to stay was DENIED because it did not meet statutory requirements (which of the requirements was not specified), Defendant was given leave to amend motion so that it could comply with SCRA. (Defendant did not seek assistance of Naval Legal Service Office Great Lakes on his stay request.)

Hunt v. UAW Local 1762, 2006 U.S. Dist. LEXIS 12673 (E.D. Ark. Mar. 7, 2006) – Guardsman called to active duty and sent to Iraq requested a stay in proceedings, including discovery, until the end of his deployment. Defendants pointed out that plaintiff's request did not state how military duties prevented his appearance, did not state whether leave would be authorized or whether plaintiff could participate in discovery. The court chose to ignore the statutory requirements of Section 522, instead finding that plaintiff's rights would not be protected during his active duty deployment and citing some SSCRA cases that state that applying the Act may work some detriment on the non-military party, but that that was one of the sacrifices that must be made for the common good.

Lenser v. McGown, 191 S.W. 3d (Ark. Sept. 16, 2004) and 2004 Ark. LEXIS 400 (Ark. June 17, 2004) – Service member received a stay in divorce proceedings while child was visiting with him and staying with paternal grandmother. Service member contended that court could not enter a temporary custody order due to stay. The Court stated that SCRA should not be used as sword and that in any case, even during a stay, the court has jurisdiction to consider matters such as support, custody and other similar matters. Courts must have the ability to address the needs of children.

Silva v. Hargadon, 2009 U.S. Dist. LEXIS 15652 (S.D. Cal. Feb 26, 2009) – Court noted in presentation of factual background that it had denied without prejudice a motion for stay of proceedings under SCRA Section 522 because no communication from the Commanding Officer was provided although required by the SCRA.

In re: B.B., 2009 Cal. App. Unpub. LEXIS 2665 (Cal. App. Ct. April 2, 2009) – Service member father was a defendant in a dependency hearing. The father did not comply with DCFS

unification requirements or take any action towards obtaining custody. Attorney appointed to represent service member requested stays under SCRA Section 522 on 3 occasions, all of which were denied because service member father did not comply with the statutory requirements. On appeal, the Court recognized that if father had complied with the statutory requirements, the stay would have been mandatory. However, because he did not, the granting of a stay was within the discretion of the trial court. The Court noted that that the father had done almost nothing in connection with the dependency case. Further, that an attorney had been appointed to represent the service member and that they were called by DCFS worker about the hearing well in advance. With those facts, the court concluded it was not an abuse of discretion to deny the stay.

Garner v. Shareef, 2009 Cal. App. Unpub. LEXIS 1485 (Cal. App. Ct. February 25, 2009) – Plaintiff appealed from judgment of dismissal after trial court dismissed her case to trial within five years of filing. Plaintiff claimed that period should have been automatically tolled by defendant’s military service. The Court discussed the stay requirements under Section 522 of the SCRA at length, then discounted any affect that they might have had on Plaintiff’s ability to bring the case to trial because the service member Defendant never asked for a SCRA stay. When they did ask for a continuance it was only for 34 days and did not comply with the SCRA, and further, that period was not long enough to help Plaintiff avoid the dismissal for want of prosecution. (It is unclear why the Court *did not even mention* the tolling provision in SCRA Section 526 in its discussion. It would seem that that would have been the applicable section to discuss.)

In re: A.R., 2009 Cal. App. LEXIS 81 (Cal. Ct. App. January 26, 2009) – In a juvenile dependency proceeding military father sought a stay due to his Navy deployment. Initial stay request did not include all of the statutory requirements, but it was supplemented so that it met all of the requirements. The lower concluded that the SCRA stay was discretionary and denied it then went ahead and declared the child a dependent. On appeal the Court noted that the cases cited by the child welfare agency were inapplicable because they referenced the SSCRA which had made the determination of a stay within the jurisdiction of the trial court. The Appellate Court held that if the statutory requirements were met, the stay was mandatory and the trial court had no discretion.

George P. v. The Superior Court of San Luis Obispo, 127 Cal. App. 4th 216 (Cal. Ct. App. Feb. 28, 2005) – National Guardsman sought appeal in denial of *additional stay* under Section 522 in a juvenile court action. The Court recognized that the initial stay was “relatively automatic” and not subject to the Court’s discretion unlike its predecessor, the Soldiers and Sailors Civil Relief Act. Additional stays under Section 522 are discretionary and based upon a continuing material affect. Here, the Guardsman had been present for nearly all of the reunification services, had testified at the 6 month hearing and had the opportunity to communicate with DSS, so the Court found no material affect justifying a continued stay. The Court did, however, attempt to limit its holding to the facts before it.

Advanced Litigation, LLC v. Herzka, 2004 Del. Ch. LEXIS 128 (Del. Ch. Aug. 20, 2004) – Service member did not submit a letter from his Commanding Officer, so he was not in strict compliance with SCRA Section 522. However, the Court on its own motion granted the stay, finding that the service member was materially affected in his ability to defend due to his service in Iraq.

Jones v. Van Horn, 640 S.E. 2d 712 (Ga. Ct. App. Dec. 29, 2006) – Stays under Section 522 must include the statutorily required information and there was nothing in the court records showing that the service member provided the required information.

City of Pendergrass v. Skelton, 628 S.E. 2d 136 (Ga. Ct. App. Mar. 7, 2006) – Trial court granted 522 stay motion lasting until end of military service *ex parte*. Service member had been nonresponsive to discovery prior to invoking SCRA and defendants had brought a motion for sanctions before the stay was put into effect. Appellate court examined the stay request and found it insufficient in that it did not support the full stay requested in that although the Commanding Officer had stated the service member would not be available, they did not say how long that would last, when they would be deploying to Iraq or that leave would not be granted. The stay was vacated.

King v. Irwin, 614 S.E. 2d 190 (Ga. Ct. App. Apr. 21, 2005) – Reservist appealed from denial of stay due to his performing annual training. The Court affirmed, noting that there was nothing in the records indicating that the Reservist had provided the required information under Section 522.

Nakayama v. Cameron, 2007 Haw. App. LEXIS 263 (Haw. Ct. App. Apr. 16, 2007) – Service member obtained an initial stay of proceedings under 522 and was given a second stay which was less than 90 days in duration. Service member contended that additional stay should have been at least 90 days. The court stated that 90 days is only for the initial stay and all subsequent stays are base upon the “continuing material affect on the service member’s ability to appear” and that they could be less than 90 days without requiring the court to appoint an attorney for the service member. Service member was assessed attorneys fees for not notifying opposing attorney that he had requested a stay he complained that the SCRA only requires him to notify the court. The court did not address the statutory requirements, choosing instead to focus on when the Service member knew that he wouldn’t be able to attend.

Posey v. Lake Pend Oreille School District, 2007 LEXIS 7829 (N.D. Idaho Feb. 2, 2007) – Plaintiff, a school teacher, sued a school district and former principal who allegedly fired the Plaintiff in retaliation for calling attention to security concerns at the school. After the Defendants fully briefed a motion for summary judgment, the Defendants filed a request for a continuation of scheduling dates and a stay based on the SCRA and the fact that the former principal was also a reservist who was being mobilized to Iraq. However, the Court rejected the request for a continuation because it did not materially affect the

rights of the service member for the Court to proceed with a fully briefed motion for summary judgment.

Santiago v. Childers, 2007 U.S. Dist. LEXIS 83787 (S.D. Ill. Nov. 13, 2007) – Plaintiff was not able to serve Defendant because Defendant was mobilized to Iraq and was facing a dismissal. Plaintiff claimed that because Defendant's wife and family were aware of the action, that knowledge should be imputed to Defendant and therefore a Section 522 stay was automatically triggered. Court ruled that there is no basis for that under law or fact and denied the stay. The Court noted that Plaintiff could refile because the Statute of Limitation was tolled under section 526 during Defendant's period of military service.

Estate of Storm, 2009 U.S. Dist. LEXIS 11091 (N.D. Iowa February 12, 2009) – Defendant filed a motion to stay proceedings under SCRA due to his deployment. The court granted the stay without much discussion, stating that it must grant the stay in this case.

IRMO: Bradley, 137 P.3d 1030 (Kan. July 14, 2006) – Noncustodial mother sought to regain custody while custodial service member was deployed to Iraq and child had been left with his paternal grandmother by agreement. Service member sought a stay. Trial court denied 522 stay, stating that SCRA did not prevent it from entering temporary orders. On appeal, Kansas Supreme Court focused on service member not complying with statutory requirements of 522 and therefore not qualifying for the mandatory stay. The Court did not address whether the trial court could have entered a temporary order, but stated that “if a trial court reaches the right result, its decision will be upheld even though the trial court relied on the wrong ground.”

Jean-Batiste v. Lafayette City-Parish Consolidated Government, 2009 U.S. Dist. LEXIS 29621 (W.D. La. April 7, 2009) – Action for civil rights violation where mobilized National Guardsman was a police officer involved in the incident. The service member provided all of the statutorily required information to obtain a Section 522 stay, however the court asked for additional information from the activated Guardsman. Court then went through an analysis of whether the service member was required to be present for the case to proceed before determining that it should be stayed. The other defendants in the case also sought a stay under Section 513. Because the service member was necessary for the case, the action was stayed as to them as well. (The court probably should have cited its discretion under Section 525 because the codefendants in this case were not sureties or guarantors and did not appear to fall within the scope of Section 513).

Lebo v. Lebo, 886 So. 2d 491 (La. Ct. App. June 25, 2004) – SCRA not involved in child custody matters on appeal, however the Court noted that one of the parties was a service member deployed to Iraq, stated that he would be entitled to ask for a stay, then set forth the procedures under Section 522.

Hernandez v. Hernandez, 906 A.2d 429 (Md. Ct. Spec. App. Sept. 1, 2006) – Service member sought a stay in divorce proceedings due to his deployment to Columbia which the trial

court denied. Appellate court found that all statutory requirements for Section 522 were met by the service members filing, and unlike the Soldiers and Sailors Civil Relief Act, the Court did NOT have the discretion to deny the stay based upon material affect. Once the conditions in the statute are met, the first stay is mandatory upon the court, it is only subsequent stays that the court has the ability to deny due to material affect considerations.

Westfall v. Westfall, 2008 Minn. App. Unpub. LEXIS 373 (Minn. Ct. App. Apr. 15, 2008) – Dissolution proceedings involving child custody and support, Air Force recruiter husband requested a continuance on Nov. 30, 2005 for a Dec. 1, 2005 resumption of his trial. Husband filed an affidavit and faxed copies of 2 letters written on Air Force letterhead. District Court found that husband: (1) failed to state the manner in which military duties materially affected his ability to appear; (2) had not submitted a letter from the Commanding Officer; and (3) submitted letters failed to state that leave was not authorized, so it denied the stay. Court of Appeals affirmed stating that husband had not complied with the requirements of Section 522.

IRMO Reed v. Albaj, 723 N.W.2d 50 (Minn. Ct. App. October 24, 2006) – Defendant service member in military confinement facility sought a stay in a divorce proceeding under SCRA. The Court held that the SCRA does not protect service members who are incarcerated in a military prison or AWOL because they are “not on active duty,” citing two cases interpreting the SSCRA. (This opinion is in conflict with Lowe v. U.S. that reached the opposite conclusion through statutory analysis while disregarding the earlier two cases as incorrectly decided.)

Shelton v. Trustees of Columbia Univ., 2005 U.S. Dist. LEXIS 26480 (S.D. N.Y., Oct. 31, 2005) – Although not at issue in the case, taking note of plaintiff’s military status, the Court informed him of his right to request a stay under Section 522 and advised him of the requirements of that Section.

KCF v. TLSF, 839 N.Y.S.2d 433 (N.Y. Sup. Ct. Apr. 12, 2007) – Divorce and custody hearings for dual military couple stationed in Korea sought to be stayed by defendant. Court appeared to be focusing on New York military law, which still included the material affect requirement when denying the application for stay instead of SCRA 522 enumerated requirements for automatic stay.

State Ex Rel Glasgow v. Jones, 2008 Ohio 4788 (Ohio September 25, 2008) – Mandamus case brought to obtain copies of correspondence from two Ohio state representatives. The Court noted that it had stayed proceedings against one of the representatives under SCRA Section 522.

Mawer v. Daimler Chrysler Corp., 2006 U.S. Dist. LEXIS 54729 (S.D. Tex. Aug. 7, 2006) – Third-party Defendant successfully requested a stay under Section 522 because she was deployed in Germany. Court also ordered the original Defendant, Daimler Chrysler

Corp., to pay the third-party Defendant damages because corporate counsel told the service member that her motion to stay was going to be denied and that she had to appear before the court.

Estate of Van Meter, 2009 Tex. App. LEXIS 2207 (Tex. App. April 2, 2009) – Service member requested a stay and suspension of administration of estate of his deceased father by his uncle who had filed for administration without the service member’s knowledge or consent. No substantive discussion of SCRA in opinion.

Dilley v. Dilley, 66 Va. Cir. 177 (Va. Cir. Ct. Nov. 2, 2004) – After an initial custody determination, the father appealed the decision and moved for temporary custody pending the outcome of the litigation. However, the court refused to hear the temporary custody matter because the mother was on active duty in Bahrain and would not be able to return for a hearing.

Davenport v. Richards, 2006 U.S. Dist. LEXIS 82238 (W.D. Wash. Nov. 9, 2006). Defendant who was mobilizing to Iraq requested a stay of proceedings. While Defendant failed to provide a letter from his commanding officer, the court granted a temporary stay and said it would reconsider the motion and grant a longer stay when the court received the communication from the commanding officer. Court rejected the Plaintiff’s arguments that a stay should not be granted because everyone “knows” what actually happened and the Defendant had “no meritorious defenses.”

524 – Stay or Vacation of Execution of Judgments

Palisades Acquisition V, LLC v. Ibrahim, 812 N.Y.S.2d 866 (N.Y. Civ. Ct. Apr. 3, 2006) – Court required a nonmilitary affidavit for joint bank account tenant so that it could determine if there was any material affect that would warrant staying execution or vacating garnishment.

World Tire Corp. v. Webb, 2007 Ohio App. LEXIS 4517 (Ohio Ct. App. Sept. 27, 2007) – Service member sought a stay in the collection of judgment against him. He alleged that he activated and deployed for over 202 days. The Court stated that he had failed to provide any evidence supporting his assertion or that he was materially affected.

525 – Duration and Term of Stays/Codefendants Not in Service

Garcia v. JG Grimm et al, 2008 U.S. Dist. LEXIS 82894 (S.D. Ca. October 17, 2008) – Motion for stay in action brought by a prisoner against Sheriff’s Deputies. One of the Deputy defendants was a reservist being mobilized and deployed and all defendants asked for a stay to run concurrent with the military member’s stay. Lead defense counsel arranged for a videotaped sworn testimony from service member to be taken. Service member offered to waive being present at the hearing if videotaped testimony was used. But plaintiff refused stating that his presence was necessary for them to prove their case.

Service member then submitted a request in compliance with Section 522 which was approved for the entire duration of his mobilization. Because the service member was deemed necessary, the court stayed proceedings as to all defendants.

526 – Statute of Limitations

Bretherick v. Crittenden County, 2007 U.S. Dist. LEXIS 20213 (E.D. Ark. Mar. 21, 2007) –

While a statute of limitations for filing a compensation claim under the Fair Labor Standards Act was silent as to whether it could be tolled, the SCRA is “crystal clear” that the period of a service member’s military service may not be included in computing any period limited by law.”

Chisolm v. United States, 82 Fed. Cl. 185 (Fed. Cl. May 30, 2008) – Retired soldier brought an action to correct his service record and to adjust retirement pay. The government sought to dismiss the action as untimely under the applicable statute of limitations. Court recognized the tolling effect of SCRA Section 526 so that the time in which to file did not start running until Staff Sergeant Chisolm retired from the Army. Unfortunately for the retiree, he did not file within the allowable time after he retired and the Court dismissed his case as untimely filed.

Lowe v. United States, 79 Fed. Cl. 218 (Fed. Cl. Nov. 15, 2007) – Service member convicted by court martial and imprisoned in a military confinement facility is still on active duty for SCRA purposes and the running of the Statute of limitations is tolled during that period.

Giel v. Winter, 503 F. Supp. 2d 208 (D. D.C. Aug. 10, 2007) – A former naval reserve officer, Plaintiff appealed the decision by the Board for the Correction of Naval Records denying his request for a special selection board remedy to reconsider his promotion for commander retroactively. While the Defendant (the Secretary of the Navy) contended that the officer’s claim was barred by a six-year statute of limitations, the court found that the plain language of section 526 contains no exception to its application.

Baker v. England, 397 F. Supp. 2d 18 (D. D.C. Oct. 31, 2005) – Marine Major brought an action to modify his evaluations. Because he was on active duty the whole time, the Statute of Limitations had not run. The court was not willing to “waste much discussion as the statute is unambiguous.” The court cited decisions construing the SSCRA predecessor to “toll ‘any’ limitations period, appearing in ‘any’ law for the bringing of ‘any’ action before ‘any’ court, board or bureau.”

Boyden v. Michaud, 2008 Me. Super. LEXIS 88 (Me. Super. May 14, 2008) – Plaintiff brought a charge for molestation against the Roman Catholic Bishop of Portland. The Bishop brought a motion to dismiss based upon the action being untimely filed. During the time that Plaintiff served in the Air Force, the State of Maine changed the statute of limitations period for filing a claim based upon sexual abuse of a minor. Because the Plaintiff was on active duty during the period of time that the statute was changed and SCRA tolled the

running of the previous limitation period, the court allowed Plaintiff to use the new law and maintain his suit, but required him to provide proof of his active duty service.

Walters v. Nadell, 2008 Mich. LEXIS 1397 (Mich. June 25, 2008) – Michigan Supreme Court reviewed the appellate decision and did not agree that the change in language from SSCRA to SCRA caused the tolling provisions to become discretionary. It held that the Section 526 is mandatory. The court went on however, went on to discuss the waiver provisions of Section 517 under the SCRA. After stating their belief that for the purposes of SCRA, a “waiver” could mean the same as a “forfeiture” in the civil procedure context, that is “a failure to assert a right in a timely fashion,” the court determined that the Section 526 mandatory could be “waived” if it was not asserted at the trial court level. Therefore, since the tolling was not brought up at the trial court level, the provision was waived and the time for filing had passed. The Dissent would have held that the tolling provision is mandatory and automatic and that there was no ability for a non-service member to waive any of the SCRA provisions.

Walters v. Nadell, 2006 Mich. App. LEXIS 849 (Mich. Ct. App. Mar. 23, 2006) – Plaintiff brought an action following an automobile accident, but was unable to serve military defendant before Statute of Limitations ran and the case was dismissed. Plaintiff claimed that SCRA Section 526 tolled the SoL, but since the issue was not brought before the trial court, the appellate court declined to address the issue. Nevertheless, the Court went on to state that changing the terminology of the statute from “shall not be included” in the SSCRA to the period of military service “may not be included” rendered the Act discretionary, and the trial court could deny the tolling.

Estate of Perry v. Roper, 168 S.W.3d 577 (Mo. Ct. App. May 24, 2005) – SCRA 526 acted to toll the period in which to present a will and apply for letters of office even though the period of limitation was not specifically referred to as a Statute of Limitation because he judicial proceedings may adversely affect the civil rights of the service member. If the petitioner was on active duty at the time of his father’s death, SCRA 526 automatically acts to toll all periods of limitation.

Krause v. Leach, 2009 U.S. Dist. LEXIS (S.D. Miss. April 7, 2009) – Action involving motor vehicle accident. SCRA Section 522 mentioned in a footnote explaining the extended period between the accident and the filing of the case. No further discussion of SCRA.

Kegley v. The City of Fayetteville, 613 S.E.2d 696 (N.C. Ct. App. June 27, 2005) – Service member sought to invoke Section 526 tolling to obtain judicial review of the city’s plan to annex land. The Court held that SCRA would not toll that period because: (1) Congress had not included the word “annexation” in the statute so as clearly intrude on the State’s sovereignty; (2) that the act was meant to address personal issues, not large-scale government action and deciding otherwise could cripple local government; and (3) because the protection the service member was seeking was overly broad in that they were not seeking to merely protect *their* property from annexation, but to request

complete nullification of the entire annexation and the SCRA has never been applied in that manner.

ITMO The Adoption of J.D.P., 198 P.3d 905 (Okla. Ct. App. August 15, 2008) – Biological mother and her husband attempted to adopt the child of service member without his consent because Oklahoma law provided that consent was not required from a parent that did not provide support or maintain a relationship for 12 of the last 14 months. Father objected citing the SCRA and pointing to his service in Afghanistan during the relevant period. The trial court determined that SCRA Section 526 applied to toll his requirement. On appeal, the Court affirmed, holding that the tolling provisions automatically applied and that this case should not be excepted from the SCRA provisions merely because it was an adoption. (Naval Legal Service Office North Central Detachment Great Lakes obtained a similar judgment in an unreported case in a Cook County, Illinois adoption.)

Lazarski v. Archdiocese of Philadelphia, 926 A.2d 459 (Pa. May 21, 2007) – Victim of sexual abuse by a priest 25 years prior to the filing of the suit claimed that SCRA Section 526 operated to toll the statute of limitations. The court rejected this argument because the tolling provision of Section 526 applies only during active duty and the victim has undisputed periods of inactive duty that would have allowed the running of the statute of limitations.

Callahan v. Callahan, 958 A.2d 673 (Vt. June 26, 2007) – Husband filed a motion for relief from Judgment granting wife an interest in his military retirement six years after final judgment in which he participated. Court declined to address husband’s SCRA argument because it was brought up the first time at oral argument with them. Further, the Court had already determined that the husband could not prevail on the merits even if he had filed in a timely manner.

527 – Maximum Rate of Interest

Linscott v. Vector Aerospace, 2007 U.S. Dist. LEXIS 55841 (D. Or. July 27, 2007) – Service-member Plaintiff sued Defendants for failure to properly overhaul a helicopter engine turbine module. Defendants countersued and claimed that the Plaintiff failed to pay Defendants for the cost of materials and service. Court granted partial summary judgment to Defendants because Plaintiff failed to comply with the SCRA Section 527 requirement that the service member provide a creditor with copies of his military orders within 180 days after termination or release from service. While Plaintiff argued that he “substantially complied” with Section 527 by asking for a fax number in order to send the order, the Court found no evidence that the orders were ever actually sent to the creditor Defendant. Examining the legislative history of the SCRA, the Court found that Congress intended the 180-day time limit to be strictly enforced and that Congress placed the burden on the service member to give the statutory notice.

Linscott v. Vector Aerospace, 2006 U.S. Dist. LEXIS 30023 (D. Or. May 12, 2006) –

Defendants obtained a judgment in a Canadian court against the service member Plaintiff who ran a family business. The Canadian judgment required the Plaintiff to pay 18% interest rate. When the Defendants attempted to register and enforce the judgment in Oregon, the Plaintiff claimed that the judgment violated the 6% interest cap of the SCRA for active-duty service members. While the District Court had no authority to vacate a Canadian judgment, the District Court did find the Canadian judgment contrary to the public policy of the SCRA and refused to allow the Defendants to register or enforcement the judgment in the U.S.

533 – Mortgages and Trust Deeds

Hurley v. Deutsche Bank Trust Co., 2009 U.S. Dist. LEXIS 20261 (W.D. Mich. March 14, 2009)

– National Guardsman sought a certification of the Courts earlier order so that they could pursue an interlocutory appeal of the dismissal of SCRA Claims. Prior to certifying the case for appeal, the court reviewed the existing case law and analyzed the statute then held that there was a private right of action under the SCRA even though not specifically mentioned in the text of the document. The court went on to find that Deutsche Bank violated the SCRA through a non-judicial foreclosure in violation of SCRA Section 533 and failure to toll the redemption period in violation of Section 526. Finally, the court concluded that the SCRA private right of action could include an award of punitive damages.

[Tom's alternate write-up:

Hurley v. Deutsche Bank Trust Co., 2009 U.S. Dist. LEXIS 20261 (W.D. Mich. March 14, 2009)

– National Guardsman sought a certification of the Courts earlier order so that they could pursue an interlocutory appeal of the dismissal of SCRA Claims. Prior to certifying the case for appeal, the court apparently finally researched the issue and discovered a number of cases from different federal courts that held that there was a private right of action under the SCRA even though not specifically mentioned in the text of the document. The court went on to find that Deutsche Bank violated the SCRA through a non-judicial foreclosure in violation of SCRA Section 533 and failure to toll the redemption period in violation of Section 526. Finally, the court concluded that the SCRA private right of action could include an award of punitive damages.

Hurley v. Deutsche Bank Trust Co., 2008 U.S. Dist. LEXIS 92872 (W.D. Mich. November 14, 2008) – Court granted Summary Judgment against Guardsman on the ground that SCRA does not provide a private cause of action. Service member sought reconsideration based upon a case that the District Court had relied upon being vacated. The court denied the request for reconsideration because it was not satisfied with the other court's reasoning and because the other court was out of circuit so it was not required to adhere to its decision.

Smith v. Washington Mutual Bank FA, 2009 U.S. App. LEXIS 1017 (4th Cir. January 15, 2009) – *Pro se* Plaintiffs challenged the foreclosure of their home under SCRA and South Carolina law, but the case was dismissed for a failure to state a claim. *Pro se* Plaintiffs filed general and conclusory objections to the initial determination that SCRA did not apply even in the face of warnings from the magistrate judge that they would waive their appellate review of the order. The Court of Appeals would not review the SCRA claims, deeming them waived. No discussion in case of how SCRA impacted mortgage foreclosures.

537 – Enforcement of Storage Liens

Linscott v. Vector AeroSpace, 2006 U.S. Dist. LEXIS 6287 (D. Or. Jan. 31, 2006) – Mobilized reservist had had his helicopter engine serviced by a company after a dispute in the quality of the servicing, repair company held engine and would not provide a temporary replacement. Court held that their withholding of the engine could be actionable under Section 537, since it referred to liens for repairs. Further the court held that although not specifically provided under the SCRA, there was a private right of action under Section 537, such that the service member could sue for damages.

538 – Protection for Dependents

Hurley v. Deutsche Bank Trust Co., 2008 U.S. Dist. LEXIS 10130 (E.D. Mich. Feb. 12, 2008) – National Guardsman mobilized to Iraq and fell behind on mortgage payments. Bank foreclosed, submitting a statement saying that Guardsman was NOT on active duty. Guardsman brought an action for damages on the foreclosure. Bank sought to dismiss SCRA claims as to Dependant wife. Court recognized that wife could obtain protection under section 538 if they were materially affected and granted plaintiff leave to amend pleadings to show damages to wife and motion to dismiss was denied. Of note, court denied one of Plaintiff's claims as time barred – however the impact of Section 526 tolling was not plead or discussed, it may have preserved this claim.

Perkins v. Global Pacific Forest Products Co., 2004 Wash. App. LEXIS 1790 (Wash. Ct. App. Aug. 3, 2004) – Owner of a timber company sued several timber companies. When the owner's brother was deployed with the National Guard to Iraq, the owner sought a stay in the case because the brother was an essential witness in the case. The owner argued that the SCRA applied to his case because he was a dependent of his brother. However, the court found that nothing in the record establishes that the brother is a "dependant" as set forth in the statute, and further that even if he was a dependant, Section 538 did not provide the protections that the brother was seeking. Instead, it allowed dependants relief from contracts, leases, bailments and similar obligations.

571 – Residence for Tax Purposes

Carr v. Or. Dept. of Rev., 2006 Ore. Tax LEXIS 223 (Or. Tax. Nov. 4, 2005) – Plaintiffs were a naval officer and spouse who maintained a Nevada address of their home of record for all

25 years of the officer's military service. In 1999, the officer was reassigned to Oregon where the Plaintiffs had a family, bought a home, and registered their cars. Because they did not intend to stay in Oregon permanently, the Plaintiffs claimed they were not obligated to pay taxes in Oregon for the year they were there. SCRA Section 511 provides that a service member will neither lose to acquire a domicile for purposes of income taxation by reason of being in a state *solely* in compliance with military orders. The tax court denied Plaintiffs claim because the fact and the Plaintiffs bought a home and registered a car in Oregon indicated that they were domiciled in Oregon for purposes of state income tax. (*But see, U.S. v. City of Highwood*, 712 F. Supp. 138 (N.D. Ill., Apr. 26, 1989) – recognizing that service members may change their license for convenience and have a home in the duty station state, but that without more is not enough to determine that they are residents of the state, subject to vehicle tax).

591 – Anticipatory Relief

Rodriguez v. American Express, 2006 U.S. Dist. LEXIS 17727 (E.D. Cal. Apr. 7, 2006) – *Pro Se* plaintiff brought complaints against a number of banks alleging failure to reduce interest rates under **Section 527**, the submission of adverse credit reports under **Section 518** and a request for restructuring under **Section 591**. Plaintiff did not respond to defendant Banks allegations of fact under their summary judgment motion. Banks claimed that they had lowered interest rates to 6% under SCRA. Granted Summary Judgment for all banks on that issue. However, it denied Summary Judgment for one bank that had calculated the interest rate reduction to the date that they were notified instead of the initial date of active duty. Court granted Summary Judgment to banks on **518** because *pro se* plaintiff had not alleged the adverse credit reports to be *solely* retaliatory rather than a factual statement that plaintiff had not been making payments. Finally, although plaintiff filed a Complaint requesting restructuring under **Section 591**, the court felt that in addition to the Complaint, plaintiff should have filed a separate motion because it was not self-executing. Finally, the Court took the position that even if the Complaint did constitute a motion for restructuring, that the allowable restructuring period had passed (which in this case would have been 1 year after demobilization).

Carroll v. Homecomings Financial, 294 Fed Appx. 945 (5th Cir. October 3, 2008) – Reservist service member sought relief from mortgage obligations under SCRA Section 591. After five hearings on the request of anticipatory relief, the court denied her request. The reservist appealed claiming that dismissing the case was an extreme sanction and should have been reconsidered. The appellate court clarified that no *case* had ever been filed, but that Section 591 was an application for discretionary relief. Because the Court below had denied the relief rather than dismissed the action as a sanction, the case was reviewed using the abuse of discretion standard and affirmed.

Other – Novel Uses of the SCRA

McCubbin, v. McCubbin, 2006 U.S. Dist. LEXIS 43890 (C.D. Mo. June 28, 2006) – Wife relocated from the U.S. to Australia with the children from her marriage to a service

member. While the wife and children were in Australia, the husband was deployed at sea. For his retirement, the husband brought the children back to the U.S. Because the marriage was deteriorating, he refused to let the kids go back to Australia to be with their mother. As a result, wife petitioned the Court to declare Australia to be the habitual residence of the children. Appealing to the implicit rationale for the SCRA but no actual SCRA section, the husband argued that the time the children spent in Australia should not be used to establish the children's habitual residence in Australia because the husband was unable to seek the return of his children to the U.S. while he was still in the Navy because he was constantly deployed at sea. Husband further argued that the SCRA contained the sort of "fundamental principles . . . relating to the protection of human rights and fundamental freedoms" contemplated by the Hague Convention. The Court rejected this argument because husband did not offer clear and convincing evidence that the return of the children would violate those principles.