

Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act

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*Office Directory
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*JA 260
September 1990*

*Legal Assistance Branch
Administrative and Civil Law Division
The Judge Advocate General's School
Charlottesville, Virginia*

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FOREWORD

This volume is part of a new series of Legal Assistance Guides being developed to replace the Legal Assistance Officer's Deskbook and Formbook and to integrate former All States Guides with other publications into a comprehensive reference work.

This series is designed to provide the legal assistance attorney with guidance and samples of the forms and letters most commonly needed in serving legal assistance clients. The series now includes the following individual titles.

- Legal Assistance Office Administration Guide
- Legal Assistance Deployment Guide
- Legal Assistance Consumer Law Guide
- Legal Assistance Family Law Guide
- Legal Assistance Notarial Guide
- Legal Assistance Real Property Guide
- Legal Assistance SSCRA Guide
- Legal Assistance Federal Income Tax Guide
- Legal Assistance Wills Guide

This publication, JA 260, is intended to provide information and reference material for the military lawyer. It replaces Department of the Army Pamphlet 27-166, 'Soldiers' and Sailors' Civil Relief Act (August 1981). While it may suggest workable solutions to legal problems, it does not represent Department of the Army policy and is not directive in nature. Comments concerning laws, regulations, cases, or other matters represent the opinion of an individual attorney in legal assistance. Use of masculine pronouns in this publication represents both the masculine and feminine gender, unless otherwise specifically stated.

The series is part of the continuing effort to improve and expand the resources available to legal assistance practitioners. To help us better serve you, please send your comments and suggestions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

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Chapter 1

Introduction

1-1. Historical background

The very nature of military service often compromises the ability of servicemembers to fulfill their financial obligations and to assert many of their legal rights. Congress and the state legislatures have long recognized the need for protective legislation. During the Civil War, the United States Congress enacted an absolute moratorium on civil actions brought against Federal soldiers and sailors, and various southern states enacted similar legislation.¹ During World War I, Congress passed the Soldiers' and Sailors' Civil Relief Act of 1918.² The 1918 statute did not create a moratorium on actions against servicemembers, but it directed trial courts to take whatever action equity required when a servicemember's rights were involved in a controversy.

The present Federal legislation. The Soldiers' and Sailors' Civil Relief Act of 1940³ is essentially a reenactment of the 1918 statute. Experience during World War II and subsequent armed conflicts made certain changes in the statute necessary. The first of these amendments was enacted in 1942.⁴ In amending the Act, Congress was motivated in part by the desire to override court decisions that in some instances had led to restrictive interpretations of the Act.⁵ The latest amendment occurred in 1972.⁶ It extended the effective period of a power of attorney executed by a Vietnam-era servicemember who subsequently was missing in action.⁷

1-2. Organization of this guide

This guide generally follows the order of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. Four exceptions are the combination of Article I, General Provisions, and Article VI, Administrative Remedies, in Chapter 2; the combination of Article II, General Relief, and Article VII, Further Relief, in Chapter 3; the dividing of Article V, Taxes and Public Lands, into two chapters, Chapter 6, Taxes, and Chapter 7, Public Lands; and the inclusion of Section 1, Short Title (50 U.S.C. App. § 501), Section 100, Purpose and Scope of the Act

(50 U.S.C. App. § 510), and Section 105, Notice of Benefits (50 U.S.C. § 515), in this chapter.

Throughout this guide when the abbreviation "SSCRA" and the term "Act" are used they shall refer to the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, unless otherwise stated. The guide will refer to various sections of the legislation itself, rather than to codified sections of the U.S. Code. Lawyers researching specific problems should also consult an annotated copy of the U.S. Code for current references to state and federal decisions.

1-3. Material effect

A central equitable concept, expressed in slightly varying statutory language, is embodied in all of the Act's relief provisions. It is the concept of "material effect."⁶ In almost every case involving a servicemember, trial courts are required to form an opinion of the extent to which the servicemember's military service has materially affected the particular situation. After this crucial determination has been made, either in favor of or adversely to the servicemember, the court may proceed with or stay the case at bar.

The concept of material effect comes into play in two broad, and sometimes interconnected, factual patterns. The patterns might be referred to as (1) that of the ability to protect rights and (2) that of the ability to meet financial obligations. Difficulties in both areas frequently arise as they represent the most common contexts in which courts apply the provisions of the Soldiers' and Sailors' Civil Relief Act.

Factual patterns giving rise to disputes about the existence and extent of servicemembers' liability or obligations raise the question of the servicemembers' ability to protect their rights. Trial courts are called upon to decide whether military service does, in fact, materially affect the servicemember's ability to protect his rights. In this context, the servicemember is usually seeking a delay--a stay in the proceedings until personal appearance is possible.

Material effect problems arise also in a purely financial milieu. Here the existence of a fixed obligation or a liquidated liability is admitted. Servicemembers put in issue the question of whether their military service has materially affected their ability to discharge, in the previously agreed upon manner, their admitted financial obligations. Trial courts concern themselves with the servicemember's financial situation. After evaluating the effect of military service, the court may either grant a stay of proceedings or some partial relief if the servicemember is equitably entitled to it, or deny relief entirely.

In some cases, the two common factual patterns are commingled. The existence and extent of a financial obligation, for example, may not be in issue in a particular case. But, the two parties defendant in the same case may have a very real dispute as to the existence and extent of their individual liabilities on the admitted obligation. If one defendant is a servicemember, the application of the concept of material effect might be readily determined without his presence if the sole issue is his ability to meet the financial obligation. When the issue of ultimate liability is added, however, the servicemember's physical presence may well be required to decide justly the incidence of liability. Therefore, in considering individual cases falling within the purview of the relief provisions of the Act, judges and attorneys representing servicemembers must be aware of and understand fully the differences in the burden and the elements of proof required to establish the material effect of military service.

1-4. Constitutionality and short title

Section 1

This Act may be cited as the Soldiers' and Sailors' Civil Relief Act of 1940. (50 U.S.C. App. § 501).

The power of Congress to pass legislation as contained in the Act was subject to favorable judicial action shortly after the Civil War.⁹ The 65th Congress also wrestled with the constitutionality of the proposed Act

of 1918, but decided in favor of it.¹⁰ A line of cases from federal and state courts supported this view.¹¹

When the current Act was challenged in the case of Dameron v. Brodhead,¹² the Supreme Court held that Congress could pass legislation such as the Act by virtue of its power "to declare war"¹³ and "to raise and support armies."¹⁴

In short, legislation conferring civil relief for members of the military service has survived judicial scrutiny from the days of the Civil War until the present.

1-5. The purpose and scope of the Act

Section 100

In order 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. (50 U.S.C. App. § 510.)

While not expressing any substantive statutory provisions, Section 100 has been a guide for courts construing the Act. Whether upholding or rejecting a claim, courts will often include wording of this section or their interpretation of it to give weight to their decisions. Generally, courts have been favorable to the servicemember. The U.S. Supreme Court has declared that the Act must be read with "an eye friendly to those who dropped their affairs to answer their country's call."¹⁵

A majority of Federal and state courts have construed the present Act and the Act of 1918 in this spirit.¹⁶

A few of those whom the Act is intended to protect will abuse its purpose. For instance, the Act "may not be employed to enable one who had flouted his obligations in civilian life to obtain indefinite delay."¹⁷ The Act itself has provided for abuses by not granting protection in those actions in which an "interest, property, or contract" has been transferred merely to take advantage of the Act.¹⁸ Other cases, however, have indicated the Act is also designed to protect rights of individuals having causes of action against persons in the military service.¹⁹

While the Act is intended to provide civil remedies, Congress has reinforced the spirit of Section 100 by imposing criminal penalties when failure to comply would thwart equitable civil relief.²⁰

On the other hand, the Act is not a panacea for every legal problem of a civil nature facing the servicemember. It will not, for instance, help rescind a rental agreement or a contract for the purchase of an automobile or a set of encyclopedias entered into after entry onto active duty. There are a myriad of situations in which the Act will not apply.

The purpose of this publication is to provide guidance to the military lawyer giving initial advice to a legal assistance client. It may be used to provide the servicemember with an immediate defense to a potential adversarial proceeding. In this regard, provisions of Section 100 reinforce arguments based on the provisions of substantive sections. For the adversary not acting in good faith, however, the local assistant United States attorney may intervene if a criminal penalty is provided. This guide is intended to be used as a guide and, therefore, should be supplemented by whatever additional legal research is necessary to meet the requirements of the military client.

1-6. Notice of benefits to persons in and persons entering military service

Section 105

The Secretary of the Army and the Secretary of the Navy shall make provisions, in such manner as each may deem appropriate for his respective Department, to insure the giving of notice of the benefits accorded by this Act to persons in and to persons entering military service. The Director of Selective Service shall cooperate with the Secretary of the Army and the Secretary of the Navy in carrying out the provisions of this section. (50 U.S.C. App. § 515.)

The Department of Defense has published a pamphlet²¹ which provides general information on the relief available under the Act. This pamphlet should be available to each individual upon entrance into the service.²²

Instruction on the provisions of the Act is also required during an early period of military training.²³ Because this instruction is conducted at such an early stage, legal assistance²⁴ and preventive law²⁵ programs should remind servicemembers of the Act on a continuing basis. Judge advocates should also ensure local bar associations and recruiting stations are sufficiently informed to advise individuals of the Act before they enter active duty. This will enable prospective servicemembers to invoke the Act in a timely manner.

FOOTNOTES

1. Act of June 11, 1864, ch. 118, 13 Stat. 123. Robinson, Justice in Grey (Harvard Univ. Press, 1941), pp. 83-88.

2. Act of Mar. 8, 1918, ch. 20, 40 Stat. 440.

3. Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178.

4. Act of Oct. 6, 1942, ch. 581, 56 Stat. 769. Minor changes were made in the Act of Jan. 20, 1942, ch. 10, 56 Stat. 10; Act of May 13, 1942, ch. 303, 56 Stat. 276; and Act of Oct. 21, 1942, ch. 619, 56 Stat. 964.

5. S. Rep. No. 1558, 77th Cong., 2d Sess. 2 (1942):

The purpose of the reported bill is to make available additional and further relief and benefits to persons in the military and naval forces and, in some instances where there has been doubt as to whether particular transactions or proceedings are within the scope of the Civil Relief Act, a new section on language has been added for the purpose of clarification only and to carry out the original intent of the Congress, but with no intent to exclude from the provisions of the Act any transaction or proceeding now included.

6. Act of October 24, 1972, Pub. L. No. 92-540, Title V, § 504(2), 86 Stat. 1098.

7. The present law is found in 50 U.S.C. App. §§ 500-548, 560-591 (1982).

8. "Material effect" and variations of the term are essential elements of the following sections of the Act: §§ 201, 202, 203, 206, 300(2), 301(3), 302(2), 305(1) and (2), 306, 500(2), 513 and 700(1).

9. *Steward v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870); "The power to pass [relief legislation] is necessarily

implied from the powers to make war and suppress insurrection."

10. H.R. Rep. No. 181, 65th Cong., 1st Sess. (1917). Possible objections considered were: Art. I, § 10, "No State shall . . . pass any . . . law impairing the obligation of contracts," and the protections guaranteed by the Fifth Amendment.

11. E.g., Clark v. Mechanics' American Nat. Bank, 282 F.2d 589 (8th Cir. 1922); Konkel v. State, 168 Wis. 335, 170 N.W. 715 (1919).

12. Dameron v. Brodhead, 345 U.S. 322 (1953).

13. U.S. Const., Art. 1, § 8, cl. 11.

14. Id. cl. 12.

15. Le Maistre v. Leffers, 333 U.S. 1, 6 (1948).

16. E.g., Plesha v. U.S., 227 F.2d 624 (9th Cir. 1955), aff'd, 352 U.S. 202 (1957) (construed liberally to benefit servicemen and veterans); Hurwitch v. Adams, 151 A.2d 286 (Del. Super. 1959), aff'd, 155 A.2d 591 (1959) (broad interpretation for benefit of those it was designed to assist); Application of Packard, 187 Misc. 400, 60 N.Y.S.2d 506 (1946) (construed liberally). McCoy v. McSorley, 119 Ga. App. 603, 168 S.E.2d 202 (1969) (Section 501 et seq. . . . should be liberally construed in favor of servicemember); Feldman v. Grelewicz, 397 N.Y.S.2d 355, 91 Misc. 2d 147 (1977) (purpose of section 501 et seq. to ensure persons in the military were fully informed of legal proceedings, and have adequate time to appear and protect their rights); Hanson v. Crown Toyota Motors Inc., Utah, 572 P.2d 380 (1977) (intent of section 501 et seq. to protect one's property during a period of military service). In addition see United States v. Kaufman, 453 F.2d 306 (C.A.N.Y. 1971); United States v. State of Illinois, 387 F. Supp. 638 (E.D. Ill. 1975); Zaki v. Bryan, 403 N.Y.S.2d 765, 91 Misc. 2d 147, ED. A.D. 1018 (1978). See also S. Rep. No. 1558, 77th Cong., 2d Sess. 6 (1942): "Any doubts that should arise as to the scope and application of the act should be resolved in favor of the person in military service involved."

17. Franklin Soc. for Home-Building & Savings v. Flavin, 265 App. Div. 720, 721, 40 N.Y.S.2d 582, 583, aff'd, 291 N.Y. 530, 50 N.E.2d 653, cert. denied 320 U.S. 786 (1943). See also Diamond v. United States, 344 F.2d 703, 170 Ct. Cl. 166 (1965); Keefe v. Spangenberg, 533 F. Supp. 49 (D.C. Okla. 1981).

18. SSCRA § 600. For a discussion of this provision see para. 2.8, infra.

19. Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975).

20. SSCRA §§ 200, 300, 301, 302, 304, 305. These provisions are discussed in chapters 3 and 4.

21. Department of Defense Pamphlet, No. PA-6B, Your Personal Affairs (Feb. 10, 1977). This pamphlet is also cited as DA Pam 360-524.

22. There are presently no provisions for furnishing information on the Act to individuals granted certain rights prior to entry into the service under the provisions of Section 106 of the Act. These rights are discussed in para. 2.6., infra.

23. Army Reg. 612-201, Personnel: Processing Control and Distribution of Personnel at U.S. Army Reception Battalions and Training Centers (26 May 1987).

24. Army Reg. 27-3, Legal Services: Legal Assistance (10 March 1989).

25. Id.

Chapter 2

General Provisions

2-1. Purpose and scope

The purpose of this chapter is to define and identify the class of persons protected by the Act. Additionally, it deals with how and when this protected status attaches, the effect of this status, and, ultimately, how and when it can be modified or terminated.

2-2. Definitions

Section 101

(1) The term "person in the military service", the term "persons in military service", and the term "persons in the military service of the United States", as used in this Act, shall include the following persons and no others: All members of the Army of the United States, [also includes members of the Air Force by virtue of sec. 305(a), National Security Act of 1947 (5 U.S.C. 171 (1))], the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service," as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service.

It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person", when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court", as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record. (50 U.S.C. App. § 511).

a. Members of the military establishment. The threshold question confronting courts in cases involving the Soldiers' and Sailors' Civil Relief Act is the status of the party seeking the benefits of the Act. The court must determine whether the party is a "person in the military service" of the United States as defined by the first sentence of section 101(1), the dependent of such a person, a person primarily or secondarily liable on an obligation with such a person, or a person to whom the Act's coverage is specifically extended in particular situations.

In defining those who are "persons in the military service of the United States," the first sentence of section 101(1) unequivocally states that only members of the organizations listed "and no others" are such persons. This statutory language has remained unchanged since 1940 when it was drafted and does not incorporate the changes made by Congress in the organization of the national military establishment since that date. Congress intended that all members of the military establishment be covered by the Act.' The definitions contained in other Federal statutes, particularly those in Title 10, United States Code, help determine which members of the military are covered by the Act.

(1) Army. The term "Army of the United States" contained in this section is synonymous with the term

"Army" used throughout Title 10, United States Code. The components of the Army are defined as--²

(a) the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; and

(b) all persons appointed or enlisted in, or conscripted into, the Army without component.

(2) Air Force. The Air Force was established as a separate military service by the National Security Act of 1947. Pursuant to the saving provisions in section 305a of that Act, all laws then relating to Army personnel became applicable to the personnel of the Air Force. The Soldiers' and Sailors' Civil Relief Act of 1940 was among those laws. The components of the Air Force are defined as--³

(a) the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve;

(b) all persons appointed or enlisted in, or conscripted into, the Air Force without component; and

(c) all Air Force units and other Air Force organizations, with their installations and supporting and auxiliary combat, training, administrative, and logistic elements; and all members of the Air Force, including those not assigned to units, necessary to form the basis for a complete and immediate mobilization for the national defense in the event of a national emergency.

(3) Navy. The term "United States Navy" contained in this section is synonymous with the term "Navy" used in Title 10, United States Code. The Navy includes "the Regular Navy, the Fleet Reserve, and the Naval Reserve."⁴ A person, male or female, who is appointed or enlisted in or inducted or conscripted into the Navy is a "member of the naval service."⁵

(4) Marine Corps. The Marine Corps "includes the Regular Marine Corps, the Fleet Marine Corps Reserve, and the Marine Corps Reserve."⁶ A person, male or female, who is appointed or enlisted in or inducted or conscripted into the Marine Corps is a "member of the naval service."⁷

(5) Coast Guard. The Coast Guard is a part of the armed forces.⁸ It is a military service at all times, whether employed in the Department of Transportation or operating in the Navy.⁹ The Coast Guard includes the Regular Coast Guard¹⁰ and the Coast Guard Reserve.¹¹

(6) Officers of the Public Health Service. The Public Health Service is not a military service although it may be so designated by the President in time of war or national emergency.¹² The Secretary of Health, Education and Welfare may detail Public Health Service officers for duty with the Army, Air Force, Navy or Coast Guard.¹³ While so detailed, in time of war, or while the Public Health Service is a military service by designation of the President, Public Health Service officers and their surviving beneficiaries are entitled:

to all rights, privileges, immunities, and benefits now or hereafter provided under any law of the United States in the case of commissioned officers of the Army of their surviving beneficiaries on account of active military service, except retired pay and uniform allowances.¹⁴

Despite the language of section 101(1), which includes only those officers detailed to the Army and Navy, the benefits of the Soldiers' and Sailors' Civil Relief Act were extended to a lieutenant commander in the United States Public Health Service, assigned for duty with the Coast Guard.¹⁵

b. Persons not members of the military establishment. Several categories of persons related to the military have been found to be outside the ambit of "persons in the military service of the United States." For example, a merchant seaman accompanying the Army and subject to court-martial jurisdiction is not entitled to the benefits of the Act.¹⁶ Similarly, civilian employees of

the armed services,¹⁷ contract surgeons,¹⁸ and employees of government contractors¹⁹ have been held to be persons not in the military service of the United States.

Although the Act primarily benefits persons in the military service, it can, however, include civilians. These include guarantors or accommodation makers,²⁰ those joined in law suits as co-defendants, and those who hold a dependent relationship to servicemembers.²¹

c. Active Federal service. In addition to being a member of the military establishment, a person seeking the benefits of the Act must also, pursuant to the second sentence of section 101(1), be either (1) on active duty or (2) engaged in "training or education under the supervision of the United States preliminary to induction into the military service."

The terms "Active duty"²² and "Active service"²³ are synonymous, as evidenced by a comparison of the relevant code sections for "Active Service" and "Active Duty." In the latter case "active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training in the active military service, and training at a school designated as a service school by law or by the Secretary of the military department concerned.²⁴

As a result of the unambiguous language, courts have held that this does not include retired personnel not on active duty,²⁵ or those in the reserve component while not on active duty.²⁶

Members of the Army and the Air National Guard of the United States are entitled to the benefits of the Act while performing full-time duty if they are entitled to pay from the United States for their duty.²⁷

d. Preliminary training. Periods of training or education preliminary to induction, if performed under the complete supervision of the United States, are treated as "full-time duty." The persons undergoing the training or education need not actually have already acquired a military status. This language appears to have been designed to cover World War II situations, such as officer candidates who were not yet members of the

military establishment, but who were undergoing training and education to prepare them for military status.

e. Divestment of rights. Section 101(1) provides that "the terms 'active service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave or other lawful cause." This raises the issue of the qualitative nature of an otherwise qualified person's military service. In the case of confinement, an Ohio court held that a soldier sentenced by a general court-martial to five years imprisonment, total forfeiture of pay and allowances, and a dishonorable discharge at the termination of the sentence was not on active duty or service and, hence, was not entitled to the benefits of the Act.²⁸

In dictum, the court stated:

I do not mean to infer that commitment for any violation of the army's rules and regulations would divest the soldier of his rights under the Soldiers' and Sailors' Relief Act, but the gravity of the offense charged and the sentence of the court-martial are factors which must be considered in determining this question.²⁹

This reasoning was apparently applied in an AWOL case when a court held that a soldier, who extended his leave 16 days without permission to attend the birth of his first child, was entitled to the benefits of the Act.³⁰ Another court, however, concluded that a sailor forfeited his protection under the Act when he was AWOL during his divorce trial.³¹ In that case, the sailor had been properly served, but subsequently went AWOL and did not appear at the proceedings.

In the case of deserters, The Judge Advocate General of the Army has expressed the advisory opinion that deserters are not "persons in the military service of the United States."³²

f. Period of time that the Act covers. Subsection 101(2) provides that protection of the Act begins "for persons entering active service after the date of this Act, with the date of entering active service" and

additionally provides "it shall terminate with the date of discharge from active service³³ or death while in active service, but in no case later than the date when this Act ceases to be in force."

Other sections of the Act, however, qualify this "period of military service." For example, sections 200 and 201 provide additional periods ranging from 30 to 90 days after the termination of all military service to assert rights protected by the Act. On the opposite end of the spectrum, section 106 back-dates the coverage of Articles I, II, and III of the Act to persons who receive orders to report for induction.

2-3. Territorial application; jurisdiction of courts; and form of procedure

Section 102

(1) The provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court. (50 U.S.C. App. § 512).

a. General application. It is not clear whether Congress intended, by the language of the first clause of section 102(1), to make the Act specifically applicable to the governments of the geographical areas mentioned or merely to delineate those areas within which the Act would have operative force. The question is now, however, of small importance. The provisions of the Act have been held applicable to the governments and the territories of the geographical areas listed in the statute.

The Attorney General of the United States early advised the Secretary of Agriculture in unequivocal terms that the Soldiers' and Sailors' Civil Relief Act of 1940 is applicable to all agencies of the Federal government. In so doing, the Attorney General recognized, but did not decide between, the two possible interpretations of the statutory language. Instead, he invoked the rule of construction that a sovereign is bound by a statute when the sovereign is a chief party of interest in the statute. The Attorney General recognized this rule as an exception to the general rule of statutory construction that the sovereign is not bound by its own statutes.³⁴

The courts have applied the provisions of the Act to the United States without exception,³⁵ as well as to State³⁶ and municipal governments.³⁷

Additionally, State courts have applied the Act in its entirety, regardless of whether a particular provision under which relief is sought has no counterpart in state law.³⁸

b. Judicial proceedings. The second clause of section 102(1) makes the Act applicable to proceedings commenced in any court within a geographical area over which the United States has jurisdiction. Section 101(4) defines the term "court" as any competent Federal or State court, whether or not it is a court of record. The third clause of section 102(1) allows courts to handle proceedings involving the Act either by use of "the usual forms of procedure" or "under such regulations as may be by them prescribed." For purposes of Federal jurisdiction, however, the Act does not present a Federal question. In Davidson v. General Finance Corporation,³⁹ the court held that an action against a finance company for alleged fraudulent conversion of an automobile sold at a sheriff's sale, following the company's foreclosure of a conditional sales contract, was a common-law action only incidentally involving the Act.

With the exception of section 205, the Act makes no reference to administrative proceedings. In those few cases where this issue has been raised it appears that administrative proceedings are not covered by the Act. For example, in Polis v. Creedon⁴⁰ the court held that a

proceeding before an area rent director was not a proceeding before a court and that a landlord in the military service had no protection under the Act. Unquestionably, however, section 205 of the Act, which suspends the running of the statute of limitations while a member is in the military service, is applicable in administrative proceedings."

2-4. Persons liable on servicemember's obligation

Section 103

(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorser, accommodation makers, and others, whether primarily or secondarily subject to the obligation or liability, the performance or enforcement of which is stayed, postponed or suspended.

(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, accommodation maker, or other person whether primarily or secondarily liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

(3) Whenever, by reason of the military service of a principal upon a criminal bail bond the sureties upon such bond are prevented from enforcing the attendance of their principal and performing their obligation the court shall not enforce the provisions of such bond during the military service of the principal thereon and may in accordance with principles of equity and justice either during or after such service discharge such sureties and exonerate the bail.

(4) Nothing contained in this Act shall prevent a waiver in writing of the benefits afforded by subsections (1) and (2) of this section by any surety, guarantor, endorser, accommodation maker, or other person whether primarily or secondarily liable upon the obligation or liability, except that after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 no such waiver shall be valid unless it is executed as an instrument separate from the obligation or liability in respect of which it applies, and no such waiver shall be valid after the beginning of the period of military service if executed by an individual who subsequent to the execution of such waiver becomes a person in military service, or if executed by a dependent of such individual, unless executed by such individual or dependent during the period specified in section 106. (50 U.S.C. App. § 513.)

a. Primarily and secondarily. Sections 103(1) and 103(2) provide those persons who are either primarily or secondarily liable with a servicemember on an obligation or liability with the same rights to delay actions and vacate judgments available to servicemembers. Specifically, these sections allow the court in its discretion to grant stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others.

In considering whether to grant the stay to a co-obligor, the courts have applied a number of tests. In Modern Industrial Bank v. Zaentz⁴² the court specified that co-obligors are entitled to a stay only if the servicemember is a party to the action and the action has been stayed as to the servicemember. In Tri-State Bonding Co. v. State⁴³ the court held that a surety could not obtain a stay unless he could show that the principal was in the military service on the date the principal was scheduled to appear, that an unsuccessful effort to secure the principal's appearance had been made, and that the principal's military service prevented his attendance on that date. Finally, a Georgia court held that where liability is joint and several and the action is brought against an accessible civilian party, the proceedings

will not be stayed unless the servicemember is a party to the action.⁴⁴

In exercising their discretion "the courts are primarily influenced by two considerations: first, whether the man in service is able to appear and defend, and second, whether a default on an obligation by reason of the change in his income will lead to an unjust forfeiture."⁴⁵ The right to open a judgment taken against a person in the military service is reserved to that person only and is not available to a judgment co-debtor.⁴⁶

Courts differ concerning the propriety of granting stays when the defendant servicemember is protected by insurance and might be considered as only nominally a party to the suit. In Boone v. Lightner,⁴⁷ the Supreme Court recognized this problem when it stated that: a nominal defendant's absence in the military service . . . might be urged by the insurance company, the real defendant, as a grounds for deferring the trial until after the war.⁴⁸ In those cases where the issue has been litigated, the courts have taken several approaches: (1) granting the stay,⁴⁹ (2) granting the stay on condition that the insurer post a bond,⁵⁰ or (3) simply denying the stay on the grounds that an insurance company should not be permitted to use the protection of the Act as a shield to postpone or escape liability.⁵¹ In one instance, the court agreed that it could grant stays of proceedings to sureties, guarantors, and other persons primarily or secondarily liable when proceedings have been stayed as to one in the military service. The court determined, however, that a stay is not warranted in the cases of primary or secondary obligors unless it is apparent that denial of the stay would leave the civil rights of the person in the military service unprotected.⁵² More recently, an appellate court reversed a trial court that refused a stay to a servicemember when the limit of his insurance coverage was less than the amount demanded by the plaintiff.⁵³ Another court concluded, however, that it was an abuse of discretion to deny a request for continuance even though the plaintiff would enforce any judgment recovered only against the proceeds of the insurance policy.⁵⁴ A well-reasoned opinion in this area is Tabor v. Miller.⁵⁵ In that case, although a motion for continuance was ostensibly made on behalf of the

military member, the court held that the real party in interest was the servicemember's insurance carrier. In reaching this decision the court noted that although the plaintiff's claim exceeded the servicemember's policy limits, his insurance carrier had rejected a settlement offer within those limits. The court concluded that the servicemember's absence had not materially affected the conduct of the defense, and upheld the lower court's decision to deny the requested continuance.

b. Codefendants. As previously indicated, a proceeding stayed as to a servicemember may also be stayed as to others primarily or secondarily subject to the same liability. In section 204, however, the Act also allows a court to proceed against other codefendants, notwithstanding a stay as to the servicemember.

A Washington state appellate court was presented with the problem of a servicemember driving a vehicle owned by his father. They were named as codefendants in a negligence action. The incident giving rise to the suit was witnessed only by the plaintiff and the absent servicemember-son. The trial court stayed the proceedings as to the son but denied a stay to the father, who was independently liable under the doctrine of imputed negligence. The appellate court held that the denial was within the trial court's discretion.⁶⁶

c. Criminal bail bond sureties. The language of section 103(3) prescribes that the court "shall not enforce the provisions of a criminal bail bond during the military service of the principal" and may in accordance with the principles of equity and justice either during or after such service discharge such sureties and exonerate the bail." In United States v. Jeffries⁶⁷ the court held that because there was no doubt that the principal was in the military, it was without authority to forfeit the bail bond and issue a warrant of arrest. Subsection 103(3) was mandatory in that case. A New York court took this one step further and held the bond could not be forfeited if the principal were in the service even if he were on furlough at the time he was required to appear.⁶⁸ In Ex Parte Moore,⁶⁹ however, an Alabama court concluded that military service alone was insufficient to prevent forfeiture of the bail bond

without a further showing that military service prevented the principal from attending the trial. In this regard, state courts will ordinarily require the surety not only to show that the principal is in the military, but also to demonstrate an effort to secure the principal's attendance.⁶⁰ In cases in which the principal was discharged four months before default⁶¹ or was not inducted until almost six months after he was required to appear,⁶² the surety could not avoid forfeiting the bail bond under subsection (3) of this section.

2-5. Extension of benefits to citizens serving with forces of war allies

Section 104

Persons who serve with the forces of any nation with which the United States may be allied in the prosecution of any war in which the United States engages while this Act remains in force and who immediately prior to such service were citizens of the United States shall, except in those cases provided for in section 512, be entitled to the relief and benefits afforded by this Act if such service is similar to military service as defined in this Act, unless they are dishonorably discharged therefrom, or it appears that they do not intend to resume United States citizenship. (50 U.S.C. App. § 514).

Sections 104 and 512 of the Act are basically the same in language and attempt to accomplish the same goals. Section 104 covers all the sections of the Act except those contained in sections 501 to 511 inclusive. Section 512 fills this gap and extends the benefits of these eleven sections in Article V to the same persons as stated in section 104. The only appreciable difference between sections 104 and 512 is that section 512 extends the benefits of sections 501-511 to those who die in the service of the armed forces of an allied nation or who die as a result of such service while section 104 does not.

The thrust of sections 104 and 512 is to allow those persons who serve in the armed forces of nations that are allied with the United States in the prosecution of

war against a common enemy to receive the protective features of the Act to the same extent as soldiers in the armed forces of the United States.

Both sections contemplate that those who serve in allied armed forces will resume citizenship sometime after their service with these allied forces. In a set of circumstances involving section 104, a United States citizen serving in a foreign armed force allied to the United States in the prosecution of any war would get the benefits of all the sections of the Act, with the exception of sections 501 to 511, as long as he received an honorable discharge from the allied armed force. Arguably, the present statutory requirement of section 104 that the former citizen must intend to resume United States citizenship before section 104 would be operative could be avoided as a result of the Supreme Court decision in Afroyim v. Rusk.⁶⁸ Section 512 of the Act would likewise be affected.

2-6. Extension of benefits to persons ordered to report for induction or military service

Section 106

Any person who has been ordered to report for induction under the Selective Training and Service Act of 1940, as amended, shall be entitled to the relief and benefits accorded persons in military service under articles I, II, and III of this Act during the period beginning on the date of receipt of such order and ending on the date upon which such person reports for induction; and any member of the Enlisted Reserve Corps who is ordered to report for military service shall be entitled to such relief and benefits during the period beginning on the date of receipt of such order and ending on the date upon which he reports for such service. (50 U.S.C. App. § 516.)

Congress added section 106 to the Act in 1942 with the express intent of providing draftees and enlisted reservists ordered to active duty with the benefits of the first three articles of the Act [50 U.S.C. §§ 510-36 (1946)] in the period between the time they received orders to active duty and the time when they reported

for duty. The Selective Training and Service Act of 1940, as amended, and mentioned in section 106, has been replaced by similar updated provisions.

Persons ordered to active duty under the draft law report in accordance with the Military Selective Service Act.⁶⁴ An individual ordered to report for induction is within the purview of section 106 even though the induction process has not been completed.⁶⁵

2-7. Waiver of benefits of the Act

Section 107

Nothing contained in this Act shall prevent--

(a) the modification, termination, or cancelation of any contract, lease, or bailment or any obligation secured by mortgage, trust, deed, lien, or other security in the nature of a mortgage, or

(b) the repossession, retention, foreclosure, sale, forfeiture, or taking possession of property which is security for any obligation or which has been purchased or received under a contract, lease, or bailment, pursuant to a written agreement of the parties thereto including the person in military service concerned, or the person to whom section 106 is applicable, whether or not such person is a party to the obligation), or their assignees, executed during or after the period of military service of the person concerned or during the period specified in section 106. (50 U.S.C. App. § 517.)

Congress added this section of the Act in 1942. It was designed to induce servicemembers and their creditors to adjust their rights privately and to make it clear that no restrictions have been placed upon the usual right of the parties to renegotiate an obligation. This section expressly permits foreclosures.⁶⁶

While servicemembers might waive, in writing, certain benefits of the Act, they do not thereby waive all other rights under the Act. For example, renegotiating a

conditional sales contract will not waive the right, in the event of default, to regain possession as prescribed by sections 301 and 303.⁶⁷ Additionally, when litigating the legality of the seizure, the servicemember does not waive the tolling of the statute of limitations as provided by section 205 of the Act.⁶⁸

2-8. Transfers to take advantage of the Act

Section 600

Where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made, the provisions of this Act to the contrary notwithstanding. (50 U.S.C. App. § 580.)

This section emphasizes the equitable nature of the Act and is designed to prevent its abuse. Debtors who are ineligible to receive the benefits of the Act are deprived of the opportunity to secure these benefits through colorable transfers or assignments to persons who are or may become servicemembers.

The pivotal issue in the few decisions interpreting this section is the existence of an intent to delay or defeat the enforcement of rights. A court in Oklahoma held that reassignment of an interest in an oil and gas lease containing a nine month drilling provision to a person who had received orders to active duty, 6 weeks before reporting, was a transfer to take advantage of the Act.⁶⁹ Similarly, when a corporation transferred mortgaged real estate, upon which it had not met previous payments, to one of its owners and officers on the day he entered military service, the court denied protection under the Act.⁷⁰

**2-9. Certification of period of military service--
treatment of missing persons**

Section 601

(1) In any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army of the United States, signed by the Chief of Naval Personnel as to persons in the United States Navy or in any branch of the United States service while serving pursuant to law with the United States Navy, and signed by the Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pursuant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced on prima facie evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and the place where such person died in or was discharged from such service.

(2) It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificates to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same.

(3) Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period

herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of the Army or Navy, or any court, or board thereof, or until such death is found by a court of competent jurisdiction: Provided, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the time when this Act ceases to be in force. (50 U.S.C. App. § 581.)

In a proceeding involving section 205 of the Act, a properly authenticated certificate of service in the United States Marine Corps was prima facie evidence of the fact of the service.⁷¹ Subsection 601(3) creates the presumption that when persons in the military service are reported missing, they will be deemed to have continued in the service until they are accounted for.

Cases involving missing persons, affected by section 601(3), should be viewed in conjunction with Chapter 10 of Title 37 United States Code.⁷²

2-10. Power of attorney

Section 701

(a) Extension for period person in missing status.

Notwithstanding any other provision of law, a power of attorney which--

(1) was duly executed by a person in the military service who is in a missing status (as defined in section 551(2) of Title 37);

(2) designates that person's spouse, parent, or other named relative as his attorney in fact for certain specified, or all, purposes; and

(3) expires by its terms after that person entered a missing status, and before or after the effective date of this section; shall be

automatically extended for the period that the person is in a missing status.

(b) Limitation on extension.

No power of attorney executed after the effective date of this section by a person in the military service may be extended under subsection (a) of this section if the document by its terms clearly indicates that the power granted expires on the date specified even though that person, after the date of execution of the document, enters a missing status.

(c) Persons subject to coverage.

This section applies only to persons in military service who executed powers of attorney during the Vietnam era (as defined in section 101(29) of Title 38). (50 U.S.C. App. § 591.)

2-11. Revocation of interlocutory orders

Section 602

Any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require. (50 U.S.C. App. § 582.)

The wording of this section is straightforward and unambiguous. It permits a court that has issued an interlocutory order under any of the sections of the Act to revoke, modify, or extend such an order on its own motion or otherwise. This section has relevance when read together with other sections that allow a court to grant certain relief and then allow the court to make "such other orders as may be just." For example, section 300, which deals with eviction and distress, allows a court to grant a three-month stay of eviction proceedings or to "make such other orders as may be just." Thus, the court could issue whatever interlocutory orders its rules of procedure allowed in such a proceeding if it found

that such an order would be "just" to all the parties involved. The language in section 300 appears to authorize the kind of interlocutory order contemplated by Congress in section 602 of the Act. Sections 200, 301, 302, and 305 are other sections of the Act that contain language that allows a court to issue interlocutory orders. Those orders also can be "revoked, modified, or extended" by section 602.

2-12. Separability of provisions

Section 603

If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby. (50 U.S.C. App. § 583.)

2-13. Termination date

Section 604

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. (50 U.S.C. App. § 584.)

The Soldiers' and Sailors' Civil Relief Act was to end on the later of the following two dates: 15 May 1945

or six months after a treaty of peace ending World War II was proclaimed by the President of the United States. In 1948, as an added provision of the Universal Military Training and Service Act, Congress stated that the Soldiers' and Sailors' Civil Relief Act was to continue in force until it was "repealed or otherwise terminated by a subsequent Act of Congress. . . ."73

Congress has not repealed or terminated the Soldiers' and Sailors' Civil Relief Act of 1940 and, therefore, the Act continues in effect.

2-14. Inapplicability of Soldiers' and Sailors' Civil Relief Act of 1918

Section 605

The provisions of section 4 of the joint resolution approved August 27, 1940 (Public Resolution Numbered 96, Seventy-sixth Congress), and the provisions of section 13 of the Selective Training and Service Act of 1940, shall not be applicable with respect to any military service performed after the date of enactment of this Act. (50 U.S.C. App. § 585.)

In the summer of 1940, the Seventy-Sixth Congress enacted legislation to extend certain benefits of the Soldiers' and Sailors' Civil Relief Act of 1918 to those who were then entering military service. In October of that same year, the Congress passed the presently existing Soldiers' and Sailors' Civil Relief Act of 1940. Section 605 makes it clear that the 1940 Act superseded in all respects those sections of the 1918 Act that were extended by the two legislative enactments of the Seventy-Sixth Congress earlier in 1940.

FOOTNOTES

1. See S. Rep. No. 2109, 76th Cong., 3d Sess. 1-2 (1940).
2. 10 U.S.C. § 3062(c) (1988).
3. Id. § 8062(d).
4. Id. § 5001(a)(1).
5. Id. § 5001(a)(3).
6. Id. § 5001(a)(2).
7. Id. § 5001(a)(3).
8. Id. § 101(4).
9. 14 U.S.C. § 1 (1988). (Responsibility for administration of the Coast Guard was transferred from the Department of Treasury to the Department of Transportation by Pub. L. No. 89-670, Oct. 15, 1966, 80 Stat. 937, 49 U.S.C. § 1655(b), except in time of war or when the President directs as provided in section 3 of this title.
10. 14 U.S.C. §§ 211-13, 351 (1988).
11. 14 U.S.C. §§ 751a, 762 (1988).
12. 42 U.S.C. § 217 (1982 & Supp. V 1987).
13. 42 U.S.C. § 215(a) (1982) (all functions of the Public Health Service of the Surgeon General of the Public Health Service, all officers and employees of the Public Health Service, and all functions of all agencies of or in the Public Health Service are transferred to the Secretary of Health, Education and Welfare by the 1966 Reorganization Plan No. 3, 31 Fed. Reg. 8855, 80 Stat. 1610, effective June 25, 1966. 42 U.S.C. § 202 (1982)).
14. 42 U.S.C. § 213(a) (1982 & Supp. V 1987).

15. Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D.C. Vt. 1974) (tolling provisions of Act suspended running of state's one-year statute of limitations for skiing accident suffered by lieutenant commander in Public Health Service).
16. Osborn v. United States, 164 F.2d 767 (2d Cir. 1947). But see Rosenbloom v. New York Life Ins. Co., 163 F.2d 1 (8th Cir. 1947).
17. Peace v. Bullock, 254 Ala. 361, 48 So. 2d 423 (1950).
18. Hart v. United States, 125 Ct. Cl. 294 (1953).
19. Hart v. United States, 95 F. Supp. 679 (D.N.J. 1951).
20. SSCRA § 103.
21. SSCRA § 306. See also Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) (statute of limitations tolled only if action is against person in military service or his heirs, executors, administrators, or assigns). Cf. Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); Card v. American Brands Corp., 401 F. Supp. 1186 (S.D.N.Y. 1975); Spaninato v. City of New York, 311 F.2d 439 (2nd Cir. 1962), cert. denied 372 U.S. 980, 83 S.Ct. 1115, 10 L.Ed.2d 144, reh'g denied 374 U.S. 818, 83 S.Ct. 1699, 10 L.Ed.2d 1042.
22. 10 U.S.C. § 101(22) (1988).
23. Id. § 101(24).
24. Id. § 101(22).
25. Jax Navy Federal Credit Union v. Fahrenbruch, 429 So.2d 1330 (Fla. Dist. Ct. App. 1983); Lang v. Lang, 176 Misc. 213, 25 N.Y.S.2d 775 (Sup. Ct. 1941).
26. Betha v. Martin, 188 F. Supp. 133 (E.D. Pa. 1960).
27. 10 U.S.C. §§ 3686, 8686 (1988).
28. Mantz v. Mantz, 69 N.E.2d 637 (Ohio C.P. 1946).

29. Id. at 639.
30. *Shayne v. Burke*, 158 Fla. 61, 37 So. 2d 751 (1946).
31. *Harriott v. Harriott*, 211 N.J. Super. Ch. Div. 445, 511 A.2d 1264 (1986); see *Driver v. Driver*, 35 Conn. 229, 416 A.2d 705 (Super. Ct. 1980).
32. E.g., JAGA 1952/3654 (22 April 1952).
33. *Diamond v. United States*, 344 F.2d 703, 170 Ct. Cl. 166 (1965) (release from active duty terminates period of military service, and section of Act which halted operation of statute of limitations during period of military service was not applicable after release from active duty).
34. 40 Ops Att'y Gen 97 (1941).
35. E.g., *Edmonston v. United States*, 140 Ct. Cl. 199, 155 F. Supp. 553 (1957) (Tucker Act); *Berry v. United States*, 130 Ct. Cl. 33, 126 F. Supp. 190 (1954), cert. denied, 349 U.S. 938 (1955) (Tucker Act); cf. *Abbattista v. United States*, 95 F. Supp. 679 (D.N.J. 1951) (Suits in Admiralty Act).
36. *Parker v. State*, 185 Misc. 584, 57 N.Y.S.2d 242 (Ct. Cl. 1945).
37. *Calderon v. City of New York*, 184 Misc. 1057, 55 N.Y.S.2d 674 (Sup. Ct. 1945).
38. *New York Life Ins. Co. v. Litke*, 181 Misc. 32, 45 N.Y.S.2d 576 (1943). See also *State v. Goldberg*, 161 Kan. 174, 166 P.2d 664 (1946).
39. *Davidson v. General Finance Corporation*, 295 F. Supp. 878 (D.C. Ga. 1968).
40. *Polis v. Creedon*, 162 F.2d 908 (Em. App. 1947) accord, *Hanebuth v. Scott*, 111 Colo. 443, 142 P.2d 1008 (1943), modified, 115 Colo. 176, 170 P.2d 530 (1946); *Hanebuth v. Patton*, 111 Colo. 447, 142 P.2d 1010 (1943), modified, 115 Colo. 166, 170 P.2d 526 (1946). (These companion cases dealt with administrative, departmental police hearings). But see *Kentucky Unemployment*

Compensation Comm'n v. Chenault & Orear, 295 Ky. 562, 174 S.W.2d 767 (1943) (dictum). See also United States v. Frantz, 220 F.2d 123, (3d Cir.), cert. denied, 349 U.S. 954, 75 S. Ct. 883, 99 L. Ed. 1278 (1955).

41. Shell Oil Co. v. Industrial Comm'n, 407 Ill. 186, 94 N.E.2d 888 (1950) (filing of workmen's compensation claim).

42. Modern Industrial Bank v. Zaentz, 177 Misc. 132, 29 N.Y.S.2d 969 (N.Y. City Munic. Ct. (1941)).

43. Tri-State Bonding Co. v. State, 567 S.W.2d 937 (Ark. 1978).

44. Hartsfield Co. v. Whitfield, 71 Ga. App. 257, 30 S.E.2d 648 (1944). But see Akron Auto Finance Co. v. Stonebraker, 66 Ohio App. 507, 35 N.E.2d 585 (1941).

45. Note, 9 U. Chi. L. Rev. 348, 349 (1942).

46. J. C. Penny v. Oberpidler, 163 S.W.2d 1067 (Tex. Civ. App. 1942), rev'd on another ground, 141 Tex. 128, 170 S.W.2d 607 (1943).

47. Boone v. Lightner, 319 U.S. 561, 569, reh'g denied, 320 U.S. 809 (1943) (emphasis added).

48. Id.

49. Craven v. Vought, 43 Pa. D&C 482, 4 Mon. Leg. R. 11, 55 York Leg. Rep. 173 (1941).

50. Royster v. Lederle, 128 F.2d 197 (6th Cir. 1942). Cf. Childers v. Nicolopoulos, 296 F. Supp. 547 (D.C. Okla. 1969) (defendant not required to post bond although stay had previously been granted). See also Swiderski v. Moodenbaugh, 45 F. Supp. 790 (D. Ore. 1942).

51. Laperouse v. Eagle Indem. Co., 202 La. 686, 12 So. 2d 680 (1942).

52. Register v. Bourguin, 203 La. 825, 14 So. 2d 673 (1943).

53. Cox v. Yates, 96 Ga. App. 466, 100 S.E.2d 649 (1957).
54. Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E.2d 343 (1952).
55. Tabor v. Miller, 369 F. Supp. 647, (D. Pa.) aff'd, 389 F.2d 645 (3d Cir.), cert. denied, Stearns v. Tabor, 391 U.S. 915, 88 Sup. Ct. 1810, 20 L. Ed. 2d 654 (1968) (defendant did not state that it would be impossible for him to appear at trial, and did not suggest that trial be held during his Christmas leave).
56. State ex rel. Frank v. Bunge, 16 Wash. 2d 358, 133 P.2d 515 (1943).
57. United States v. Jeffries, 140 F.2d 745 (7th Cir. 1944).
58. People v. Correa, 181 Misc. 1019, 43 N.Y.S.2d 266 (1943).
59. Ex Parte Moore, 244 Ala. 28, 12 So. 2d 77 (1943).
60. E.g., State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248 (1944); People v. Continental Gas Co., 284 App. Div. 944, 134 N.Y.S.2d 742 (1954), rev'd 205 Misc. 5, 126 N.Y.S.2d 127 (Sup. Ct. 1953); Cumbie v. State, 367 S.W.2d 693 (Tex. Civ. App. 1963).
61. United States v. Carolina Gas Ins. Co., Ill., 237 F.2d 451 (7th Cir. 1956).
62. State v. Benedict, 234 Iowa 1178, 15 N.W.2d 248.
63. Afroyim v. Rusk, 387 U.S. 253 (1967) (Congress has no power under the Constitution to divest a person of his United States citizenship absent his voluntary renunciation thereof).
64. 50 U.S.C. App. §§ 451, 453, 454, 455, 456, 458-471a (1982 & Supp. V 1987).
65. E.g., Clements v. McLeod, 155 Fla. 860, 22 So. 2d 220 (1945); J.C.H. Service Station v. Patrikes, 181 Misc.

401, 46 N.Y.S.2d 288 (1944); Ostrowski v. Barczynski, 211, 24 Erie County L.J., 45 Pa. D&C 451 (C.P. 1942).

66. Brown v. Gerber, 495 P.2d 1160 (Colo. 1972) (permitting foreclosure of trust deed on encumbered property acquired after purchaser had commenced his period of military service).

67. S & C Motors v. Carden, 223 Ark. 164, 264 S.W.2d 627 (1954).

68. Harris v. Stem, 30 So. 2d 889 (La. App. 1947).

69. Lima Oil & Gas Co. v. Pritchard, 92 Okla. 113, 218 Pac. 863 (1923) (1918 Act).

70. Ninth Fed. Sav. & Loan Ass'n v. Parkway West Corp., 182 Misc. 919, 48 N.Y.S.2d 762 (Sup. Ct. 1943), cf. Sullivan v. State Bar, 28 Cal. 2d 488, 170 P.2d 888 (1946).

71. Betha v. Martin, 188 F. Supp. 133, 134 (E.D. Pa. 1960); Van Doeran v. Pelt, 184 S.W.2d 744 (Mo. App. 1945).

72. Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 625.

73. 50 U.S.C. App. § 464 (1982).

Chapter 3

General Relief: Default Judgments, Affidavits, Bonds, Attorneys for Persons in Service

3-1. Purpose and Scope.

This chapter examines the general relief provisions of the Act applicable when a default judgment is taken or sought against a servicemember whose ability to participate in the judicial proceeding is materially affected by military service.

3-2. Procedure Upon Default by Defendant.

Section 200(1)

In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before 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. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. Unless it appears that the defendant is not in such service, the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of

the defendant under this Act. Whenever, under the laws applicable with respect to any court, facts may be evidenced, established, or proved by an unsworn statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury, the filing of such an unsworn statement, declaration, verification, or certificate shall satisfy the requirement of this subsection that facts be established by affidavit. (50 U.S.C. App. § 520.)

a. Affidavit. Section 200(1) of the Act provides that before judgment in any action in any court, if there is a default of any appearance by the defendant, the plaintiff must file an affidavit stating facts showing whether the defendant is in military service.

(1) When required. The Act is clear that this subsection applies to any civil action or proceeding in any court. There has been little controversy on this point, although one Ohio decision ruled that presentation of a will for probate was not an adversary proceeding and interested parties need not appear before the court. Therefore, the court did not require an affidavit by the plaintiff (petitioner) when the minor son of the deceased was in military service.¹ The court held that the Soldiers' and Sailors' Civil Relief Act applies when servicemembers are sued as defendants but does not apply to "in rem" proceedings that are not against named defendants.² Nevertheless, the great majority of decisions have included probate cases within the scope of this subsection.³

The plaintiff must file an affidavit where there is a default of any appearance by the defendant. The courts have agreed that "any appearance" means any appearance whatsoever.⁴ Defendants have argued that they could appear especially for the purpose of testing the court's jurisdiction without losing the benefits of this section. In one response to this argument, the court stated: "[t]he benefits of [50 U.S.C. App.] section 520 are made to depend on an absence of any appearance, which includes a special as well as a general appearance. So, whether the appearance made was special or general is not

material to the question.⁵ In dealing with the question of the meaning of "any appearance," another court held:

Consideration of the meaning of the phrase "any appearance" is sometimes required. The 1918 Act used the words "an appearance" but in the 1940 Act the phrase was broadened to read "any appearance". The word "appearance" is defined in Webster's New Int. Dict. 2d Ed., 1940, as meaning in law, "the coming into court of a party summoned in an action either by himself or by his attorney." Technically there are several different kinds and methods of appearance. See Am Jur, appearances, section 1, etc. A default of any appearance by the defendant means a default in any one of several ways of making an appearance. "Any" applies to every individual part without distinction.⁶

It appears that any act before the court by a defendant-servicemember, or the defendant's attorney, will constitute an appearance depriving the servicemember of the benefits of section 200. In Blankenship v. Blankenship,⁷ defendant's counsel filed an affidavit asking the court to quash the complaint and the service or continue the cause. In Reynolds v. Reynolds⁸ the defendant's counsel filed a motion to dismiss for lack of jurisdiction. In Vara v. Vara⁹ the defendant filed a motion to quash service. In each of these cases, the court held that the servicemember made an appearance.

Upon receiving service of process in an overseas area, a servicemember sometimes writes a letter to the court or sends a telegram asking for protection under the Act. Such an informal communication should not be classified as an "appearance" by the courts.¹⁰ The same is true of a legal-appearing document prepared by a military legal assistance officer and mailed to the court.¹¹ In practice, however, at least one court has held that a letter from a legal assistance attorney invoking the Act and requesting a stay constituted an appearance.¹² This appearance waived the servicemember's protection against a default judgment.

The requirement for the court to appoint an attorney to represent a defaulting defendant-servicemember is discussed later in this chapter. Nothing a court

appointed attorney does personally can amount to an appearance on behalf of a servicemember, as far as the provisions of section 200 are concerned.¹³ This is true for two reasons. First, although counsel is appointed when there is a default of appearance, the appointment does not change that fact; and second, the appointed counsel cannot waive any of the defendant's rights and one of these is the right to apply to reopen a judgment entered in default of appearance.¹⁴

(2) Content. Subsection 200(1) states that the plaintiff's affidavit shall set forth facts showing that the defendant is not in military service. This should require more than a statement that the defendant is not in the service. Some facts are required before the court will enter a default judgment.¹⁵ If the defendant is in service, the plaintiff should so state in the affidavit. If the plaintiff cannot determine whether defendant is in the service, the plaintiff must so state in the affidavit.

The last provision of subsection 200(1) permits an unsworn statement, declaration, verification, or certificate in writing to take the place of an affidavit as long as it is subscribed and certified or declared to be true under penalty of perjury and is permitted by the rules of court. An Idaho court held that a verified complaint containing statements as to the defendant's military status complied with the statutory requirement for an affidavit. The court stated that the essential element was that the allegation was made under oath.¹⁶ In United States v. Kaufman,¹⁷ the court held that documents presented in support of default judgments were an "affidavit" for purposes of prosecution under section 520(2) of the Act, even though the defendant did not actually swear to the written statements.

(3) Persons protected. Occasionally, a civilian defendant determines that the plaintiff failed to file an affidavit as to the defendant's military status and alleges that his rights have been violated and the default judgment should be vacated. In this situation, a Michigan court pointed out that plaintiff's failure to file an affidavit of nonmilitary service before taking default judgment did not prejudice defendants who were admittedly not in military service at the time the

default was entered.¹⁸ The courts have agreed that the affidavit requirement protects only the military defendant who cannot appear in defense.¹⁹

(4) Effect of not filing affidavit. Subsection 200(1) of the Act spells out several consequences of a plaintiff's failure to file an affidavit of nonmilitary service. If such an affidavit is not filed, a court will not enter default judgment until the plaintiff meets the Act's requirements.²⁰ Another consequence of failure to file an affidavit is that a subsequent default judgment is voidable and can be reopened at a later date on application by the defendant under certain conditions. Until that occurs, however, the judgment is valid and binding and entitled to recognition under the principles of full faith and credit.²¹ In the Ohio case of Thompson v. Lowman,²² the court said,

It will be observed that the filing of the military affidavit is not made a jurisdictional matter. The Act authorizes entry of judgment notwithstanding the absence of the affidavit when an order of court directing such entry has been secured. The failure to file such affidavit does not affect the judgment, and is only an irregularity. . . . When the judgment is rendered without filing the requisite affidavit, the courts have uniformly ruled that the judgment is not void, but only voidable, subject to being vacated at the instance of the servicemember, but only upon proper showing that he has been prejudiced by reason of his military service in making defense.²³

b. Court appointed attorney. Section 200(1) of the Act requires that if the plaintiff does not file an affidavit showing that the defendant is not in military service, the court shall appoint an attorney to represent the defendant and to protect defendant's interests before entering a default judgment. The 1960 amendments to the Act changed this wording from "may appoint" to "shall appoint," making this a mandatory requirement.²⁴ The sentence in subsection 200(1), which requires the court to appoint an attorney, also contains the phrase, "if the defendant is in such service." When the plaintiff files an affidavit stating that defendant is in service, or stating that plaintiff is unable to determine if

defendant is in service, the court must make findings as to whether defendant is in military service. Then, if the defendant is in service, the court must appoint an attorney.

None of these provisions apply unless the defendant has defaulted of any appearance whatsoever. Therefore, if the defendant has appointed an attorney to represent him in the case, this section will not apply. For example, the California Supreme Court held that the provisions of this section were designed to protect defendants in military service who do not appear by ensuring appointment of attorneys to represent them. The section did not protect a defendant who had appointed his own attorneys to protect his interests.²⁵ An interesting situation can arise when a servicemember retains an attorney from previous, related litigation. In such a situation, the California court ruled that, where notice of a wife's motion to modify a support order was served upon an absent husband's attorney in the original divorce action, but the attorney stated he was no longer authorized to represent defendant and had not been able to communicate with the husband, it was error to fail to appoint an attorney.²⁶ Further information in this area appears in paragraph 3.4 of this chapter.

c. Bond requirement. In addition to requiring the plaintiff to file the appropriate affidavit and the court to appoint an attorney, subsection 200(1) provides that before entering judgment the court may require plaintiff to file a bond. When it appears that the defendant is in military service the court may require, as a condition to the entry of a default judgment, that the plaintiff file a bond. The face amount of the bond may be used to indemnify the defendant against any loss or damage suffered if the judgment is later set aside. The court is also permitted to make any further order or enter such judgment as in its opinion may be necessary to protect the defendant's rights.

3-3. Penalty for False Affidavit.

Section 200(2)

Any person who shall make or use an affidavit required under this section, or a statement,

declaration, verification, or certificate certified or declared to be true under penalty of perjury permitted under subsection (1), knowing it to be false, shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. (50 U.S.C. App. § 520.)

Subsection 200(2) provides a criminal sanction for making or using a false affidavit under section 200(1). Any person who makes or uses an affidavit or an authorized [by section 200(1)] substitute therefor, knowing it to be false, is guilty of a misdemeanor. The punishment provided is imprisonment not to exceed one year or a fine not to exceed \$1,000, or both.²⁷

3-4. Court Appointed Attorney.

Section 200(3)

In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts. (50 U.S.C. App. § 520.)

a. General. Subsection 200(3) provides for court appointment of an attorney to represent a servicemember who is a party to the action and who has not personally appeared therein or been represented by an authorized attorney. This subsection differs from the subsection 200(1) requirement in that this section says the court "may appoint" instead of "shall appoint." This is true because this subsection, 200(3), is not referring to a condition which must exist before a default judgment is entered, but is stating that the court may appoint an attorney at any time during the proceedings. Consequently, several questions have arisen concerning court appointed counsel.

b. Responsibilities of appointed attorney. When a plaintiff files an affidavit stating that the defendant is in military service or that the plaintiff cannot determine whether he is in military service and an attorney is appointed to represent this missing defendant, what does the attorney do? The attorney is charged by statute with representing the servicemember and protecting his interest. One author has noted that an "appointed attorney is under an obligation to exhaust every reasonable means of establishing contact with the servicemember prior to trial date so that some logical course of action can be agreed upon."²⁸ Another writer has indicated that "local court rules . . . sometime provide that the appointed attorney shall inquire into defendant's military status and whether his ability to meet his debts has been materially affected and then report to the court."²⁹ A New York court, in appointing such counsel, said it was for the purpose of obtaining facts as to whether the soldier's ability to comply with the terms of the obligation had been materially affected by his military service and to report to the court thereon or move for a stay in the soldier's behalf.³⁰ In another case, the court stated that the purpose of the appointed counsel, either required or suggested, is to obtain a stay for the defendant.³¹ Of course, if the military defendant is geographically and militarily able, he may desire to cooperate fully in the defense. This would, then, constitute an appearance and would deprive him of the opportunity to apply to reopen the judgment under subsection 200(4). Unless the defendant is able to be present for trial and to testify and fully cooperate in the defense, the primary purpose of the appointed attorney should be to obtain a stay until the defendant can be present. The attorney can make this motion without depriving the defendant of the right to apply to reopen any default judgment that might result.

c. Compensation of appointed attorney. When a military defendant has defaulted and the court has appointed an attorney to represent him and protect his interest, the court must also address the amount of the attorney's fee and the source of payment. A New Jersey court opined that:

Ordinarily the services rendered by proctor and counsel so appointed are to be regarded as a

patriotic duty for which no compensation would be expected by members of a profession deeply imbued by a sense of public responsibility. Certainly not as against a party in military service. However, in cases in which allowances are commonly made according to the usual probate practice, there seems no good reason why reasonable compensation should not be awarded.³²

Similarly, the Wisconsin Supreme Court held that the appointed attorney should be paid compensation allowed those in public service and fees ordinarily chargeable between attorney and client.³³

d. Acts not binding on defendant. Subsection 200(3) of the Act also provides that no attorney appointed by the court to represent defendant-servicemembers has power to waive any of the servicemembers' rights or to bind them by his acts. Paragraph 3-2a(1) of this chapter noted that nothing the guardian ad litem does personally can amount to an appearance on behalf of the servicemember insofar as the provisions of section 200 are concerned. In the Illinois case of Rutherford v. Bentz,³⁴ the court stated that the acts of the guardian ad litem appointed to represent a defendant who was overseas in military service could not bind the defendant with respect to his right to a continuance.

Of course, once servicemembers begin authorizing acts by their appointed attorneys, they will ordinarily be bound thereby. The Supreme Court of Washington has said:

It appears from the language of the Act that the protection afforded a servicemember from any waiver of his rights by legal counsel was intended to apply only where attorney acted under authority of the court, rather than authority of the servicemember. In each case a question of fact exists; i.e., whether servicemember has, himself, authorized the attorney to act for him. That the attorney was originally appointed under the act is no wise determinative of this question.³⁵

If defendants realize that they are unable to be present for trial and their chances of success are greatly decreased by their absence, they may wish to preserve

their right to reopen default judgments under 200(4). In that case, they should not authorize any action by their court-appointed attorneys because the court may construe the action to be an appearance in the proceedings.

3-5. Reopening Default Judgments.

Section 200(4)

If any judgment shall be rendered in any action or proceeding governed by this sec on against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment. (50 U.S.C. App. § 520.)

a. Requirements to apply for reopening. Subsection 200(4) of the Act provides a method whereby a defendant-servicemember may have a default judgment reopened. In attempting to have the judgment reopened, the defendant must apply to the same court that rendered the judgment.³⁰ Three conditions must exist before a servicemember can apply to have the court reopen a default judgment reopened.

(1) Judgment during service or within 30 days thereafter. Subsection 200(4) refers only to default judgments rendered against the servicemember during his period of service or within thirty days thereafter. This excludes any judgments rendered before the defendant entered military service or more than thirty days after separation from service.

(2) Application during service or within 90 days thereafter. The defendant or a legal representative must file an application to reopen not later than 90 days after termination of military service. Defendants discovering default judgments against them more than 90 days after termination of their military service are too late.³⁷

(3) Must have made no appearance. This subsection, 200(4), refers to default judgments in any action or proceeding governed by section 200. The only judgment governed by section 200 is one in which there is a default of "any appearance" by the defendant. Therefore, to apply to reopen judgments, defendant-servicemembers must not have made any appearance in an action.³⁸ To preserve their right to apply for a reopening, they should notify plaintiff's attorney of their military service so that the proper affidavit is filed, then allow the court appointed attorney to move for a stay. It would be unnecessary to do more. Additionally, the Supreme Court of Wisconsin has held that the provision of the Soldiers' and Sailors' Civil Relief Act authorizing application within 90 days of termination of service to reopen a judgment is equally available to the soldier represented by a court appointed attorney and to the soldier without court appointed representation.³⁹

b. Criteria for reopening judgment. Servicemembers must demonstrate that their military service prejudiced their ability to defend their cases and that they have meritorious defenses before they may reopen default judgments under section 200(4).⁴⁰ Trial courts have a wide measure of discretion in deciding whether to reopen default judgments.⁴¹

(1) Prejudiced by military service. Defendants must show that at the time of judgment they were prejudiced in their ability to defend the suit because of their service. The courts have ruled that a voidable default judgment is subject to being vacated at the instance of a servicemember, but only upon proper showing that the servicemember's defense has been prejudiced by reason of military service.⁴² In Becknell v. D'Angelo,⁴³ the court vacated an amended divorce decree of a

servicemember who had left the continental United States before a hearing on his wife's motion to amend, even though he had appeared at the hearing on the initial decree. His military service prejudiced his ability to defend in the action. In Federal Home Loan Mortgage Corp. v. Taylor,⁴⁶ the court held that the trial court was within its discretion in determining that acceleration of the entire mortgage debt due to default on one month's installment was unconscionable. Misunderstanding and lack of communications were attributable to the mortgagor husband's military service in the Philippines.⁴⁶

A New York court, however, refused to set aside a default separation decree against a servicemember when he was fully advised of pendency of the action, was always accessible to the court, and refused to accept notice by certified mail of the time and place of the trial. The court held that he was not prejudiced by reason of military service in defending the action.⁴⁸ A California court ruled that if a servicemember against whom a default judgment was entered had no desire to assert a defense and had so demonstrated by his prior conduct, his military service did not prejudice him.⁴⁷ It may, of course, be quite difficult for defendants to show that their military service prejudiced their ability to defend when they have been in close contact with a court appointed attorney and have cooperated fully in the conduct of the defense.

(2) Meritorious or legal defense. In addition to showing they were prejudiced in their ability to defend, servicemembers must show that they have a meritorious or legal defense to the original cause of action before a court will reopen a default judgment. For example, one court did not abuse its discretion when it set aside a default judgment when the defendant alleged a meritorious defense.⁴⁸ Similarly, in the case of Flagg v. Sun Investment & Loan Corp.,⁴⁹ the petitioner was prevented from defending an action on a note as well as the foreclosure of his mortgage because of his military service. Petitioner's funds were on deposit with the military and were not available to him until his permanent change of station or discharge. He was therefore unable to pay the creditor the amount due. This situation was sufficient to constitute prejudice by

reason of military service. The petitioner was entitled to have the foreclosure sale and confirmation reopened so he could defend the case. In contrast, when a wife obtained a decree in equity declaring a divorce obtained by husband after entry into armed forces void because of fraud, the husband could not reopen the case. His petition did not show a meritorious or legal defense to the original suit.⁵⁰

The requirement that petitioners have a meritorious defense is a useful provision. It avoids a waste of effort and resources in reopening judgments in cases in which servicemembers have no defense.

When a default judgment is based on an affidavit that falsely states that defendant is not in military service, the servicemember has the right to have the judgment set aside without establishing a meritorious defense.⁵¹ To ultimately succeed on the merits, however, the servicemember must still have a meritorious defense.

c. Rights of a bona fide purchaser. When a default judgment is vacated, set aside or reversed under this section, title to property held by a bona fide purchaser could theoretically be in jeopardy. Subsection 200(4) protects the bona fide purchaser, however, by stating that vacating, setting aside, or reversing any judgment under the Act shall not impair any right or title acquired by any bona fide purchaser for value under the judgment.

3-6. Stay of Proceedings Where Military Service Affects Conduct Thereof.

Section 201

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. (50 U.S.C. App. § 521.)

a. The nature of section 201 "stay." A "stay" under section 201 differs from those granted under section 301, 302, and 700. It is distinguishable on two principal grounds. First, the latter three stay provisions involve pre-service obligations while section 201 applies to both pre-service and in-service obligations.

Second, in applying sections 301, 302, and 700 "the court makes substantive determinations about the nature of the obligation (*i.e.*, whether it falls within one of these sections) and the servicemember's ability to meet the obligation (*i.e.*, the presence or absence of material effect). If the court finds that the servicemember's ability to comply with the terms of his obligation is materially affected by military service, the court may order a stay."²² On the other hand,

In deciding whether to grant a stay under [section 201], a court does not look to the nature of the obligation at all. What the court does examine is whether the ability of the servicemember to participate in a judicial action has been materially affected by military service."²³

(1) Who may apply. A proper person to seek a stay is a person in the military service, as defined in section 101 of the Act and, more specifically, one who is involved in the proceedings as either a plaintiff or defendant."²⁴

Arguably, when a servicemember is involved in a proceeding, but is neither the plaintiff nor the defendant, the servicemember is not entitled to a "stay" under this section. The statutory language has not, however, been interpreted by the courts in such a restricted manner. Rather, at least one court has held that "one who is a proper, as distinguished from an indispensable, party to a proceeding, and whose rights or interests may be affected by its determination is entitled to the benefit of the Act."²⁵

If the servicemember is neither the plaintiff nor the defendant, does this mean that his associates, persons not in the military, can seek the protection of the Act? The answer to the question depends to a large part on the legal relationship of the servicemember not only to the issue in controversy, but also to the parties involved. One court has held that co-makers of a note are entitled to a stay based on the military service of one of the co-makers.⁵⁶ Other courts have reached the opposite conclusion, however, in the following situations: when defendant's counsel was unavailable because of military service;⁵⁷ when witnesses were unavailable because of military service;⁵⁸ and in the case of an auto accident, when the plaintiff was imputed with the negligence of a learner permittee who was presently unavailable because of military service.⁵⁹

(2) When and where application may be made. The statute specifies that in "any action or proceeding . . . during the period of service or within sixty days thereafter," the servicemember may seek a stay. Compliance with applicable court rules prescribing time of filing and requisites for a motion for continuance is not necessary in the application for relief.

Section 201 applies to courts not of record as well as courts of record, but is inapplicable in administrative or departmental hearings or proceedings.

b. Court powers to stay. A court must act on a stay either when a defendant applies to the court or when the proceedings themselves put the court on notice that a servicemember's rights are affected. Once the court has notice, regardless of how notice was given, it must determine whether "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." The test is therefore one of material effect.

(1) Granting the stay. Courts have expressed a wide variety of opinions on what they will consider in determining whether to grant a stay. As a matter of policy, it is immaterial that a delay or inconvenience may result from a stay. A stay is a proper imposition upon an individual citizen on behalf of those discharging their obligations to the common defense.⁶⁰ On the other

hand, the section cannot be used by a party to shield wrongdoing or lack of diligence,⁶¹ or be used as an instrument by which one in the military service may endanger the peace, health, and lives of people by staying proceedings intended to protect the general public.⁶²

In Boone v. Lightner,⁶³ the Supreme Court addressed the issue of whether the Act mandates grant of a stay in all cases. The Court held that a trial court must grant a stay only when material effect is present. A more recent state court opinion, however, seems to place this burden on the nonmilitary party in all instances. The court held that a person in the military service is entitled as a matter of law to a stay of any proceeding by or against him, upon a showing that he is in the military service, unless further relevant evidence demonstrates that his ability to prosecute or defend is not materially impaired by his military service.⁶⁴

In some cases, the servicemember may not apply for a stay, but the court becomes aware of the fact that one of the parties is in the military service. The statute authorizes the trial court to grant a stay sua sponte in these cases. The court must use the same decision-making process it uses in evaluating requested stays; the court must determine whether the servicemember's military service materially affected the ability to appear. If the court determines that material effect does exist, it should grant the stay. Failure to grant a stay sua sponte in such circumstances would violate the intent of the Act, as expressed in section 100, and the equitable philosophy behind it. Such a failure would probably be reversed on appeal as an abuse of judicial discretion.⁶⁵ It could also serve as a sound equitable basis for attacking a default judgment under section 200(4).

In exercising their discretion, a number of courts have established guidelines to assist them. First, since this section of the Act is discretionary, it is not an absolute bar to proceedings against someone in the military service. Therefore, servicemembers are not entitled to stays of proceedings in all instances.⁶⁶ In deciding whether to grant a stay, a court must consider all the facts and circumstances in each case.⁶⁷ Second,

the power to stay under all the facts and circumstances does not imply a power to stay in anticipation that at some future time, as the litigation progresses, the ability of the servicemember to prosecute or defend will be materially affected by reason of military service.⁶⁸ Last, an appellate court will reverse a trial court only when it has abused its exercise of discretion.⁶⁹

(2) Who has the burden of proof to show "material effect." In discussing the question of burden of proof, the Supreme Court concluded 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 sense to know from what direction their information should be expected to come.⁷⁰

In response to this language, the trial courts have varied from case to case and jurisdiction to jurisdiction in allocating the burden of showing material effect.⁷¹ As a practical matter, however, the person in the military service should always present evidence that demonstrates that military service has materially affected his ability to prosecute or defend the action.⁷²

c. Minimum evidentiary requirements. No uniform standards prescribe the quantity or quality of evidence necessary to support a stay. Each case requires an individual determination based on the evidence. Similar to the burden of proof issues, the requisites vary from jurisdiction to jurisdiction, often based largely on the visceral reaction of the court to the case and on the judicial philosophy of the individual on the bench.

Nevertheless, one obvious requirement exists in all section 201 cases. The moving party must be a "person in the military service" within the ambit of section 101. In a small minority of jurisdictions such a showing has been a sufficient basis for a stay.⁷³ The vast majority

of jurisdictions follow Boone v. Lightner,⁷⁴ however, and require something more of the servicemember.

One of the most important factors is often unavailability--that is, the servicemember's ability to attend the court proceedings. If the unavailability is temporary and will end at a fixed date in the relatively near future, the courts will almost always grant a stay. Courts more carefully scrutinize protracted unavailability, particularly when it results from an overseas assignment. In these cases, the courts usually require servicemembers to make some effort to delay their departure or to secure leave to return from their overseas stations. A majority of courts require servicemembers stationed in the continental United States to attempt to obtain leave.⁷⁵

Courts also usually require servicemembers to be diligent in their attempts to appear.⁷⁶ A servicemember may satisfy the requirement by showing that the command denied an effort to obtain leave. In other cases, servicemembers may demonstrate diligent efforts to participate in the proceedings and to complete them before an anticipated unavailability begins. In all instances, servicemembers must act in good faith in their otherwise diligent efforts to protect their rights.⁷⁷

The central issue in these evidentiary requirements is whether the case requires the servicemember's presence at trial. The trial courts often give substantial weight to the nature of the action and the relationship of the servicemember to the action. The servicemember's ignorance of the facts in a dispute may militate against a stay. On the other hand, a court may consider the availability of the servicemember either personally or by deposition during the pre-trial period to be the determining factor in denying a stay.

In some situations, courts have consistently denied stays. Denial of stays in appeals involving purely legal issues reflects courts' concern with the need for a servicemember's presence.⁷⁸ Courts have also consistently denied stays when granting them would be contrary to public policy. Abatement of a public nuisance is an example that illustrates this policy.⁷⁹ Many courts

dealing with paternity,⁸⁰ custody, and support,⁸¹ however, have favored granting stays.

3-7. Fines and Penalties on Contracts.

Section 202

When an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired. (50 U.S.C. App. § 522.)

Section 202 of the Act deals with two types of situations. First, when compliance with the terms of a contract is stayed pursuant to the Act, no fine or penalty shall accrue by reason of failure to comply during the period of the stay. Second, when no stay exists and a fine or penalty is imposed for nonperformance, the court can relieve enforcement if the person was in the military service when the penalty was incurred and his ability to pay or perform was materially impaired.

This section can be applicable to late charges on an installment contract or to a delinquency fine on a promissory note. In these cases, the court must conclude that the maker's military service impaired the ability to pay.

3-8. Stay or Vacation of Execution of Judgments, Attachments.

Section 203

In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service--

(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this Act. (50 U.S.C. App. § 523.)

This is another "stay" section of the Act. It differs from other stay provisions because it is not a stay of proceedings, but authorizes a court to stay execution of a judgment or order entered against a servicemember. It also authorizes a court to vacate or stay an attachment or garnishment on a servicemember's property. The same basic rules for granting stays under section 201 apply. These rules require good faith on the part of servicemembers. Their military service also must materially affect their ability to comply with the judgment or decree entered against them. The suit giving rise to the judgment may have commenced prior to, during, or within 60 days after military service. Additionally, "as in the case of sections 201, 301, and 302 the court is empowered to order a stay on its own motion if it finds material effect and must grant the stay on the servicemember's motion unless it finds an absence of material effect."⁸²

In the proper case, a servicemember might use this section as authority to request a court to reduce the amount of alimony or child support the court has required him to pay.⁸³ Although the statutory language speaks only of relief in cases brought against the servicemember,⁸⁴ courts have granted relief to a husband who initiated a proceeding to determine the extent of his obligation for support and maintenance because of his change in circumstances when he entered military service.⁸⁵

Additionally, one court ruled that once judgment against a servicemember-defendant is entered and stayed, a servicemember cannot question the entry of the judgment when the plaintiff appeals the court's order to suspend collection.⁸⁶

3-9. Duration and Term of Stays; Codefendants Not In Service.

Section 204

Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a co-defendant with others the plaintiff may nevertheless by leave of court proceed against the others. (50 U.S.C. App. § 524.)

This section is a companion provision to other sections of the Act that allow a court to grant a stay of proceedings because of military service. In this regard, with the exception of section 700, none of the stay provisions set a specific duration for the stay. Ideally, absent other considerations, a servicemember can obtain a stay for his entire period of military service and three months thereafter. The actual duration of a stay will frequently depend on the equities of the case.⁸⁷ Litigation under this section principally arises when a court allows an action to proceed against an individual who is a co-defendant of the person in

military service. A court will stay all proceedings in a consolidated action as to the nonservice defendant when necessary to protect the interest of the servicemember.⁸⁸

When a court grants relief in a factual situation specifically covered by one of the Act's provisions, however, the court must follow the duration provision contained in the specific section rather than the provisions of section 204.

3-10. Statute of Limitations as Affected by Period of Service.

Section 205

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment. (50 U.S.C. App. § 525.)

This section of the Act tolls statutes of limitations during the period of military service of any military plaintiff or defendant. Once military service is shown, the period of limitations is automatically tolled for the duration of the service.⁸⁹ The courts have held that this section is applicable to state governments,⁹⁰ municipal governments,⁹¹ and administrative proceedings.⁹² Whether the cause of action accrued prior to or during the period of service is immaterial.⁹³ This section is inapplicable, however, to periods of limitations imposed by federal internal revenue laws.⁹⁴

Unlike other general relief provisions, section 205 does not require servicemember's to show their military service materially affected their ability to participate in the proceedings.⁹⁵ Courts have no discretion in applying section 205, which is always self-executing.⁹⁶

Section 205 sometimes has the effect of a two-edged sword. It can operate both to the advantage and to the disadvantage of a servicemember because it applies to actions by or against the servicemember.⁹⁷

This section tolls any period of limitation established "by any law, regulation, or order . . . in any court, board, bureau, commission, department, or other agency of the government" whether related to administrative proceedings, periods for redemption of real estate, enforcement of tax obligation (not federal taxes) or assessment. Until recently, few cases held it to be inapplicable. In Pannell v. Continental Can Co.,⁹⁸ the Fifth Circuit relied on two state court decisions⁹⁹ in holding that the Act is inapplicable to a career servicemember. In Pannell, the servicemember purchased real estate during his term of service, then subsequently failed to pay state taxes on the property. The state conducted a tax sale of the property, and the servicemember failed to redeem within the statutory redemption period. The servicemember argued that the redemption period was in the nature of a statute of limitations and was tolled during the period of military service in accordance with section 205. In holding that the period was not tolled, the court said,

Section 525 is inapplicable to a career servicemember like Colonel Pannell. He is not shown to have been handicapped by his military service from asserting any claim he had prior to the expiration of the prescribed period.¹⁰⁰

In 1981, the Court of Claims rejected the Pannell analysis. In Bickford v. United States,¹⁰¹ the court held that section 205 is applicable to all servicemembers, without regard to whether their military status affects their ability to pursue an action. Bickford was a JAGC officer who sued for back pay and allowances arising from his participation in the excess leave program during law

school. A 6 year statute of limitations is applicable to such a claim, and Bickford filed suit more than 9 years after his claim accrued. The court held that Bickford's active service after law school tolled the statute and, in a footnote, stated that Pannell was wrongly decided.

Whether other courts will require a showing of prejudice or material effect remains to be seen. Only in divorce actions where desertion was not attributed to military service¹⁰² and in probate proceedings¹⁰³ have courts relaxed the requirements of section 205.

Recently, the government has invoked the doctrine of laches in wrongful discharge claims against the United States. The government has argued that, although military service tolls the statute of limitations, lengthy delays in filing claims prejudice the government's ability to defend and also significantly increase the government's liability to pay for unrendered services it does not need or want.¹⁰⁴ The laches theory has had mixed success in the courts, but it is another example of how defendants may avoid the effects of section 205.

3-11. Maximum Rate of Interest.

Section 206

No obligation or liability bearing interest at a rate in excess of 6 per centum per annum incurred by a person in military service prior to his entry into such service shall, during any part of the period of military service which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942, bear interest at a rate in excess of 6 per centum per annum unless, in the opinion of the court, upon application thereto by the obligee, the ability of such person in the military service to pay interest upon such obligation or liability at a rate in excess of 6 per centum per annum is not materially affected by reason of such service, in which case the court may make such order as in its opinion may be just. As used in this section the term

"interest" includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) in respect of such obligation or liability. (50 U.S.C. App. § 526.)

This section provides that the rate of interest on debts incurred by servicemembers prior to service shall not exceed 6 percent per annum during their period of service. To avoid application of this section, a creditor must show that the ability of the servicemember to pay more is not materially affected by reason of military service. The term "interest" includes both service and carrying charges.

As a consequence of this section, when a servicemember owes money and the interest rate is more than 6 percent per annum, the rate must be reduced to 6 percent when the debtor enters military service. The protection ends, however, if the creditor convinces a court that the servicemember's ability to pay is not materially affected by military service. The creditor's burden of persuasion is less when the servicemember is a volunteer and service occurs during peacetime.

This section does not apply to transactions entered into after entry into military service.¹⁰⁸ Attorneys should consider this section, however, in connection with section 700 in making any application for relief from financial obligations.

3-12. Federal Income Taxes.

Section 207

Section 205 of this Act shall not apply with respect to any period of limitation prescribed by or under the internal revenue laws of the United States. (50 U.S.C. App. § 527.)¹⁰⁸

FOOTNOTES

1. Case v. Case, 124 N.E.2d 856 (Ohio Probate Ct. 1955).
2. Id.
3. E.g., In re Ehlke's Estate, 250 Wisc. 583, 27 N.W.2d 754 (1947); In re Cool's Estate, 19 N.J. Misc. 236, 18 A.2d 714 (1941); Lavender v. Gernhart, 201 Md. 92, 92 A.2d 751 (1952); In re Larson, 81 Cal. App. 2d 258, 183 P.2d 688 (1947).
4. E.g., Blankenship v. Blankenship, 263 Ala. 297, 82 So. 2d 335 (1955); Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943); In re Cool's Estate, 19 N.J. Misc. 236, 18 A.2d 714.
5. Blankenship v. Blankenship, 263 Ala. at 303, 82 So. 2d at 340. See also Cloyd v. Cloyd, 564 S.W.2d 337 (Mo. App. 1978).
6. In re Cool's Estate, 19 N.J. Misc. at 238, 18 A.2d at 716-17.
7. Blankenship v. Blankenship, 263 Ala. 297, 82 So. 2d 335.
8. Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251.
9. Vera v. Vera, 14 Ohio 2d 261, 171 N.E.2d 384 (1961).
10. Rutherford v. Bentz, 354 Ill. App. 532, 104 N.E.2d 343 (1952).
11. Bowery Savings Bank v. Pellegrino, 185 Misc. 912, 58 N.Y.S.2d 771 (Sup. Ct. 1945).
12. Skates v. Stockton, 140 Ariz. 505, 683 P.2d 304 (Ariz. Ct. App. 1980); see also Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (letter from legal assistance attorney requesting a stay constituted an appearance; letter failed to invoke SSCRA).

13. E.g., Rutherford v. Bentz, 345 Ill. App. 532, 104 N.E.2d 343; In re Ehlke's Estate, 250 Wisc. 583, 27 N.W.2d 754.

14. See Kerig, The Absent Defendant and the Federal Soldiers' and Sailors' Civil Relief Act, 33 N.Y.U.L. Rev. 975, 981 (1958).

15. See United States v. Simmons, 508 F. Supp. 552 (E.D. Tenn. 1980) (court required more than a statement that no interested parties were in the military service).

16. Bedwell v. Bedwell, 68 Idaho 405, 195 P.2d 1001 (1948).

17. United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971).

18. Haller v. Walczak, 347 Mich. 292, 79 N.W.2d 622 (1956).

19. E.g., Vision Service Plan of Penn. v. Penn. AFSCME Health and Welfare Fund, 326 Pa. Supr. 474, 474 A.2d 339 (Pa. Super. Ct. 1984); Poccia v. Benson, 99 R.I. 364, 208 A.2d 102 (1965).

20. Akers v. Bonifasi, 629 F. Supp. 1212 (M.D. Tenn. 1984).

21. Courtney v. Warner, 290 So. 2d 101 (Fla. App. 1974).

22. Thompson v. Lowman, 108 Ohio App. 453, 155 N.E.2d 258, aff'g, 155 N.E.2d 250 (Ohio C.P. 1958).

23. Id., at 456, 155 N.E.2d at 261. See also Hernandez v. King, 411 So.2d 758 (La. Ct. App. 1982); Krumme v. Krumme, 6 Kan. App. 2d 939 (Ct. App. 1981); Unsatisfied Claim and Judgment Fund Bd. of Fortney, 264 Md. 246, 285 A.2d 641 (1972); Davidson v. General Finance Corp., 295 F. Supp. 878, (N.D. Ga. 1968).

24. 50 U.S.C. App. § 520 (1982).

25. Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251.

26. Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551 (1947).

27. E.g., United States v. Kaufman, 453 F.2d 306 (1971).
28. Kerig, supra note 14 at 980.
29. Borden, The Soldiers' and Sailors' Civil Relief Act, 8 Prac. Law. 65, 68 (1962).
30. Bowery Savings Bank v. Pellegrino, 185 Misc. 912, 58 N.Y.S.2d 771.
31. In re Ehlke's Estate, 250 Wisc. 583, 27 N.W.2d 754.
32. In re Cool's Estate, 19 N.J. Misc. at 239 18 A.2d at 717.
33. In re Ehlke's Estate, 250 Misc. 583, 27 N.W.2d 754.
34. Rutherford v. Bentz, 345 Ill. App. 532, 104 N.W.2d 343.
35. Sanders v. Sanders, 63 Wash. 2d 709, 713, 388 P.2d 942, 945 (1964).
36. Davidson v. GFC, 295 F. Supp. 878 (N.D. Ga. 1968).
37. E.g., Morris Plan Bank v. Hadsell, 202 Ga. 52, 41 S.E.2d 881 (1947); Radich v. Bloomberg, 140 N.J. Eq. 289, 54 A.2d 247, cert. denied, 332 U.S. 810 (1947).
38. Artis-Wergin v. Artis-Wergin, 444 N.W.2d 750 (Wis. Ct. App. 1989) (legal assistance attorney's letter to the court was "an appearance"); Skates v. Stockton, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1984) (legal assistance attorney's letter to the court invoking the Soldiers' and Sailors' Civil Relief Act was "an appearance"); see also Hayn, Soldiers' and Sailors' Civil Relief Act Update, The Army Lawyer, Feb. 1989, at 40; Reinold, Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation - Where's the Relief?, The Army Lawyer, June 1986, at 17.
39. In re Ehlke's Estate, 250 Wisc. 583, 27 N.W.2d 754.
40. Krumme v. Krumme, 6 Kan. App. 2d 939, 639 P.2d 814 (Ct. App. 1981).

41. LaMar v. LaMar, 19 Ariz. App. 128, 505 P.2d 566 (1973). Becknell v. D'Angelo, 506 S.W.2d 688 (Tex. Civ. App. 1974).

42. E.g., Thompson v. Lowman, 108 Ohio App. 453, 155 N.E.2d 258, aff'g 155 N.E.2d 250; Haller v. Walczak, 347 Mich. 292, 79 N.W.2d 622 (1956); Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551;

43. Becknell v. D'Angelo, 506 S.W.2d 688 (Tex. Civ. App. 1974).

44. Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203 (Fla. App. 1975).

45. See Saborit v. Welch, 108 Ga. 611, 133 S.E.2d 921 (1963) (defendant's absence overseas in military service prima facie shows he was prejudiced in making his defense). Cf. LaMar v. LaMar, 19 Ariz. App. 128, 505 P.2d 566 (no abuse of discretion to refuse to vacate default divorce judgment obtained against servicemember stationed abroad, where he was fully informed of action, took no steps to protect any rights he might have cared to assert, and made no attempt to stay proceedings).

46. Burgess v. Burgess, 234 N.Y.S.2d 87 (1962).

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

48. Gray v. Dillon, 97 Ariz. 16, 396 P.2d 251 (1964). See also Urbana College v. Conway, 29 Ohio App. 3d 13, 502 N.E.2d 675 (Ct. App. 1985) (an independent counterclaim arising from the same transaction, although valid, is not a meritorious defense); LaMar v. LaMar, 19 Ariz. App. 128, 505 P.2d 566 (motion to vacate must not only declare that movant has a good and meritorious defense to the action but must also set out what the defense is).

49. Flagg v. Sun Investment & Loan Corp., 373 P.2d 226 (1962).

50. Martin v. Martin, 200 Tenn. 191, 292 S.W.2d 9 (1956).

51. Kirby v. Holman, 238 Iowa 355, 25 N.W.2d 664 (1947).
52. Bagley, The Soldiers' and Sailors' Civil Relief Act--A Survey, 45 Mil. L. Rev. 1, 12 (1969).
53. Id.
54. See Mays v. Tharpe and Brooks, Inc., 143 Ga. App. 815, 240 S.E.2d 159 (1977) (a person in the military is entitled as a matter of law to a stay of proceedings against him upon his bare application stating that he is at the time actively in military service).
55. See also McCoy v. McSorley, 119 Ga. App. 603, 168 S.E.2d 202 (1969) (stays in judicial proceedings where persons in military service are involved should be liberally construed in favor of servicemember).
56. Hempstead Bank v. Gould, 54 Misc. 2d 410, 282 N.Y.S.2d 602 (1967).
57. Grimes v. State of Oklahoma, 377 P.2d 847 (1963).
58. Moulder v. State, 118 Ga. App. 87, 162 S.E.2d 785 (1968).
59. Forker v. Pomponio, 60 N.J. Super. 278, 158 A.2d 849 (1960).
60. Semler v. Oertwig, 234 Iowa 233, 12 N.W.2d 265 (1943).
61. See Booker v. Everhart, 33 N.C. App. 1, 234, S.E.2d 46 (1977) rev'd 294 N.C. 146, 240 S.E.2d 360 (1978); Runge v. Fleming, 181 F. Supp. 224 (N.D. Iowa 1960).
62. City of Cedartown v. Pickett, 194 Ga. 508, 22 S.E.2d 318 (1942).
63. Boone v. Lightner, 319 U.S. 561, reh'g denied, 320 U.S. 809 (1943).
64. Mays v. Tharpe and Brooks, Inc., 143 Ga. App. 815, 240 S.E.2d 159; see also Boothe v. Henrietta Eggleston Hosp. for Children, 168 Ga. App. 352, 308 S.E.2d 844 (Ct. App. 1984).

65. Coburn v. Coburn, 412 So.2d 947 (Fla. Ct. App. 1982) (trial court abused its discretion in refusing to postpone proceedings concerning child custody, alimony, attorneys fees, and costs until husband's military service could not hamper his ability to defend the action).

66. Fourth Nat'l Bank in Wichita v. Hill, 181 Kan. 685, 314 P.2d 312 (1957); see also Power v. Power, 720 S.W.2d 683 (Tex. Ct. App. 1976) (bare statement requester was in military was insufficient to establish material effect).

67. See Graves v. Bedner, 167 Neb. 847, 95 N.W.2d 123 (1959); Tabor v. Miller, 389 F.2d 645 (3rd Cir. 1968).

68. Sullivan v. Storz, 156 Neb. 177, 55 N.W.2d 499 (1952).

69. McCoy v. McSorley, 119 Ga. App. 603, 168 S.E.2d 202; see also Moulder v. Steele, 118 Ga. App. 87, 162 S.E.2d 785 (1968) (grant or denial of stay is final judgment on collateral matter of stay and is appealable).

70. Boone v. Lightner, 319 U.S. 561, 569 (1943).

71. See, e.g., Coburn v. Coburn, 412 So. 2d 947 (Fla. Ct. App. 1982) (burden is on party who opposes stay of military service); Bond v. Bond, 547 S.W.2d 43 (Tex. Civ. App. 1976) (trial court has wide discretion in deciding which party should carry the burden of proof on the issue of prejudice); Mayfield Sales Inc. v. Sams, 169 So. 2d 150 (La. App. 1964) (burden on defendant in military service); Holzman's Furniture Store v. Schrapf, 39 So. 2d 450 (La. App. 1949) (does not impose burden on party resisting application for stay to satisfy trial court by clear and convincing evidence that servicemember's rights are not impaired); Gates v. Gates, 197 Ga. 11, 25 S.E.2d 108 (1943) (may obtain evidence from either party); Bowsman v. Peterson, 45 F. Supp. 741 (1942) (burden on plaintiff resisting application for stay).

72. See, e.g., Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988) (to invoke stay provision, servicemember must show actual unavailability and an adverse effect created by his absence); Roberts v. Fuhr, 523 So.2d 20

(Miss. 1987) (servicemember invoking statutory stay provision has burden of showing defense will be materially affected by his military service); Palo v. Palo, 299 N.W.2d 577 (D. S.D. 1980) (stay not granted to a servicemember who failed to demonstrate an attempt to take leave, actual unavailability, and adverse effects from absence at trial). Contra Coburn v. Coburn, 412 So.2d 947 (Fla. App. Ct. 1982) (burden of persuasion in issue of material effect is on party opposing servicemember's request for a stay).

73. Mays v. Tharpe and Brooks, 143 Ga. App. 815, 240 S.E.2d 159. But see Norris v. Superior Court of Mohave County, 14 Ariz. App. 183, 481 P.2d 553 (1971) (denial of continuance was not an abuse of discretion where plaintiff was in military service and stationed in Germany, where his affidavit did not state that he would be unavailable for trial, that he had requested leave, that it was not possible to obtain leave or that his rights would be impaired if matter would be tried in his absence); Roark v. Roark, 201 S.W.2d 862 (Tex. Civ. App. 1947).

74. Boone v. Lightner, 319 U.S. 561 (1943).

75. E.g., Hackman v. Postel, 675 F. Supp. 1132 (N.D. Ill. 1988); Palo v. Palo, 299 N.W.2d 577 (D. S.D. 1980); Graves v. Bedner, 167 Neb. 847, 95 N.W.2d 123.

76. See, e.g., Palo v. Palo, 299 N.W.2d 577 (court noted that servicemember had not attempted to take leave and had not demonstrated his unavailability).

77. See Zitomer v. Holdsworth, 409 F.2d 724 (3rd Cir. 1971); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), rev'd 294 N.C. 146, 240 S.E.2d 360.

78. Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166 (1948); Rosier v. McDaniel, 129 W. Va. 401, 40 S.E.2d 832 (1946).

79. State ex rel. Swanson v. Heaton, 237 Iowa 564, 22 N.W.2d 815 (1946); City of Cedartown v. Pickett, 194 Ga. 508, 22 S.E.2d 318 (1942).

80. Mathis v. Mathis, 236 So. 2d 775 (Miss. 1970) (paternity suit is of such personal and intimate nature that absence materially affects defense unless a specific finding is made to the contrary).
81. Derby v. Kim, 238 Ga. 429, 233 S.E.2d 156 (1977).
82. Bagley, supra note 52, at 13.
83. McGlynn v. McGlynn, 178 Misc. 530, 35 N.Y.S.2d 6 (Sup. Ct. 1942).
84. Rochester Ropes v. Beckworth Havens, 182 Misc. 548, 49 N.Y.S.2d 126 (Sup. Ct. 1944).
85. McKinney v. McKinney, 182 Misc. 903, 50 N.Y.S.2d 8 (Sup. Ct. 1944).
86. Akron Auto Finance Co. v. Stonebraker, 66 Ohio App. 507, 35 N.E.2d 585 (1941).
87. E.g., Korsch v. Lambing, 28 N.Y.S.2d 167 (Sup. Ct. 1941).
88. Heck v. Anderson, 234 Iowa 379, 12 N.W.2d 849 (1944).
89. Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975).
90. Parker v. State, 185 Misc. 584, 57 N.Y.S.2d 242 (Ct. Cl. 1945).
91. Calderon v. City of New York, 184 Misc. 1057, 55 N.Y.S.2d 674 (Sup. Ct. 1945).
92. Shell Oil Co. v. Industrial Comm'n, 407 Ill. 186, 94 N.E.2d 888 (1950).
93. In re Thompson v. Reedman, 201 F. Supp. 837 (E.D. Pa. 1961); Wolf's Estate, 264 F.2d 82 (3rd Cir. 1959).
94. SSCRA § 207. Stone v. C.I.R., 73 T.C. 617 (1980); see Allen v. United States, 439 F. Supp. 463 (D.C. Cal. 1977) (statute of limitations which barred relief to taxpayer in action brought to recover alleged overpayment

of federal income tax paid while taxpayer was a member of armed services was not tolled by the Act).

95. Syzmore v. Sacramento County, 127 Cal. Rptr. 741, 55 C.A.3d 517 (1976) (section is applicable without regard to prejudice to servicemember).

96. Newman v. Newman, 234 Ga. 297, 216 S.E.2d 79 (1975); Van Heest v. Verch, 58 N.J. Super. 427, 156 A.2d 301 (1959).

97. Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); see also Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) (tolls a limitation provision if action is either against any person in military service or is against his heirs, executors, administrators, or assigns). But see Card v. American Brands Corp., 401 F. Supp. 1186 (D.C.N.Y. 1975), and Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D.C. Vt. 1974) (holding statute of limitations not tolled for wife of servicemember bringing suit in her own name).

98. Pannell v. Continental Can Co., 554 F.2d 216 (5th Cir. 1977).

99. Bailey v. Barranca, 83 N.M. 90, 488 P.2d 725 (1971); King v. Zagorski, 207 So. 2d 61 (Fla. D. Ct. App. 1968).

100. 554 F.2d 216, 225 (1977).

101. Bickford v. United States, 656 F.2d 636 (Ct. Cl. 1981).

102. Rebar v. Rebar, 165 Pa. Super. 341, 67 A.2d 598 (1949).

103. McCoy v. Atlantic Coast Lines R. Co., 229 N.C. 57, 47 S.E.2d 532 (1948).

104. Deering v. United States, 620 F.2d 242 (Ct. Cl. 1980); see also Foster v. United States, 733 F.2d 88 (Fed. Cir. 1984) (laches effective as an affirmative defense against claims filed seven, eight, and nine years after accrual); Hankins v. United States, 7 Cl. Ct. 698 (1985). See contra Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988) (government failed to demonstrate

sufficient prejudice from defendant's delay to invoke defense of laches).

105. *Shield v. Hall*, 207 S.W.2d 997 (Tex. 1948).

106. See *Stone v. C.I.R.*, 73 T.C. 617 (1980) (the section 205 provision tolling the statute of limitations is inapplicable to any limitations period under internal revenue laws).

Chapter 4

Rent, Installment Contracts, Mortgages, Liens, Assignments, Leases

4-1. Purpose and Scope

This chapter examines Articles III and VII of the Soldiers' and Sailors' Civil Relief Act. Article III contains sections 300 through 306, which relate to evictions, lease terminations, installment sales contracts, repossessions, mortgage foreclosures on real and personal property, storage lien foreclosures, and the rights of life insurance contract assignees. The benefits of Article III are the only ones the Act extends to both servicemembers and their family members. Article VII contains section 700 as its sole section. This section permits servicemembers to seek relief from financial obligations before defaulting on the payments. Except for evictions and storage lien foreclosures under Article III, the benefits available under these two articles apply only to transactions entered into by servicemembers before they enter military service.

4-2. Eviction and Distress

Section 300

(1) No eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$150 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.

(2) On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other

order as may be just. Where such stay is granted or other order is made by the court, the owner of the premises shall be entitled, upon application therefor, to relief in respect of such premises similar to that granted persons in military service in sections 301, 302, and 500 of this Act to such extent and for such period as may appear to the court to be just.

(3) Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof, or attempts so to do, shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(4) The Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury with respect to the Coast Guard, as the case may be, is empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person. (50 U.S.C. App. § 530.)

a. General. This section protects servicemembers and their dependents from eviction for nonpayment of rent.¹ It provides criminal sanctions² for those who knowingly take part in the eviction or attempted eviction of the spouse, children, or other dependents of a servicemember from any premises occupied as a dwelling and rented for less than \$150 per month. In these circumstances, a landlord must obtain a court order authorizing an eviction.³ The Act does not define the terms "eviction" and "distress," but the courts have applied their commonly accepted meanings in deciding cases arising under this section.⁴

b. Application. The provisions of this section apply when the following conditions exist:

(1) A landlord attempts an eviction or distress⁵ during the period of military service, or after receipt of orders to report to duty as provided in section 106 of the Act.

(2) The premises are occupied as a dwelling by the spouse, children, or other dependents of the servicemember.⁶

(3) The agreed rent does not exceed \$150 per month.

Although section 300 purports to apply only to those cases in which the rent does not exceed \$150, at least one court has granted relief when the amount of monthly rent exceeded \$150. In Balconi v. Dvascas,⁷ the monthly rent was \$340, but the court held that a servicemember's child and ex-wife were eligible under the Act for protection against eviction. The court concluded that the rent was actually less than \$150 if adjusted for inflation occurring since 1966, when Congress raised the maximum rent from \$80 to \$150.

Courts have required that a landlord-tenant relationship exist since this section contemplates a disturbance of that relationship.⁸ One court has, however, held this section to be applicable to a constructive eviction by the owner of a dwelling in which a servicemember's dependents were sub-tenants of the lessee.⁹

c. Action in court; material effect. A landlord may evict a servicemember or his dependents only "upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession." Although not clearly stated in the section, a fair and reasonable interpretation of the preceding phrase indicates that the landlord should first obtain a court order authorizing the eviction.¹⁰ The landlord may obtain the court order by applying to a proper court and showing that the servicemember's military service has no material effect upon the ability of his dependents to pay the rent.

Since the purpose of this section is to provide the servicemember protection against an eviction for nonpayment of rent,¹¹ the court must determine, in addition to whether a landlord-tenant relationship exists,¹² whether the tenant is a dependent of the servicemember. Additionally, the court must determine

whether the tenant's ability to pay the agreed rent is materially affected by the servicemember's military service. Material effect is present when the servicemember does not earn sufficient income to permit him to pay the rent.¹³ It is immaterial whether the dwelling was rented before or after entry on active duty.¹⁴

d. Nature and extent of relief for lessee. If the lessor files an application for an eviction order and the court finds that military service has materially affected the servicemember's ability to pay the rent, the court may either stay the eviction proceedings for not longer than three months,¹⁵ or "it may make such other order as may be just."¹⁶ In granting a three month stay, one court held that if the servicemember paid the fourth month's rent, he could not be evicted for failure to pay the previous rent. Also, the landlord could not evict him for not paying the rent that accrued during the period of the stay.¹⁷ His obligation to pay the arrears was not abated, however.

e. Extension of relief to lessor. Section 300 also permits the landlord to apply for certain relief when the court has granted a stay of eviction. The landlord, in the court's discretion, may obtain a court order providing protection similar to a servicemember's protection under sections 301, 302 and 500 of the Act.

f. Compulsory rental deductions. Section 300(4) authorizes the Secretaries of the respective services to order allotments from the pay of a servicemember to defray costs of renting premises occupied by the servicemember's dependents. The Secretary of the Army has implemented this authority in Army Regulation 37-104-3.¹⁸ In each case, the Secretary must order the deduction. Deductions will be ordered only when a court of competent jurisdiction has rendered a judgment or order directing payment, or when a commander submits a recommendation to HQDA (DACF-IC-PA), supported by a statement that a deduction is necessary to permit the continued occupancy of the dwelling by the member's dependents.

4-3. Installment Contracts

Section 301

(1) No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price, or a deposit or installment under the contract, lease, or bailment, from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered the military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment thereunder due for any other breach of the terms thereof occurring prior to or during the period of such military service, except by action in a court of competent jurisdiction.

(2) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in subsection (1) of this section or in section 107, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by a fine not to exceed \$1,000, or both.

(3) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interest of all parties. (50 U.S.C. App. § 531.)

a. General. Section 301 is designed to protect the servicemember who, prior to entry into military service,¹⁹ has entered an installment contract for the purchase of real or personal property. If the servicemember's ability to make the payments is materially affected by his service, the vendor is prohibited from taking action under the contract without authority from a proper court.

b. Application. This section applies if the servicemember has entered either an installment contract for the purchase of real or personal property, or a contract of lease or bailment with a view to purchase real or personal property, prior to entry into military service. In addition, the servicemember must have paid, prior to entry into military service, a deposit or installment under the contract. The vendor is then prohibited from exercising any right or option under the contract to rescind or terminate the contract, to resume possession of the property for nonpayment of any installment due, or to breach the terms, except by action in a court of competent jurisdiction. It is immaterial whether the nonpayment or other breach occurred prior to or during the period of military service.²⁰

This section does not prevent the parties from entering into a written agreement pertaining to repossession or forfeiture of the property, provided the parties execute the agreement subsequent to the servicemember's entry into active duty or his receipt of notice of induction.²¹

This section has no application to installment contracts entered into after entry upon active duty.²² Nor does it apply where a deposit or installment has not been paid by or on behalf of the servicemember before he receives an induction notice or before he enters active duty.²³

c. Court action required. As previously noted, this section prohibits the vendor from enforcing any of his rights under the contract except by action in a court of competent jurisdiction.²⁴ Section 301(3) provides that "upon the hearing of such action the court may order . . ." one of three possible courses of action.²⁵ This phrase, along with the phrase, "action in a court

of competent jurisdiction," indicates that the vendor must have a court order before taking any action with respect to the property in question.²⁸

This section, however, does not prevent the court from taking action to bring the property into judicial custody. In Universal C.I.T. Credit Corp. v. Ganter,²⁷ the court construed "action in a court of competent jurisdiction" and held that the issuance and delivery to the sheriff of a summons, complaint, requisition, affidavit, and an action in replevin constituted an "action in a court of competent jurisdiction as required by section 301 of the Soldiers' and Sailors' Civil Relief Act . . . and the action by the sheriff will not violate the provisions of that section."²⁸

Court procedure is mandatory under this section of the Act.²⁹ Property repossessed without benefit of the requisite court action will subject the creditor to a suit for wrongful conversion³⁰ and criminal liability. In addition, several cases indicate that where oppression, fraud, or malice on the part of the creditor can be shown, punitive damages may be awarded.³¹

d. Nature and extent of relief. When an action by a creditor-vendor comes before a court under this section, three alternative courses of action are open to the court. First, the court may order repayment of any prior installments or deposits as a condition of terminating the contract and resuming possession of the property. Second, the court may order a stay of the proceedings,³² as provided in this Act, during the period of military service and for 3 months thereafter.³³ Third, the court may make such other disposition of the case as may be equitable to conserve the interests of all parties.³⁴ These three types of relief are predicated upon a finding that the ability of the servicemember to meet his obligation is or has been materially affected by reason of his military service.³⁵

Courts have exercised their equitable powers in a variety of ways. In a case where the court found that a servicemember's ability to comply had been materially affected by his military service, but any delay in enforcement would impose an "unnecessary, unexpected and unjustifiable hardship" on the creditor, "without

bringing any benefit" to the servicemember, the court refused to grant a stay and resorted to its equitable powers to resolve the dilemma. Because the value of the security exceeded the amount due under the contract, the property was ordered sold, thereby terminating the servicemember's liability while the creditor received the balance due on the contract.³⁶ In another case in which the security for the obligation would have been destroyed or so diminished in value as to render it useless, the court ordered it sold and the proceeds divided proportionately.³⁷

e. Material effect. In determining whether military service materially affects a servicemember's ability to meet his obligations, the court may compare his financial condition prior to entry on active duty with his condition while in military service.³⁸ Thus, where it was shown that the plaintiff had defaulted prior to entry into military service and that he earned more money while in the military service than as a civilian, the court properly refused to stay the proceedings, holding that the plaintiff failed to prove that his service in the Navy impaired his ability to meet obligations.³⁹

Another factor that courts have considered is when the default or noncompliance by the servicemember began. When a pattern of noncompliance was begun long before the debtor's induction into the service, it supported the court's belief that military service was not the cause of the debtor's inability to meet the obligation.⁴⁰ Consequently, the servicemember seeking relief under this section must show hardship or material effect before he is entitled to protection under this section of the Act.

f. Criminal sanctions. As in other sections of the Act, subsection 301(2) provides that anyone who knowingly resumes possession of property that is subject to this section without taking the action required by subsection (1), or attempts to do so, shall be guilty of a misdemeanor. The punishment prescribed is imprisonment for not more than one year or a fine of not more than \$1,000 or both.

4-4. Mortgage Foreclosures

Section 302

(1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service--

(a) stay the proceedings as provided in this Act; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107, unless upon order previously granted

by the court and a return thereto made and approved by the court.

(4) Any person who shall knowingly make or cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. (50 U.S.C. App. § 532.)

a. General. This section contains language similar to section 301 and attempts to accomplish similar results. Section 302, however, is specifically designed to protect servicemembers against foreclosure of mortgages and other security instruments. The essential difference between these two sections is that section 302 requires a secured obligation, whereas section 301 does not require a security interest in the property. Section 302 requires the secured creditor to seek a court order authorizing foreclosure.

b. Application. Relief under section 302 is available to servicemembers and, pursuant to section 306, to their dependents. Subsection (1) clearly defines the obligations to which section 302 applies. In order to come within the provisions of this section, the servicemember must establish the following:

(1) That relief is sought on an obligation secured by (a) mortgage, (b) trust deed or (c) other security in the nature of a mortgage on either real or personal property;

(2) That the obligation originated prior to his entry into military service;

(3) That the property was owned by him or his dependent prior to the commencement of military service; and

(4) That the property is still owned by the servicemember or his dependent at the time relief is sought."

c. Action in court. Subsection (3) of section 302 prohibits the foreclosure and sale of mortgaged property in the absence of an agreement executed subsequent to the servicemember's receipt of notice of induction,⁴² or in the absence of a court order, regardless of any contractual provisions.⁴³ A foreclosure in violation of subsection (3) may render the action voidable, and might also subject the mortgagee or trustee to criminal prosecution.⁴⁴

The requirement for a court order prior to foreclosure and sale of mortgaged property is contained in the clause, "unless upon an order previously granted by the court. . . ." Two courts construing this clause have differed as to exactly when the order must have been previously granted. A New Jersey court held that the order must have been granted prior to the servicemember's entry on active duty.⁴⁵ A New York court, however, held that this clause means that the order must have been granted prior to foreclosure and not prior to the servicemember's entry on active duty.⁴⁶ The New York rule appears to be the correct rule, in view of the language of section 302(2): "In any proceedings commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service. . . ." The New Jersey rule could not reasonably be applied to a breach which occurred after the mortgagor's entry upon active duty.

d. Nature of ownership. The Act requires the servicemember to have "owned" the mortgaged property prior to his entry upon active duty, continuing up to the time relief is sought from the court. Several questions relating to the nature of the ownership required to bring an obligation within the Act's coverage have been litigated.

Generally, the courts have interpreted the word "owned" to mean equitable and legal interests in property. This was the usage given under the Act of 1918⁴⁷ and the same meaning has been applied to the present Act.⁴⁸ While the weight of authority supports this proposition, difficulties arise when innocent third parties who are purchasers for value without notice are

involved. In these instances, the courts avoid exercising their equitable powers in favor of the servicemember by stating that "equitable" title must be recorded.⁴⁹

e. Material effect. A mortgagee bringing a foreclosure action will provide the court with proof of the existence and the extent of the mortgage debt upon which suit is instituted and the date of default in payment. If favorable to him the mortgagee will often present the mortgagor's pre-service payment record. This is done when the record demonstrates pre-service default or a continuous pattern of tardy payments.⁵⁰

Having determined that the servicemember "owned" the property as required by section 302(1), the trial court must then form an opinion on the ability of the servicemember to meet his financial obligations. That is, the court must determine whether military service has materially affected the servicemember's ability to discharge his pre-service responsibilities in the manner agreed upon. As one court has stated, "The criteria, then, is a combination of two factors, i.e., (1) whether the defendant's inability to comply results by reason of such military service, and (2) that such military service has materially affected the ability to comply."⁵¹

To secure relief under section 302, the servicemember should provide the court with sufficient financial information on the material effect of military service.⁵² Two pieces of financial information are always essential: pre-service income and in-service income. Pre-service income, out of which the agreed mortgage payments previously were paid on time,⁵³ is considered as a standard. In-service income must not only be smaller, but it must be insufficient to reasonably maintain the servicemember before a court will grant relief.⁵⁴ Proof of in-service income should include showing the amount of (1) military pay and allowances, (2) allotments to dependents, and (3) any other nonmilitary income, even if earned by dependents. In-service income should be treated as a net amount, because proof of any additional expense caused by military service is proper. When material effect is found, the courts exercise their discretion in fashioning appropriate relief.⁵⁵

f. Nature of relief. In a mortgage foreclosure proceeding, the Act generally provides the servicemember with three types of relief, which, under proper circumstances, are as follows:

(1) A stay of the proceedings, or an extension of the maturity dates of his obligations by way of diminished payments;

(2) Where foreclosure judgment has already been ordered, a reopening or setting aside of the judgment in order that the reviewer may assert a defense;⁵⁶ and

(3) Where a sale has been had under a judgment of foreclosure, invocation of the statutory redemption period, extended by a period equal to his military service.⁵⁷

The extent of the mortgagor's financial disability resulting from military service heavily influences a court's decision on the measure of relief to be granted. Courts attempt to make equitable disposition of individual cases on their particular facts, in an effort "to conserve the interests of all parties." This effort frequently results in granting the mortgagor, in appropriate cases, some form of conditional relief.

Conditional relief usually constitutes a stay of the foreclosure proceedings on condition that the mortgagor make some partial periodic payment on the outstanding mortgage debt.⁵⁸ In its discretion, the court determines to which of the incidents of the debt the payment will be applied. Although section 302 prescribes no priority of application, a pattern has emerged from the cases. Usually, payments are applied in the following order: current and accrued taxes; hazard insurance; interest on the debt; and principal. Arrearages and FHA mortgage insurance premiums have been inserted in the priority scale in various fashions. So also have the application of sums from casualty insurance recoveries, amounts held in escrow by the mortgagee, and property surpluses.⁵⁹ Sometimes, when a court has granted a stay and ordered partial payments, the court has also required the servicemember to make periodic sworn statements of his financial condition either to the court or to the

mortgagee.⁶⁰ Conditional stay orders occasionally grant a mortgagee the right to apply for an amended stay order if the mortgagor's ability to discharge his debt becomes less impaired.⁶¹ Such an amendment is within the court's power as a matter within its equitable powers and its continuing jurisdiction over the case.

4-5. Anticipatory, Applied for Relief

Section 700

(1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

(a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as

is prescribed in such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

(b) In the case of any other obligation, liability, tax, or assessment, a stay of the enforcement thereof during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period of time equal to the period of military service of the applicant or any part of such period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of such period of military service or the date of application, as the case may be, in equal periodic installments during such extended period at such rate of interest as may be prescribed for such obligation, liability, tax or assessment, if paid when due, and subject to such other terms as may be just.

(2) When any court has granted a stay as provided in this section no fine or penalty shall accrue during the period the terms and conditions of such stay are complied with by reason of failure to comply with the terms or conditions of the obligation, liability, tax, or assessment in respect of which such stay was granted. (50 U.S.C. App. § 590.)

a. General. This section is similar to sections 301 and 302. It provides a means by which a person in military service may orderly liquidate obligations and liabilities affected by that service. The essential difference is that section 700 permits the servicemember to initiate the action instead of waiting for the creditor to commence proceedings.²²

A court may suspend enforcement of all or any portion of any obligation or liability that arose prior to entry on active duty, or any tax or assessment falling due either before or during service. To obtain relief, the servicemember must apply to the court during his military service, or within six months thereafter, and satisfy the

court that his ability to meet his obligations are materially affected by his service.

b. Application. This section includes all contracts and mortgages covered by sections 301 and 302 plus any other obligation or liability incurred prior to entry on active duty or any tax or assessment regardless of when the tax or assessment falls due. This section differs from sections 301 and 302 as follows:

(1) The servicemember is permitted to institute the action for a stay of the enforcement of his obligations;

(2) The servicemember may apply for relief even if he is not in default on the obligation;

(3) The stay under this section may be for a longer period of time than under other sections of the Act.

(4) For the purposes of relief, the section is divided into two categories:

(a) obligations incurred for the purchase of real estate or secured by a mortgage or other security in the nature of a mortgage of real estate, and

(b) all other obligations, liabilities, taxes, or assessments.

c. Action in court. To obtain relief under this section, the servicemember is required to apply to the court in accordance with subsection (1). No court, as yet, has granted relief on its own motion under the provisions of this section.

The question of whether or not a servicemember is entitled to a stay where there is no default and no action pending was raised in Application of Marks.⁶³ The court decided that no action need be pending and the servicemember need not be in default. Additionally, a servicemember is not prohibited from applying for relief after action has been brought or a stay been granted under the provisions of sections 301 or 302.⁶⁴

d. Nature of relief. Once the court is satisfied that the servicemember's ability to meet his obligations is materially affected⁶⁶ by his service, it has authority to not only stay the enforcement of the obligation, but also to set up an equitable plan or schedule for him to repay the debts he is unable to handle because of military service.

The stay provisions of this section provide that if the obligation involved is for the purchase of real estate or is secured by real estate, the court may grant a stay to allow the servicemember to suspend all payments while in service. The servicemember may then make up these back payments, plus interest, by spreading them out equally over the remaining life of the contract, plus a period of time equal to his time in service. For all other debts, the time allowable to make up the back payments cannot exceed a period of time equal to his time in service.

An example provides the best explanation of these provisions. Assume that when A enters the service, he owns a mortgaged house with 20 years remaining on the mortgage, and a boat with 5 years of installment payments remaining. While spending two years on active duty, he made reduced payments on both obligations by obtaining a stay under this section. When he is separated from the service, he has 18 more years on his mortgage and is \$1400.00 in arrears. He also has three years of payments remaining on his boat and is \$800.00 in arrears on this debt. The court may allow the \$1400.00 to be spread out for a period of 20 years and the \$800.00 for a period of two years. The maximum permissible period for the stay on the mortgage is calculated by adding the 18 years remaining on the mortgage at the time of separation to the two years A spent in the service. As to the installment contract on the boat, A could be permitted a maximum of 2 years to make up the arrears since the court is allowed to grant a stay equal to his term of service.

In addition, the discharged servicemember will be required to resume his regular payments at the same time he is paying the arrears. The stay described in the example is the maximum allowable stay. The court could

order less time for repayment, in accordance with its equitable powers.⁶⁶

4-6. Personal Property Repossession Appraisals

Section 303

Where a proceeding to foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof, has been stayed as provided in this Act, the court may, unless in its opinion an undue hardship would result to the dependents of the person in military service, appoint three disinterested parties to appraise the property and, based upon the report of the appraisers, order such sum, if any, as may be just, paid to the person in military service or his dependent, as the case may be, as a condition of foreclosing the mortgage, resuming possession of the property, or rescinding or terminating the contract. (50 U.S.C. App. § 533.)

a. General. This section is designed to provide supplemental relief for all parties when an installment contract or other obligation for the purchase of personal property has been stayed under other sections of the Act.

b. Application. Section 303 is applicable in cases where a stay has been granted under this Act in any proceeding to "foreclose a mortgage upon or to resume possession of personal property, or to rescind or terminate a contract for the purchase thereof." In such a case, the trial court is empowered to appoint three appraisers to determine the value of the personal property involved. Based on the appraised value, the court may order whatever sum, if any, it believes is representative of the servicemember's equity to be paid to the servicemember or his dependent. This payment may be made a condition precedent to foreclosing the mortgage, terminating the contract, or permitting the vendor to resume possession of the chattel. This section has been effectively employed in the situation where the value of the pledged chattel is "rapidly diminishing."⁶⁷

When applying section 303, the trial court is faced with the task of striking a delicate balance of the equities between (1) the servicemember, in whose favor a ruling previously has been made by way of a stay or proceedings; (2) the dependent of the servicemember, who should not be subjected to undue hardship as a result of losing use of the chattel; and (3) the vendor, who has neither been paid nor has the benefit of the possession of the chattel.

The sole restriction against the court's use of this section is embodied in the clause "unless in its opinion an undue hardship would result to the dependents of the person in the military service." "Undue hardship" is difficult to define. Therefore, the courts have considered it a factual determination that must be made on a case by case basis.⁸⁸

4-7. Termination of Leases by Lessees

Section 304

(1) The provisions of this section shall apply to any lease covering premises occupied for dwelling, professional, business, agricultural, or similar purposes in any case in which (a) such lease was executed by or on the behalf of a person who, after the execution of such lease, entered military service, and (b) the premises so leased have been occupied for such purposes, or for a combination of such purposes, by such person or by him and his dependents.

(2) Any such lease may be terminated by notice in writing delivered to the lessor (or his grantee) or to the lessor's (or his grantee's) agent by the lessee at any time following the date of the beginning of his period of military service. Delivery of such notice may be accomplished by placing it in an envelope properly stamped and duly addressed to the lessor (or his grantee) or to the lessor's (or his grantee's) agent and depositing the notice in the United States mails. Termination of any such lease providing for monthly payment of rent shall not be effective until thirty days after the first date on which the next rental payment is

due and payable subsequent to the date when such notice is delivered or mailed. In the case of all other leases, termination shall be effected on the last day of the month following the month in which such notice is delivered or mailed and in such case any unpaid rental for a period preceding termination shall be proratably computed and any rental paid in advance for a period succeeding termination shall be refunded by the lessor (or his assignee). Upon application by the lessor to the appropriate court prior to the termination period provided for in the notice, any relief granted in this subsection shall be subject to such modifications or restrictions as in the opinion of the court justice and equity may in the circumstances require.

(3) Any person who shall knowingly seize, hold, or detail the personal effects, clothing, furniture, or other property of any person who has lawfully terminated a lease covered by this section, or in any manner interfere with the removal of such property from the premises covered by such lease, for the purpose of subjecting or attempting to subject any of such property to a claim for rent accruing subsequent to the date of termination of such lease, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. (50 U.S.C. App. § 534.)

a. General. This section of the Act differs from section 300 dealing with eviction in that it provides a method by which the servicemember-lessee, rather than the lessor, may terminate a lease. Its scope is not limited, as is section 300, by either the amount of the agreed rent or the nature of the premises. Section 304 is, however, limited in application to premises occupied prior to^{oo} entry into military service. In further contrast to section 300, this section does not require that the lessee's ability to perform be materially affected by his military service.

b. Application. The termination provisions of this section apply to any lease covering premises occupied

for dwelling, professional, business, agricultural or similar purposes, if the following two conditions are met:

(1) The lease was executed by a person who, after the execution of such lease, entered military service;⁷⁰ and

(2) The leased premises have been occupied for such purposes by the servicemember or his dependents.

c. Procedural requirements. The lessee must deliver written notice of termination to the lessor at any time after entry on active duty or receipt of orders as contemplated by section 106.⁷¹ Delivery may be made by posting a properly addressed and stamped envelope in the U.S. mails. Oral notice to the lessor is insufficient.⁷²

The effective date of the termination is determined by the method of rental payment under the lease. In the case of a month to month rental, the termination becomes effective 30 days after the first date on which the next rental payment is due subsequent to the date when the notice of termination is delivered. For example, if the rent is due on the first day of each month, and notice is mailed on 1 August, then the "next rental payment is due and payable" on 1 September. Thirty days after that date would be 1 October, the effective date of termination.

All other leases will be terminated on the last day of the month following the month in which proper notice is delivered. For example, if the lease requires a weekly or yearly rental and proper notice of termination is given on 20 July, the effective date of termination would be 31 August.

d. Return of security or prepaid rent. The servicemember is required to pay rent for only those months before the lease is terminated.⁷³ If the servicemember has paid rent in advance, then section 304 requires the lessor to prorate and refund the unearned portion. If a deposit for security was required by the lessor, then, upon termination of the lease, the lessee is entitled to the deposit.⁷⁴

e. Lessor's rights. Section 304 also extends certain rights to the lessor whose lease is terminated under these provisions. The lessor may, during the period from his receipt of notice to the effective date of termination, petition the appropriate court for relief from the lease termination. The court may then make such "modifications or restrictions as in the opinion of the court justice and equity may in the circumstances require."⁷⁵ If the lessor seizes or attempts to seize the personal property of the lessee for the purpose of subjecting the property to a claim for rent accruing after the effective date of termination, however, he may commit a misdemeanor under subsection (3).⁷⁶

4-8. Rights of Life Insurance Assignees; Enforcement of Storage Liens

Section 305

(1) Where any life insurance policy on the life of a person in military service has been assigned prior to such person's period of military service to secure the payment of any obligation of such person, no assignee of any policy (except the insurer in connection with a policy loan) shall, during the period of military service of the insured or within one year thereafter, except upon the consent in writing of the insured made during such period or when the premiums thereon are due and unpaid or upon the death of the insured, exercise any right or option by virtue of such assignment unless upon leave of court granted upon an application made therefor by such assignee. The court may thereupon refuse to grant such leave unless in the opinion of the court the ability of the obligor to comply with the terms of the obligation is not materially affected by reason of his military service. For the purpose of this subsection premiums which are guaranteed under the provisions of article IV of this Act shall not be deemed to be due and unpaid.

(2) No person shall exercise any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a person in military service during such person's

period of military service and for 3 months thereafter, except upon an order previously granted by a court upon application therefor and a return thereto made and approved by the court. In such proceeding the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to pay the storage charges due is not materially affected by reason of his military service--

(a) stay the proceedings as provided in this Act, or

(b) make such other disposition of the case as may be equitable to conserve the interest of all parties. The enactment of the provisions of this subsection shall not be construed in any way as affecting or as limiting the scope of section 302 of this Act.

(3) Any person who shall knowingly take any action contrary to the provisions of this section, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both. (50 U.S.C. App. § 535.)

a. Life insurance. Subsection (1) is designed to govern the situation where, prior to entry into military service, an insured has assigned his life insurance policy as collateral for a loan. After entry on active duty, this section prohibits the assignee from exercising any right or option under the assignment of the policy except in the following circumstances:

(1) Where written consent is made by the insured after entry into military service; or

(2) When the premiums on the policy due are unpaid;⁷ or

(3) When the insured dies; or

(4) Upon leave of court granted upon an application made therefor by the assignee.

The purpose of this section is to require creditors holding life insurance policies as collateral to obtain court approval before attaching the proceeds of the policy.

b. Storage liens. Subsection (2) pertains to the foreclosure of liens for storage of household goods or other personal property of military personnel, whether the goods were stored prior to entry upon active duty or not. Such foreclosure is prohibited during the period of military service and for three months thereafter, unless the lienholder obtains an order from a court and a return is made and approved by the court.⁷⁸

Congress included this section to ensure judicial safeguards in all foreclosure proceedings and to avoid the possibility that summary foreclosures allowed by some states would be held without the protections of section 302.⁷⁹

4-9. Extension of Benefits to Dependents

Section 306

Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent. (50 U.S.C. App. § 536.)

Under the terms of this section, dependents of military personnel may apply to a court for the benefits of all the sections under Article III.⁸⁰ If the court finds that the dependent's ability to comply with the terms of a contract or other obligation is materially affected by the military service of the person upon whom he or she is dependent, then the court is authorized to

grant the dependent at least the same degree of relief to which the servicemember would be entitled."⁸¹

Congress added this section in 1942 to avoid situations in which dependents suffered as a result of the servicemember's period of service. It applies the situations such as the foreclosure of a mortgage on the home of a widowed mother, entirely dependent upon her soldier son, because she herself was not a "person in the military service."⁸²

Since the Act does not define "dependent," the courts have treated this as a question of fact to be determined in each individual case. The courts have determined whether the individual invoking the Act is dependent upon a servicemember for support and maintenance. One court held that this section does not protect a business partner.⁸³

FOOTNOTES

1. The provisions of this section are entirely different from, and not to be confused with, the provisions of section 302, which deals with mortgages, trust deeds, etc. *Union Labor Life Ins. Co. v. Wendeborn*, 19 N.J. Misc. 496, 21 A.2d 317 (1941).

2. A violation of this section will also support an action for damages for wrongful eviction, including an award of punitive damages. *Spampinato v. M. Breger & Co.*, 226 F.2d 742 (2d Cir. 1955), cert denied, 350 U.S. 973, reh'g denied, 350 U.S. 1009 (1956); *Prather v. Clover Spinning Mills*, 215 S.C. 103, 54 S.E.2d 529 (1949).

3. Pub. L. No. 89-358, § 10, 80 Stat. 28 (1966), raised the rent ceiling amount from \$80 to \$150 per month.

4. "Eviction" means "a dispossession of a tenant by a landlord." "Distress" is "the taking of another's personal property out of his possession either for holding or for sale in order to obtain satisfaction of a part due rent claim." *Leshner v. Louisville Gas & Electric Co.*, 49 F. Supp. 88 (W.D. Ky. 1943); *Arkless v. Kilstein*, 61 F. Supp. 886 (E.D. Pa. 1944).

5. For a case holding that the tenant may waive his rights to an action for wrongful distress under this section, see State ex. rel. *Myers v. Kodge*, 129 W. Va. 820, 42 S.E.2d 23 (1947).

6. The persons entitled to protection under this section are those in the armed service, or their dependents, who have an obligation to pay rent for the leased premises. *Pfeiffer v. McGarvey*, 61 F. Supp. 570 (E.D. Pa. 1945). See *Balconi v. Drascas*, 133 Misc.2d 685, 507 N.Y.S.2d 788 (Rochester City Ct. 1986) (dependents include child and ex-wife who are financially dependent on servicemember).

7. *Balconi v. Drascas*, 133 Misc.2d 686, 507 N.Y.S.2d 788 (Rochester City Ct. 1986).

8. See Clinton Cotton Mills v. United States, 164 F.2d 173 (4th Cir. 1947); Leshner v. Louisville Gas & Electric Co., 49 F. Supp. 88; Arkless v. Kilstein, 61 F. Supp. 886.

9. Clinton Cotton Mills v. United States, 164 F.2d 173.

10. It is not necessary to file a petition for authority to commence the eviction proceeding; only "leave of court" is necessary before any actual eviction is proper. Eviction proceedings could be commenced against a servicemember without filing a petition for authority to commence the proceeding. Cox v. McGregor, 330 Mich. 260, 47 N.W.2d 87 (1951). See generally 24 A.L.R.2d 1067 (1951).

11. See London v. O'Connell, 20 Misc.2d 168, 192 N.Y.S.2d 594 (N.Y. City Mun. Ct. 1959); Bronson v. Chamberlain, 53 N.Y.S.2d 172 (Syracuse Mun. Ct. 1945).

12. See Scanlan v. Garrick, 326 Ill. App. 461, 61 N.E.2d 773 (1945); Nassau Savings & Loan Ass'n v. Ormond, 179 Misc. 447, 39 N.Y.S.2d 92 (Sup. Ct. 1942); Prather v. Clover Spinning Mills, 215 S.C. 103, 54 S.E.2d 529.

13. See para. 4.4e, infra, for a full discussion of "material effect." For examples in which courts denied relief under this section because the petitioner failed to show that his ability to pay was materially affected by reason of his military service, see Arkless v. Kilstein, 61 F. Supp. 886; and Harvey v. Home Owners' Loan Corp., 189 Misc. 73, 67 N.Y.S.2d 586 (Sup. Ct. 1946).

14. Clinton Cotton Mills v. United States, 164 F.2d 173.

15. Daily v. Kelly, 304 Ky. 229, 200 S.E.2d 114 (1947).

16. See, e.g., Academy St. Corp. v. Calderson, 38 Misc.2d 873, 238 N.Y.S.2d 853 (N.Y. City Ct. 1963); Railroad Federal Savings & Loan Ass'n v. Morrison, 179 Misc. 893, 40 N.Y.S.2d 319 (Sup. Ct. 1943).

17. Jonda Realty Corp. v. Marabotto, 178 Misc. 393, 34 N.Y.S.2d 301 (Sup. Ct. 1942).

18. Army Reg. 37-104-3, Financial Administration: Military Pay and Allowances Procedures, para. 55-5 (4 Apr. 1988).
19. Jim's Trailer Sales, Inc. v. Shutok, 153 F. Supp. 274 (W.D. Pa. 1957).
20. Hampton v. Commercial Credit Corp., 199 Mont. 476, 176 P.2d 270 (1946).
21. SSCRA § 107. See also Hansen v. Ryan, 186 S.W.2d 595 (Mo. 1945).
22. Jim's Trailer Sales, Inc. v. Shutek, 153 F. Supp. 274 (W.D. Pa. 1957); accord, Charles H. Jenkins v. Lewis, 259 N.C. 86, 130 S.E.2d 49 (1963).
23. Cox v. McGregor, 330 Mich. 260, 47 N.W.2d 87 (1951); Ryan v. Bloom, 120 Mont. 443, 186 P.2d 879 (1947), cert. denied, 333 U.S. 874 (1948).
24. This section does not provide the servicemember-debtor any rights until after the vendor has sought to enforce the contract, either by repossession or through court action. Application of Roosin, 30 N.Y.S.2d 9 (Sup. Ct. 1941).
25. See paragraph 4.3d, infra.
26. See Luke v. Mercantile Acceptance Corp. of Cal. 111 Cal. App.2d 431, 244 P.2d 764 (1952).
27. Universal C.I.T. Credit Corp v. Ganter, 182 Misc. 833, 44 N.Y.S.2d 908, 910 (Sup. Ct. 1943).
28. Note that the servicemember's interest was protected by the plaintiff's undertaking in replevin. Furthermore, the effect of this holding was to approve the action of the sheriff as an officer of the court, and not to allow the creditor to repossess without court action.
29. S. & C. Motors v. Carden, 223 Ark. 164, S.W.2d 627 (1954).

30. See *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah 1977); *Pacific Finance Corp. v. Gilkerson*, 217 S.W.2d 440 (Tex. Civ. App. 1949); *Application of Aber*, 180 Misc. 736, 40 N.Y.S.2d 48 (Sup. Ct. 1942); *Hampton v. Commercial Credit Corp.*, 119 Mont. 476, 176 P.2d 270 (1946).

31. *Hampton v. Commercial Credit Corp.*, 119 Mont. 476, 176 P.2d 270. See also *Bowling v. Stark*, 268 So.2d 201 (Fla. App. 1972).

32. The court may grant the stay on its own motion, or on motion by the servicemember or someone on his behalf.

33. SSCRA § 204, and SSCRA § 101(2).

34. *Nassau Savings & Loan Assoc. v. Ormond*, 179 Misc. 447, 39 N.Y.S.2d 92.

35. The grammatical construction of this section indicates that the "material effect" clause in section 301(3) modifies the first and second types of relief only. The cases which have granted other equitable relief, however, have also required some showing that the servicemember's ability to comply is or has been materially affected by his military service. See *Boone v. Lightner*, 319 U.S. 561, reh'g denied, 320 U.S. 809 (1943); *Fed. Nat. Mortgage Ass'n. v. Denziel*, 136 F. Supp. 859 (E.D. Mich. 1956); *New York Life Ins. Co. v. Litke*, 180 Misc. 297, 41 N.Y.S.2d 526 (Sup. Ct. 1943) modified on other grounds, 181 Misc. 32, 45 N.Y.S.2d 576 (Sup. Ct. 1943). But see *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380. (In an action in which damages were sought for wrongful repossession of plaintiff's car, without filing a lawsuit, while he was in military service, plaintiff was not required to prove inability to pay occasioned by his military service.)

36. *Associates Discount Corp. v. Armstrong*, 33 N.Y.S.2d 36 (Rochester City Ct. 1942).

37. *Holtzman's Furniture Store v. Schrapp*, 30 So.2d 450 (La. App. 1949).

38. *Brown Service Ins. Co. v. King*, 247 Ala. 311, 24 So.2d 219 (1945).

39. *Harvey v. Home Owners' Loan Corp.*, 189 Misc. 73, 67 N.Y.S.2d 586 (1946).
40. *See Creamer v. Ansopiano*, 183 Misc. 716, 52 N.Y.S.2d 862 (Sup. Ct. 1945); *Reese v. Bacon*, 176 S.W.2d 971 (Tex. Civ. App. 1944).
41. *Meyers v. Schmidt*, 181 Misc. 589, 46 N.Y.S.2d 420 (Sup. Ct. 1944). *See also Tucson Telco Federal Credit Union v. Bowser*, 9 Ariz. App. 242, 451 P.2d 322 (1969) (obligation of adult single woman evidenced by note and chattel mortgage executed solely by her, encumbering automobile owned by her, incurred eight months prior to her marriage to a civilian, who one year later was inducted into the Armed Forces, which obligation was paid entirely from earnings from maker until repossession of automobile, was obligation entitled to protection of provisions of sections 300-306 of the Act).
42. SSCRA § 107.
43. *Hoffman v. Charlestown Five Cents Sav. Bank*, 231 Mass. 324, 121 N.E. 15 (1918).
44. SSCRA § 302(4).
45. *Stability Building and Loan Ass'n v. Liebowitz*, 132 N.J. Eq. 477, 28 A.2d 653 (1942).
46. *Syracuse Savings Bank v. Brown*, 181 Misc. 999, 42 N.Y.S.2d 156 (Sup. Ct. 1943).
47. *Morse v. Stober*, 233 Mass. 223, 123 N.E. 780 (1919); *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 324, 121 N.E. 15 (1918).
48. *Fourth National Bank in Wichita v. Hill*, 181 Kan. 683, 314 P.2d 312 (1957); *Guleserian v. Pilgrim Trust Co.*, 331 Mass. 431, 120 N.E.2d 193 (1954); *Twitchell v. Home Owners' Loan Corporation*, 59 Ariz. 22, 122 P.2d 210 (1942).
49. *E.g., Lansing v. Kremmelbein*, 33 Misc.2d 899, 227 N.Y.S.2d 138 (Sup. Ct. 1962); *Godwin v. Gerling*, 362 Mo. 19, 239 S.W.2d 352 (1951).

50. Franklin Soc. for Home-Building & Savings v. Flavin, 265 App. Div. 720, 40 N.Y.S.2d 582 (1943), aff'd, 291 N.Y. 530, 50 N.E.2d 653, cert. denied, 320 U.S. 786 (1944).

51. Hunt v. Jacobson, 178 Misc. 201, 204, 33 N.Y.S.2d 661, 664 (Sup. Ct. 1942).

52. The Act does not state which party has the burden of proof. The Supreme Court in Boone v. Lightner, 319 U.S. 561 (1943) ruled that the burden of going forward would be determined by the trial courts. In some cases, the servicemember was required to prove material effect, e.g., Queens County Sav. Bank v. Thaler, 181 Misc. 229, 44 N.Y.S.2d 4 (Sup. Ct. 1943); whereas in other cases the one bringing the action against a servicemember had the burden of proving lack of material effect, e.g., Meyers v. Schmidt, 181 Misc. 589, 46 N.Y.S.2d 420. In any event, the servicemember should be prepared to go forward with sufficient evidence to support his position.

53. "While promptness in the payment of a bill may indicate ability to pay, the failure to be prompt in the payment of bills does not necessarily indicate inability to pay." Meyers v. Schmidt, 181 Misc. at 592, 46 N.Y.S.2d at 423.

54. Hempstead Bank v. Collier, 289 N.Y.S.2d 797 (Sup. Ct. 1967).

55. E.g., Brown Service Ins. Co. v. King, 247 Ala. 311, 24 So.2d 219.

56. The case should be examined, in the event of a default judgment, to determine whether there was either a false affidavit or a failure to file an affidavit as is required by section 200. Such a defect may affect the validity of the judgment obtained. Wilkin v. Shell Oil Co., 197 F.2d 42 (10th Cir. 1951); cert. denied, 344 U.S. 854; reh'g denied, 344 U.S. 888.

57. See SSCRA § 205; e.g., Illinois National Bank of Springfield v. Gwinn, 348 Ill. App. 9, 107 N.E.2d 764 (1952); Radich v. Bloomberg, 140 N.J. Eq. 289, 54 A.2d 249 (1947); Flagg v. Sun Investment & Loan Corp., 373 P.2d 226 (Okla. 1962).

58. E.g., Federal National Mortgage Association v. Deziel, 136 F. Supp. 859.

59. See Brown Service Ins. Co. v. King, 247 Ala. 311, 24 So.2d 219; Railroad Federal Savings & Loan Ass'n v. Morrison, 179 Misc. 893, 40 N.Y.S.2d 319 (Sup. Ct. 1943); Nassau Savings & Loan Ass'n v. Ormond, 179 Misc. 447, 39 N.Y.S.2d 92.

60. New York Life Ins. Co. v. Litke, 180 Misc. 297, 41 N.Y.S.2d 526, modified on other grounds, 181 Misc. 32, 45 N.Y.S.2d 576.

61. E.g., O'Leary v. Horgan, 179 Misc. 518, 39 N.Y.S.2d 555 (1943).

62. Kindy v. Koenke, 216 F.2d 907 (8th Cir. 1954).

63. 181 Misc. 497, 46 N.Y.S.2d 755 (Sup. Ct. 1944).

64. New York Life Ins. Co. v. Litke, 180 Misc. 297, 41 N.Y.S.2d 526, modified on other grounds, 181 Misc. 32, 45 N.Y.S.2d 576.

65. See para. 4.43., supra, for a discussion of material affect.

66. E.g., Application of Pickard, 187 Misc. 400, 60 N.Y.S.2d 506 (1946); Morris Plan Indus. Bank of N.Y. v. Petluck, 187 Misc. 87, 60 N.Y.S.2d 162 (1946).

67. See S & C Motors v. Carden, 223 Ark. 164, 264 S.W.2d 627 (1954); and Associates Discount Corp. v. Armstrong, 33 N.Y.S.2d 36 (Rochester City, Ct. 1942).

68. Commercial Securities Co. v. Kavanaugh, 13 So.2d 533 (La. App., 1943). This case also contains an excellent discussion of the reasons for the 1942 amendment to this section. For two cases applying this section prior to the 1942 amendment, see Price v. Phillips, 12 So.2d 59 (La. App. 1942); National Bond & Investment Co. v. Christner, 24 Westmoreland County, L.J. (C.P. 1942).

69. This is emphasized because most servicemembers have the mistaken belief that this section applies to leases entered into after entry on active duty.

70. In *Erlich v. Landman*, 179 Misc. 972, 40 N.Y.S.2d 743 (Sup. Ct.), appeal denied, 266 App. Div. 941, 46 N.Y.S.2d 219 (Sup. Ct. 1943) (the fact that the lessee's son, for whom the lessee leased the premises, went into the Army, did not entitle lessee to relief under this section).

71. SSCRA § 106; *Ostrowski v. Barzynski*, 24 Erie County L.J. 221, 45 Pa. D. & C. 452 (C.P. 1942).

72. SSCRA § 106; *Ostrowski v. Barzynski*, 24 Erie County L.J. 221, 45 Pa. D. & C. 452 (C.P. 1942).

73. *J.C.H. Service Stations, Inc. v. Patrikes*, 181 Misc. 401, 46 N.Y.S.2d 228 (N.Y. City Ct. 1944).

74. *Patrikes v. J.C.H. Service Stations, Inc.*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct.), aff'd, 180 Misc. 927, 46 N.Y.S.2d 233 (Sup. Ct. 1943).

75. *Bal Harbour Tower, Inc. v. Keller*, 227 So.2d 219 (Fla. App. 1969).

76. Personal property has been defined as including personal effects, clothing, or furniture and was extended to include a money deposit. *Patrikes v. J.C.H. Service Stations, Inc.*, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct.), aff'd, 180 Misc. 927, 46 N.Y.S.2d 233.

77. Under the express language of this section, premiums that are guaranteed under the provisions of Article IV of this Act shall not be deemed to be due and unpaid.

78. See para. 4.3c, supra, for a discussion of court order and a return thereto.

79. This section specifically states that it shall not affect or limit the scope of section 302.

80. While section 700 is included in this chapter, the extension of benefits to dependents applies to Article III only.

81. See, e.g., Reid v. Margolis, 181 Misc. 222, 44 N.Y.S.2d 518 (1943); Pfeiffer v. McGarvey, 61 F. Supp. 570 (E.D. Pa. 1945); Tucson Telco Federal Credit Union v. Bowser, 451 P.2d 322 (Ariz. App. 1969).

82. See Great Barrington Savings Bank v. Brown, 239 Mass. 546, 132 N.E. 398 (1921).

83. Patrikes v. J.C.H. Service Stations, Inc., 180 Misc. 917, 42 N.Y.S.2d 158 (N.Y. City Ct.), aff'd 180 Misc. 927, 46 N.Y.S.2d 233 (Sup. Ct.).

Chapter 5

Insurance

5-1. Purpose and Scope

The purpose of this chapter is to discuss Article IV, section 400 through 408, of the Soldiers' and Sailors' Civil Relief Act. These sections provide a means by which a servicemember may have the Veterans' Administration guarantee payment of premiums on certain types of commercial life insurance contracts. Relatively few servicemembers have applied for benefits under these sections, probably because the law merely provides a moratorium on premiums and does not relieve the servicemember from liability for repayment of the premiums.

a. General. These sections are designed to provide a means by which any person entering the armed services may apply for continued protection by commercial life insurance.¹ Upon proper application, a servicemember may have the premiums and interest for certain types of commercial life insurance guaranteed for his period of military service and for two years thereafter.²

The Administrator of Veterans' Affairs³ is charged with supervising the implementation of these sections. Section 407 authorizes and directs the Administrator of Veterans' Affairs to promulgate regulations and procedures necessary to implement the provisions of sections 400 through 408. Pursuant to this authority, the administrator has prescribed regulations that may be found in volume 38 of the Code of Federal Regulations, sections 7.20 through 7.34.

b. Application. The provisions of these sections apply to commercial life insurance policies taken out by any person in the military service of the United States⁴ whose life is insured under and who is the owner of such policy⁵ The policy must be in force on a premium paying basis at the time the servicemember applies for benefits. The servicemember must have taken out the policy and paid one premium not less than 180 days⁶ before the date the insured entered military service.⁷ Also, the maximum

amount of life insurance guaranteed for any one individual is \$10,000.⁸

Attorneys should examine policy provisions to determine eligibility. A policy containing a provision that limits or eliminates liability for death arising from or in connection with military service, or any activity that the insured may be called upon to perform in connection with his military service, is not eligible for protection under the Act.⁹ A policy that requires the insured servicemember to pay an additional premium because of military service is also outside the purview of the Act.¹⁰

c. Nature and extent of relief. An individual entitled to the benefits of the Act may request governmental guarantee of premiums by filing Veterans' Administration Form 9-380 with his insurance company and forwarding a copy of the application to the Veterans' Administration.¹¹ The Veterans' Administration will then determine whether the policy is covered by the sections in Article IV or not.¹² The Veterans' Administration determination is final and is not subject to review by any other official, agency,¹³ or court.¹⁴

Unlike several other sections, such as sections 201 and 301, which require the court to find that the servicemember was materially affected by military service, these sections do not require a specific finding of material effect. Hence, any person in military service could apply for relief in accordance with these sections. Relief may be granted regardless of the impact of military service on the individual's ability to pay the premiums.

Once the Veterans' Administration deems a policy to be covered by Article IV, the policy will not lapse, terminate, or be forfeited because of the servicemember's failure to make premium payments or pay any indebtedness or interest due during this period of military service or for two years after the expiration of such service.¹⁵ During this period, the government does not pay the premiums for the servicemember but simply guarantees that the premiums will be paid at the end of the period.

The insured servicemember must repay the unpaid premiums and interest no later than 2 years after the expiration of his term of military service.¹⁶ If he fails to pay these amounts by the end of this 2 year period, the amount then due is treated by the insurance company as a loan on the policy.¹⁷ This assumes that the policy has a sufficient cash surrender value to cover the amount of the unpaid premiums and interest. If the cash surrender value of the policy is less than the amount owed, the insurance company may terminate the policy and the United States will pay the insurance company the difference between the cash surrender value and the amount of the then outstanding debt.¹⁸ Also, if the policy matures as a result of death or by any other means during the protected period, the insurance company is required to deduct from the amount of the settlement the unpaid premiums and interest that were guaranteed by the Veterans' Administration.¹⁹

If the United States is required to pay any amount to an insurance company under the provisions of Article IV, the amount paid becomes a debt due the United States by the insured. This amount may be deducted from any other amounts due the insured by the United States.²⁰ If there is no other sum of money due the insured by the United States, a civil action may be brought to recover the sum due.²¹

5-2. Definitions

Section 400

As used in this article--

(a) The term "policy" shall include any contract of life insurance or policy on a life, endowment, or term plan, including any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association, which does not provide for the payment of any sum less than the face value thereof or for the payment of an additional amount as premiums if the insured engages in the military service of the United States as defined in section 101 of article I of this Act or which does not contain any limitation or restriction upon coverage relating

to engagement in or pursuit of certain types of activities which a person might be required to engage in by virtue of his being in such military service, and (1) which is in force on a premium-paying basis at the time of application for benefits hereunder, and (2) which was made and a premium paid thereon before the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942 or not less than one hundred and eighty days before the date the insured entered into the military service. The provisions of this Act shall not be applicable to policies or contracts of life insurance issued under the War Risk Insurance Act, as amended, the World War Veterans Act, as amended, or the National Service Life Insurance Act of 1940, as amended.

(b) The term "premium" shall include the amount specified in the policy as the stipend to be paid by the insured at regular intervals during the period therein stated.

(c) The term "insured" shall include any person in the military service of the United States as defined in section 101, article I, of this Act, whose life is insured under and who is the owner and holder of and has an interest in a policy as above defined.

(d) The term "insurer" shall include any firm, corporation, partnership, or association chartered or authorized to engage in the insurance business and to issue a policy as above defined by the laws of a State of the United States or the United States. (50 U.S.C. App. § 540.)

5-3. Persons Entitled to Benefits

Section 401

The benefits and privileges of this article shall apply to any insured, when such insured, or a person designated by him, or, in case the insured is outside the continental United States (excluding Alaska and the Panama Canal Zone), a beneficiary, shall make written application for protection under

this article, unless the Administrator of Veterans' Affairs in passing upon such application as provided in this article shall find that the policy is not entitled to protection hereunder. The Veterans' Administration shall give notice to the military and naval authorities of the provisions of this article, and shall include in such notice an explanation of such provisions for the information of those desiring to make application for the benefits thereof. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Veterans' Administration. The total amount of insurance on the life of one insured under policies protected by the provisions of this article shall not exceed \$10,000. If an insured makes application for protection of policies on his life totaling insurance in excess of \$10,000, the Administrator is authorized to have the amount of insurance divided into two or more policies so that the protection of this article may be extended to include policies for a total amount of insurance not to exceed \$10,000, and a policy which affords the best security to the Government shall be given preference. (50 U.S.C. App. § 541.)

5-4. Form of Application

Section 402

Any writing signed by the insured and identifying the policy and the insurer, and agreeing that his rights under the policy are subject to and modified by the provisions of this article, shall be sufficient as an application for the benefits of this article, but the Veterans Administration may require the insured and insurer to execute such other forms as may be deemed advisable. Upon receipt of the application of the insured the insurer shall furnish such report to the Veterans' Administration concerning the policy as shall be prescribed by regulations. The insured who has made application for protection under this article and the insurer shall be deemed to have agreed to such modification of the policy as may be required to give this article full force and

effect with respect to such policy. (50 U.S.C. App. § 542.)

5-5. Lapse of Policies for Nonpayment of Premiums

Section 403

The Administrator of Veterans' Affairs shall find whether the policy is entitled to protection under this article and shall notify the insured and the insurer of such finding. Any policy found by the Administrator of Veterans' Affairs to be entitled to protection under this article shall not, subsequent to the date of application, and during the period of military service of the insured or during two years after the expiration of such service, lapse or otherwise terminate or be forfeited for the nonpayment of a premium becoming due and payable, or the nonpayment of any indebtedness or interest. (50 U.S.C. App. § 543.)

5-6. Rights and Privileges of Insured

Section 404

No dividend or other monetary benefit under a policy shall be paid to an insured or used to purchase dividend additions while a policy is protected by the provisions of this article except with the consent and approval of the Veterans' Administration. If such consent is not procured, such dividends or benefits shall be added to the value of the policy to be used as a credit when final settlement is made with the insurer. No cash value, loan value, or withdrawal of dividend accumulation, or unearned premium, or other value of similar character shall be available to the insured while the policy is protected under this article except upon approval by the Veterans' Administration. The insured's right to change a beneficiary designation or select an optional settlement for a beneficiary shall not be affected by the provisions of this article. (50 U.S.C. App. § 544.)

5-7. Settlement of Policies During Protection

Section 405

In the event of maturity of a policy as a death claim or otherwise before the expiration of the period of protection under the provisions of this article, the insurer in making settlement will deduct from the amount of insurance the premiums guaranteed under this article, together with interest thereon at the rate fixed in the policy for policy loans. If no rate of interest is specifically fixed in the policy, the rate shall be the rate fixed for policy loans in other policies issued by the insurer at the time the policy bought under the Act was issued. The amount deducted by reason of the protection afforded by this article shall be reported by the insurer to the Administrator of Veterans' Affairs. (50 U.S.C. App. § 545).

5-8. Guaranty of Premiums and Interest

Section 406

Payment of premiums and interest thereon at the rate specified in section 405 hereof becoming due on a policy while protected under the provisions of this article is guaranteed by the United States, and if the amount so guaranteed is not paid to the insurer prior to the expiration of the period of insurance protection under this article, the amount then due shall be treated by the insurer as a policy loan on such policy, but if at the expiration of said period the cash surrender value is less than the amount then due, the policy shall then cease and terminate and the United States shall pay the insurer the difference between such amount and the cash surrender value. The amount paid by the United States to an insurer on account of applications approved under the provisions of this article, as amended, shall become a debt due to the United States by the insured on whose account payment was made and, notwithstanding any other Act, such amount may be collected either by deduction from any amount due said insured by the

United States or as otherwise authorized by law. Any moneys received as repayment of debts incurred under this article, as originally enacted and as amended, shall be credited to the appropriation for the payment of claims under this article. (50 U.S.C. App. § 546.)

5-9. Regulations; Finality of Determinations

Section 407

The Administrator of Veterans' Affairs is hereby authorized and directed to provide by regulations for such rules of procedure and forms as he may deem advisable in carrying out the provisions of this article. The findings of fact and conclusions of law made by the Administrator of Veterans' Affairs in administering the provisions of this article shall be final, and shall not be subject to review by any other official or agency of the Government. (50 U.S.C. App. § 547.)

5-10. Prior Act

Section 408

(1) The provisions of this article in force immediately prior to the enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942 (hereinafter in this section called "such provisions") shall remain in full force and effect with respect to all valid applications for protection executed prior to the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942 and all policies to which such applications pertain shall continue to be entitled to the protection granted thereby.

(2) Any insurer under a policy accepted under such provisions shall, subject to the approval of the Administrator of Veterans' Affairs and upon complete surrender by it to the United States, within ninety days after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendment of 1942, of all certificates issued in accordance with such provisions together with all

right to payment hereunder, be entitled to the guarantee of unpaid premiums and interest thereon and the mode of settlement for such policies as provided by this article, as amended. The privileges and benefits granted by the foregoing sentence shall be in lieu of the method of settlement, and the requirement for accounts and reports prescribed by such provisions. In the event any such insurer fails to surrender within the said ninety days all such certificates and rights to payment, the accounts, reports, and settlements required to be made by such insurer under such provisions shall continue to be made as required and shall be governed by such provisions. (50 U.S.C. App. § 548.)

FOOTNOTES

1. The provisions of these sections are not applicable to policies of United States Government Life Insurance and National Service Life Insurance. SSCRA § 400; 38 C.F.R. § 7.21 (1988).
2. SSCRA § 403; 38 C.F.R. § 7.27 (1988).
3. The head of the Veterans' Administration is called the Administrator of Veterans' Affairs. 38 U.S.C. § 210 (1982) (Supp. V, 1987).
4. See SSCRA § 101 for a definition of "person in the military service."
5. SSCRA § 400; 38 C.F.R. § 7.20 (1988).
6. By Act of July 11, 1956, 70 Stat. 528, the minimum number of days a policy is required to be in effect before entry on active duty was increased from 30 to 180 days.
7. SSCRA § 400; 38 C.F.R. § 7.21 (1988).
8. SSCRA § 401; 38 C.F.R. § 7.24 (1988).
9. SSCRA § 400; 38 C.F.R. § 7.21 (1988). This relates only to the primary death benefit. If a provision limits or eliminates some other benefit (e.g., double indemnity), the policy will still qualify. 38 C.F.R. § 7.21(a).
10. SSCRA § 400; 38 C.F.R. § 7.21.
11. 38 C.F.R. § 7.26(b).
12. SSCRA § 403; 38 C.F.R. § 7.26(d).
13. SSCRA § 407.
14. 38 U.S.C. 211(a) (1982).
15. SSCRA § 403, 38 C.F.R. § 7.27.

16. SSCRA § 406; 38 C.F.R. § 7.30.
17. Id.
18. Id.
19. SSCRA § 405; 38 C.F.R. § 7.29(a).
20. SSCRA § 406; 38 C.F.R. § 7.30.
21. Id.

Chapter 6

Taxation

6-1. Purpose and Scope

Congress intended that service personnel be given relief from strict compliance with the rules for the payment of taxes to various tax authorities. Public policy dictates that the servicemember should be spared the loss of his home,¹ the burden of penalties for nonpayment of income taxes,² and the requirement to pay a myriad of taxes to jurisdictions where he is situated solely because of his military service.³ In this chapter, the provisions of sections 500, 513, and 514 of the Act will be discussed.

6-2. Taxes Respecting Personalty, Money, Credits, or Realty; Sale of Property to Enforce Collection; Redemption of Property Sold; Penalty for Nonpayment; Notice of Rights to Beneficiaries of Section

Section 500

(1) The provisions of this section shall apply when any taxes or assessments, whether general or special (other than taxes on income), whether falling due prior to or during the period of military service, in respect of personal property, money, or credits, or real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

(2) No sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon application made therefor by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court thereupon, unless in its opinion the ability of the person in military service to pay such taxes or assessments is not materially affected by reason

of such service, may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon. (50 U.S.C. App. § 560.)

a. General. Section 500 involves the sale of property resulting from tax deficiencies as well as subsequent redemption rights. Taxes include any taxes or assessment, whether special or general, due before or during the period of military service. It does not include income taxes.

b. Property protected. The Act specifically protects certain classes of property:

- (1) personalty;
- (2) money;
- (3) credits, and
- (4) real property owned and occupied for dwelling, professional, business, or agricultural purposes by a person in military service or his dependents at the

commencement of his period of service and still occupied by his dependents or employees.

c. Realty. Protection of realty under this section has been the subject of court interpretation. Courts have strictly construed the limitation on the use of the property by the servicemember. Where the servicemember never resided on the land, farmed it, raised livestock on it, or leased it to another for agricultural purposes, but merely inspected it periodically for trespassers, a court held that the servicemember was not in "occupation of the land for agricultural purposes" and, therefore, not protected against the sale for nonpayment of taxes.⁴

d. Protection provided.

(1) Sale of property. Sale of the property described above may not be accomplished to enforce the collection of taxes or assessments except with permission of the court and then only when the court determines that the military service does not materially affect the servicemember's ability to pay. One court held that a deed issued in violation of section 500(2) was voidable.⁵ Another court held that a grantee under such a void tax deed had no cause of action against a servicemember for improvements the grantee placed on the land in reliance on the deed. The grantee had been notified that a person protected by the Act owned the property.⁶

(2) Right of redemption. In cases where the property may be lawfully sold to satisfy taxes or assessments, section 500(3) gives the servicemember a liberal period of time in which to redeem the property. Whenever protected property is sold or forfeited for the collection of taxes or assessments on the property, the servicemember is granted the right to redeem or commence action to redeem the property. Action must begin not later than six months after termination of military service or a later date, if a greater period for redemption is authorized by the laws of the state or territory. The ability to pay need not be materially affected by military service for section 500(3) to apply. Rights under section 500(3) are absolute rights and are not subject to judicial discretion.

If relief under section 500 is inappropriate, either because more than 6 months have passed since termination of service, or because the land is not one of the limited types listed in section 500, section 205 should be examined for possible relief.⁷ Section 205 suspends the time for computing the limitation of actions during the period of service. This includes the period "for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment." Using section 205 in conjunction with section 500, greater relief may be obtained. In Le Maistre v. Leffers,⁸ the Supreme Court held that section 205 is not restricted by section 500; rather, they supplement each other.

6-3. Income Taxes; Collection Deferred; Interest; Statute of Limitations

Section 513

The collection from any person in the military service of any tax on the income of such person, whether falling due prior to or during his period of military service, shall be deferred for a period extending not more than six months after the termination of his period of military service if such person's ability to pay such tax is materially impaired by reason of such service. No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such amount during such period, shall accrue for such period of deferment by reason of such nonpayment. The running of any statute of limitations against the collection of such tax by distraint or otherwise shall be suspended for the period of military service of any individual the collection of whose tax is deferred under this section, and for an additional period of nine months beginning with the day following the period of military service. The provisions of this section shall not apply to the income tax on employees imposed by section 1400 of the Federal Insurance Contributions Act. (50 U.S.C. App. § 573.)

a. General. Section 513 defers collection of any income tax, federal or state, on military or nonmilitary income, falling due either before or during military service. A servicemember's ability to pay the tax, however, must be materially impaired by reason of service. Collection of taxes shall be deferred for a period not in excess of 6 months after the termination of military service. No interest or other penalty may accrue for the nonpayment of any tax on which collection was deferred.⁹

b. Restrictions by Internal Revenue Service (IRS). The IRS has directed¹⁰ that, with regard to federal income taxes, a deferment of payment may be granted only when the servicemember makes a proper application and meets the burden of proving not only an inability to pay but that the inability resulted from military service. The IRS specifically limited the application of section 513 to an initial period of service, defined as--

- (1) the period of induction;
- (2) a period of active duty pursuant to a first enlistment;
- (3) the period of service prior to any reenlistment following recall of the taxpayer to active duty from a reserve or National Guard unit;
- (4) the first period of a reenlistment following a break in service of 1 year or longer; or
- (5) for an officer falling by analogy into one of the above, 2 years.

Attorneys should advise servicemembers seeking relief beyond the limits of the regulation, but within the limits provided by section 513, to first apply administratively to the IRS for an exception.

c. State income tax. Servicemembers seeking relief from state income taxes should apply to the local state tax authority or the state attorney general and cite section 513.

d. Filing. Section 513 grants relief from tax collection but not from filing returns. An extension or postponement of the time for filing may, however, be authorized under other authority. For example, personnel on duty overseas are authorized an automatic extension of two months (or longer if granted permission) for filing federal income tax returns. Personnel on duty in a combat zone are authorized to postpone filing their federal income tax returns for the duration of combat service plus 180 days. Several states provide similar relief for military personnel in filing state income taxes.¹¹

e. Nonapplicability of section 205. Under the provisions of section 207 of the Act, the relief granted by section 205, which suspends the statute of limitations of actions during the period of service, does not apply to periods of limitations prescribed by or under the internal revenue laws of the United States.

6-4. Residence for Tax Purposes

Section 514

(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled,

compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district. Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: Provided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. This section shall be effective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

(2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. (50 U.S.C. App. § 574.)

a. General. Section 514 provides that a servicemember neither loses nor acquires a residence for purposes of taxation with respect to his person, personalty, or income by reason of being absent or present in any tax jurisdiction solely in compliance with military orders. This was intended "to prevent multiple state taxation of the property and income of military

personnel serving within various taxing jurisdictions through no choice of their own."¹²

In discussing section 514, the term "state" is intended to include the District of Columbia, possessions, and territories. The term "home state" means the "state of domicile" or the "state of residence," which for the most part have no significant difference in the application of this section.¹³ The term "host state" means the state in which the servicemember is stationed or his state of temporary presence¹⁴ when there is no distinction between the two terms. Occasionally, the servicemember may be stationed in one state where the post is near a state boundary and have his quarters in the neighboring state. In such case, the term "state of temporary presence" could refer to both, while "state of station" would refer to the military post.

The constitutionality of this section was upheld by the Supreme Court in the case of Dameron v. Brodhead.¹⁵

b. Income tax. Unless it is also the home state, the host state may not tax the compensation a servicemember receives "for military and naval service" because this compensation "shall not be deemed income for service performed" in the host state. This is a statutory exception to the general rule that income may be taxed where it is earned as well as where the taxpayer resides.¹⁶

At least one court has determined that a school board cannot charge nonresident servicemembers tuition for children enrolled in the host state public schools. Although the tuition charge was not an income tax or a personal property tax, its effect was the same. Servicemembers would be double taxed by supporting school systems in their states of domicile as well as in the host state. The court determined that the Act was intended to prevent such a situation. Accordingly, it held that the tuition requirement was invalid under the supremacy clause.¹⁷

Income derived from off-duty employment, on or off post, is not "compensation for military and naval service" and, therefore, does not have the protection of

the Act. This leaves off-duty income vulnerable to the general rule that it may be taxed by the state where it is earned and by the home state. If the state where the off-duty income is earned is other than the host state, such as when the soldier works in a state adjoining his military post, the host state may not tax the income because the servicemember is a nonresident with respect to the host state. The host state may only tax nonresidents on income earned within its boundaries.¹⁸

Section 514 does not protect income earned by dependents of servicemembers. Thus, this income might be taxed by (1) the home state, (2) the host state, and (3) the state where the income is earned. If the state where the income is earned is other than the host state, as for example, when the duty station is near a state boundary, the only theory upon which the host state could tax is that the dependent acquired a statutory residence in the host state. Attorneys should examine the law of the host state to determine if the dependent, especially the spouse, acquires a residence for tax purposes. Attorneys should determine the length of temporary presence in the host state necessary to qualify as a resident for tax purposes.¹⁹

Although states may not tax a nonresident servicemember's military income, a number of states take it into account. Kansas has such a scheme that has survived legal challenge. For purposes of calculating the tax bracket of a nonmilitary spouse who earned income in the state, Kansas adds in the servicemember's military income if the couple filed a joint federal return. Although the servicemember's income is not taxed, the spouse's income is thereby taxed at a higher rate. This practice has been upheld by the Tenth Circuit.²⁰

In situations where the servicemember, his dependent, or both, are properly subject to taxation by two or more states, the servicemember and his dependents may be eligible for tax credits. Generally, this is a credit against the tax of the home state in the amount of the tax paid to the state where the income was earned. There may be amount limitations or other formulas to determine the amount of the credit. Another form of tax credit occurs when the state in which the income is earned gives the nonresident taxpayer credit for tax on the income

paid in the home state. In either case, state statutes are generally worded to prevent the tax credit from being taken twice. Other forms of relief may consist of an exclusion or deduction of the income from the gross income reported to the home state when tax was paid to the state where it was earned, or merely an itemized deduction of the tax paid to the other state.²¹

The authority of the host state to tax the income earned by off-duty personnel or any other persons working or residing on post, regardless of the nature of federal jurisdiction over the post, is contained in the "Buck Act" of 1940.²² Since employment by a nonappropriated fund activity is not based on military orders and wages are not paid from appropriated funds, there is no authority for regarding the income derived therefrom as "compensation for military and naval service." Income from nonappropriated funds is derived from services rendered within the host state, and falls under the tax authority given the host state in the Buck Act.

c. Real property. Real property is excluded from section 514 since it is generally taxed only by the state in which it is situated. Therefore, it is not affected by one's status, whether a domiciliary or a resident, military or civilian.²³

d. Tangible nonbusiness personal property. Section 514 states that for purposes of taxation, nonbusiness personal property "shall not be deemed to be located or present in or to have a situs for taxation" in the host state. This section does not, however, extend protection to property owned by the servicemember's dependents. Examples of, and exceptions to, this general rule follow.

(1) Sales and use taxes. In Sullivan v. United States,²⁴ the Supreme Court held that section 514 does not exempt servicemembers from sales and use taxes imposed by a state other than the state of domicile.

In Sullivan, the Court determined that sales and use taxes are not imposed on the property itself. Rather, a sales tax is an excise imposed upon the sale transaction, and a use tax is "in the nature of an excise upon the privilege of using, storing or consuming property."²⁵ Since these taxes are not on the property

itself, it does not matter where the property is "deemed" to be in a physical or constructive sense.²⁸ Congressional action in the Buck Act of 1940²⁷ dealt specifically with sales and use taxes. State authorities were authorized to collect such taxes on land subject to Federal jurisdiction,²⁸ except for sale or use of property sold by the United States or its instrumentalities through a commissary, a ship store, or the like.²⁹

The Supreme Court, in Sullivan, in addition to allowing the sales tax, was reluctant to bar the imposition of the closely related use tax, despite the existence of section 514. Section 514 prohibits host state taxes "with respect to personal property, or the use thereof" and "in respect to motor vehicles or the use thereof." The Court held that Congress intended to limit protection of servicemembers' personal property. Only "annually recurring taxes on property--[including] the familiar ad valorem personal property tax,"³⁰ are prohibited.

While the Sullivan case makes it clear that a tax on the sales transaction, whether it is called a sales tax or a use tax, may be imposed by the state, there remains the problem of whether a servicemember's property is subject to such a tax each time he moves the property to a new state. Servicemembers should retain evidence of sales taxes paid on the purchase of major items, if not all items, to avoid further taxation upon relocation. Ordinarily, a credit in the amount of the sales tax paid will be given by the authority imposing the use tax. Because this is strictly a state function, however, which under the Sullivan case is not subject to the protection of section 514, there is no federal assurance that states will grant a credit or exemption for sales taxes paid.

(2) Ad valorem tax.³¹ The host state may not impose an ad valorem tax on the nonbusiness personal property of nonresident servicemembers. The right to impose this tax is reserved to the home state. Whether or not the home state has such a tax or enforces it with regard to servicemembers is of no concern to the host state. The Act's prohibition of taxes of this type is absolute.³² A municipal tax on such property by the political subdivision of the host state where a servicemember lives, while actually assigned for duty in

another subdivision in the same state, likewise may not be imposed.³³

(a) Constructive placement. Since the law allows the use of the fiction that personal property is not in the place where it is physically located for the purpose of assessing an ad valorem tax, the home state could legally apply a reverse fiction in finding its legal presence for tax purposes in a place where it is not. The application of this fiction would, however, have practical drawbacks, especially where the tax assessor must see the property in order to set a tax.

(b) Property located on federally controlled lands. Regardless of whether the property is owned by the servicemember or his dependent, if the property is located on an installation subject to the exclusive jurisdiction of the Federal government, the state may not impose an ad valorem personal property tax.³⁴ Exclusive federal jurisdiction means "exclusive legislative jurisdiction" and is applied to situations wherein the Federal Government has received, by whatever method, all the legislative authority of the state. Usually the state has reserved only the right to serve process regarding activities that occurred off the land involved.³⁵ The fact that the post or installation exists does not automatically mean the installation is subject to exclusive federal jurisdiction. On the contrary, the current trend is away from exclusive jurisdiction to arrangements in which the state will have more authority.³⁶ Quite often, the type of jurisdiction may vary from one place to another on the same reservation.

(c) Motor vehicles. Section 514(2)(b) provides that the term taxation includes "licenses, fees, or excises in respect to motor vehicles or the use thereof" provided that the license, fee, or excise required by the home state has been paid. In California v. Buzard,³⁷ the Supreme Court held that even though the law of the home state exempted a resident from payment of a license, fee, or excise when the vehicle was not driven in the home state, the servicemember would have to register and license his vehicle in his home state in order to qualify for the exemption from payment of a license, fee, or excise tax in the host state. If a servicemember does not pay to license and register his car in his home

state, the host state may require him to pay in order to register his vehicle in the host state. The servicemember does not, however, have to pay the entire amount assessed if a portion of the license, fee, or excise exceeds the amount necessary to defray the cost of issuance and administration. The Court also held in Buzard that the excessive amount is an ad valorem tax that may not be imposed by the host state upon a servicemember's personal property. This specifically includes motor vehicles.³⁹

The motor vehicle, then, may fit into two categories. First, as a piece of tangible non-business property it is exempt from ad valorem taxes regardless of the authority or desire of the host state to tax it. Second, as a machine that moves on the streets and highways of the host state, it is subject to the police power of the host state. A state may exercise its police power to require a servicemember to register a vehicle in its jurisdiction if, and only if, the servicemember has not registered the vehicle in the home state. Where the registration fee or license may properly be exacted by the host state, any portion assessed as revenue need not be paid.

A similar rule applies to the requirement for municipal registration. So long as the requirements of the home state are met, the political subdivision has no greater right than the host state to impose its own requirements. A servicemember need not, however, pay a similar tax or fee to the state of domicile in order to avoid municipal revenue-raising taxes in the host state.⁴⁰ Nonresident servicemembers are exempt from paying revenue-raising taxes regardless of whether they paid similar taxes in their state of domicile.⁴⁰

(d) Mobile homes. If the host state treats a mobile home as tangible nonbusiness personal property, the mobile home has the same protection as a motor vehicle or any other such property with regard to ad valorem taxes imposed by the host state.⁴¹ If the law of the host state also classifies the mobile home as a motor vehicle, registration with its accompanying license, fee, or excise may be imposed if the servicemember has not complied with the registration requirements of his home state. The same restrictions prohibiting the state from

imposing an ad valorem tax in the form of a license, fee, or excise also apply.

By making certain modifications to a mobile home, such as removing wheels or installing plumbing and electrical connections, an owner may make the mobile home relatively affixed to the land. In some states, the mobile home may then be treated as a piece of real property. In such a case, it would have no protection under section 514.⁴²

e. Intangible non-business personal property. This category includes stocks, bonds, and bank deposits. Subject to taxation are the income derived from this property and the value of the property itself.

(1) Income. Traditionally, the owner's legal domicile has taxed income from intangible property.⁴³ In this regard, the authority to impose an income tax on intangibles is independent of the authority to impose an ad valorem tax on intangibles.⁴⁴

(2) Ad valorem tax. Intangibles have as their taxable situs the servicemember's domicile.⁴⁵ While generally not the practice, there appears to be no legal obstacle to imposition of such a tax on dependents' intangible nonbusiness property by virtue of their acquired residence.⁴⁶

(3) Transfer taxes. No court has addressed relief from payment of state or local taxes on the transfer of securities, but it is doubtful that Congress intended to preclude this type of tax. This conclusion is supported by the rule in the Sullivan case.⁴⁷

f. Motor vehicle operator permits. The rule in Buzard⁴⁸ applies here as well as in the licensing of the vehicle itself. Generally, if a servicemember has an operator's permit from his home state, he need not apply for a permit in the host state. The Act does not, however, make the servicemember immune from the police power of the host state. In exercising its police power, the host state may properly require a servicemember to take a driving examination but it may not exact a fee for this.⁴⁹ The fee, however, could be required when the servicemember does not have a permit from his home state.

g. Business property. Whether tangible or intangible, owned by the servicemember or his dependent, section 514 specifically excludes property used in a business or trade from protection under the Act. Therefore, the value and income derived from business property may properly be taxed in the state where the business or trade is conducted. The host state may also exact revenue producing licenses, fees, and excises. An automobile used by a dependent to drive to and from work, however, should not be considered business property.

Included in this category is the income derived from the rental of real property which, for example, was purchased at the last duty station and rented out in lieu of selling it upon reassignment. If the home is located in a state other than the home state, the servicemember should investigate whether or not the home state treats this income as taxable.⁵⁰

FOOTNOTES

1. H.R. Rep. No. 3030, 76th Cong., 2d Sess. 9 (1940) (discussing the intent of § 500).
2. SSCRA § 513.
3. H.R. Rep. No. 2198, 77th Cong., 2d Sess. 6 (1942) (discussing the intent of § 514).
4. Day v. Jones, 112 Utah 286, 187 P.2d 181 (1947).
5. Moorman v. Thomas, 199 So. 2d 719 (1967).
6. See Day v. Jones, 112 Utah 286, 187 P.2d 181 (1947).
7. For a full discussion of § 205, see para. 3.10, supra. Le Maistre v. Leffers, 333 U.S. 1 (1948).
8. Le Maistre v. Leffers, 333 U.S. 1 (1948). See also Hedrick v. Bigby, 228 Ark. 40, 305 S.W.2d 674 (1957).
9. Hogg v. Allen, 105 F. Supp. 12 (D.C. Ga. 1952), rev'd in part on other grounds, 215 F.2d 640 (5th Cir. 1954).
10. Revenue Procedure 57-25, 1957-2 Cum. Bull. 1092. Deferment of the Collection of Income Tax Assessments Made Against Persons Who Are Currently in the Armed Forces of the United States.

Section 1. Purpose

The purpose of this Revenue Procedure is to prescribe policy and procedure for the deferment of the collection of income tax assessments made against persons currently in the Armed Forces of the United States.

Section 2. Definition

The term "initial period of service" as used in this Revenue Procedure means the period of active duty for which a taxpayer is inducted into the military service under any selective service act;

the period of active duty under the first enlistment of a taxpayer in the armed service; or the period of service, prior to any reenlistment, following recall of the taxpayer to active duty from an inactive reserve or National Guard unit or the first period of reenlistment, for a taxpayer who has been out of the service for one year or more. In the case of an officer, the initial period of service will be limited to the first two years following his entry into the service under one of the above-mentioned occurrences.

Section 3. Background

Section 513 of the Soldiers' and Sailors' Civil Relief Act of 1940, U.S.C. App. 573, incorporated into the Selective Service Act of 1948 and continued in effect by the Universal Military Training and Service Act of 1951, 50 U.S.C. App. 451, provides that the collection of any income tax from persons serving in the military services of the United States may be postponed if such person's ability to pay is materially impaired by reason of such service. The deferment, if granted, is limited to the period of military service and six months following the day such military service ends. If collection is deferred, the statutory period for the assessment and collection of tax is suspended for the period of military service and nine months following the day such military service ends.

Section 4. Policy

.01 Deferments of the collection of income tax assessments, outstanding against members of the Armed Forces, will not be granted except from the written request of the taxpayer, supported by satisfactory evidence that his ability to pay his account has been materially impaired due to his military service. In order to be granted a deferment, the taxpayer must show that he is serving an initial period of service, as defined, and that because of this service his ability to pay his Federal income tax has been materially impaired.

.02 Deferments will be limited to the taxpayer's initial period of service, as defined herein, and six months following the day such service ends. Immediately upon the final day of the sixth month following the end of the initial period of service, the deferred account will be moved into a collectible status and collection enforced in the same manner as any outstanding account. All rights and privileges consistent with the internal revenue laws and regulations will still be available to the taxpayer.

.03 Deferments will not be granted under Section 513 of the Soldiers' and Sailors' Civil Relief Act, supra, as continued in effect, except as specifically prescribed herein.

Section 5. Collection of Interest or Penalty on Deferred Military Accounts.

Section 513 of the Soldiers' and Sailors' Civil Relief Act of 1940, supra, as continued in effect, provides the following with respect to the collection of interest or penalty, "No interest on any amount of tax, collection of which is deferred for any period under this section, and no penalty for nonpayment of such account during such period, shall accrue for such period of deferment by reason of such nonpayment."

11. See generally Office of The Judge Advocate General, U.S. Dep't of Air Force, All States Income Tax Guide. This publication is normally published annually.

12. H.R. Rep. No. 2198, 77th Cong., 2d Sess. 6 (1942).

13. The terms "domicile" and "residence" are frequently distinguished, in that domicile is the home, the fixed place of habitation; while residence is a transient place of dwelling. *Fisher v. Jordon*, 116 F.2d 183, 186 (5th Cir. 1940). However, the Act, by stating that the residence shall not follow the servicemember to his military station solely by virtue of his service, in

effect causes the residence to merge with, or prevents it from being distinguished from, the domicile.

14. The term "state of temporary presence" was used cautiously by the Supreme Court in *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953), and distinguished from the term "original residence."

15. *Dameron v. Brodhead*, 345 U.S. at 324.

16. New York ex rel. *Cohn v. Graves*, 300 U.S. 308 (1937).

17. *United States v. Onslow County Bd. of Educ.*, 728 F.2d 628 (4th Cir. 1984).

18. New York ex rel. *Whitney v. Graves*, 299 U.S. 366 (1937).

19. See Office of The Judge Advocate General, U.S. Dep't of Air Force, All States Income Tax Guide, supra note 11, for a digest of state law regarding residence and state income taxes.

20. *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987).

21. In any case, the current statutes of the states concerned should be examined. If statutes are not available, sources such as the All States Income Tax Guide, supra, note 11, contain the address of each of the state tax authorities.

22. 4 U.S.C. §§ 105-110 (1988). § 106(a) provides:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

23. See para. 6-4d(2)(d), infra, for the treatment of mobile homes as real property.

24. Sullivan v. United States, 395 U.S. 169 (1969).

25. Id. at 177, quoting Connecticut Light & Power Co. v. Walsh, 134 Conn. 295, 307, 57 A.2d 128, 134 (1948).

26. Dameron v. Brodhead, 345 U.S. at 326.

27. 4 U.S.C. §§ 105-110.

28. 4 U.S.C. § 105(a) provides:

No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

29. 4 U.S.C. § 107 provides:

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary

unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch.

30. Sullivan v. United States, 395 U.S. at 176.

31. The term "ad valorem tax" means a tax or duty upon the value of the article or thing subject to taxation. Arthur v. Johnson, 185 S.C. 324, 327, 194 S.E. 151, 154 (1937).

32. Dameron v. Brodhead, 345 U.S. 322.

33. Woodroffe v. Village of Park Forest, 107 F. Supp. 906 (N.D. Ill. 1952). The court went into great detail to show that the servicemember was still a resident of Pennsylvania and that despite his long period of service in Illinois the exemptions of § 514 still applied.

34. Surplus Trading Co. v. Cook, 281 U.S. 647 (1930). 4 U.S.C. §§ 105-110, does not apply to the ad valorem personal property tax; hence, this case was not overruled by the statute.

35. Administrative and Civil Law Division, The Judge Advocate General's School, Army, Administrative and Civil Law: Handbook, ACIL-ST-296, para. 2-5 (Feb. 1989).

36. Id. at para. 2-6, 2-7.

37. California v. Buzard, 382 U.S. 386 (1966).

38. Id., at 392. The host state attempted to impose an \$8.00 standard fee which was held reasonable and a \$100.00 fee based upon the value of the vehicle. The latter was determined to be an ad valorem tax.

39. United States v. City of Highwood, 712 F. Supp. 138 (N.D. Ill. 1989) (city could not require nonresident Fort Sheridan soldiers to pay revenue raising fee on vehicles operated within the city).

40. Id.

41. Snapp v. Neal, 382 U.S. 397 (1966) (this is a companion case to and decided on the same day as California v. Buzard, 382 U.S. 386); United States v. Illinois, 525 F.2d 374 (7th Cir. 1975) (mobile home is personal property under Illinois law; county could not impose personal property tax on mobile homes owned by nonresident servicemembers).

42. See para. 6-4.c., supra.

43. Suttles v. Illinois Glass Co., 206 Ga. 849, 59 S.E.2d 394 (1950).

44. New York ex rel. Cohn v. Graves, 300 U.S. 308.

45. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936); also see text, para. 6-4d, infra.

46. Curry v. McCanless, 307 U.S. 357 (1939); Graves v. Elliott, 307 U.S. 383 (1939). These cases apply only to death taxes and do not directly address the ad valorem tax itself.

47. Sullivan v. United States, 395 U.S. 169.

48. California v. Buzard, 382 U.S. 386.

49. JAGA 1953/7267, 3 Sep 53, 3 Dig. Ops. JAG SSCRA, § 45.11.

50. Christian v. Strange, 96 Ariz. 106, 392 P.2d 575 (1964).

Chapter 7

Public Lands

7-1. Purpose and Scope

Sections 501-502 of the Act provide the servicemember who is a homestead or desert-land entryman,¹ who has a mining claim, or whose widow has a claim to such land, with the right to obtain waiver of certain requirements as to occupancy and improvement of public lands.²

7-2. Rights to Public Lands not Forfeited; Grazing Lands

Section 501

(1) No right to any lands owned or controlled by the United States initiated or acquired under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws.

(2) If a permittee or licensee under the Act of June 28, 1934 (48 Stat. 1269), enters military service, he may elect to suspend his permit or license for the period of his military service and six months thereafter, and the Secretary of the Interior by regulations shall provide for such suspension of permits and licenses and for the remission, reduction, or refund of grazing fees during such suspension.

(3) This section shall not be construed to control specific requirements contained in this article. (50 U.S.C. App. § 561.)

7-3. Homestead Entries and Settlement Claims; Service as Equivalent to Residence and Cultivation

Section 502

If any person whose application for a homestead entry has been allowed or who has made application for homestead entry which may thereafter be allowed, after such entry or application enters military service, or if any person who has a valid settlement claim enters military service, the Department of the Interior shall construe his military service to be equivalent to residence and cultivation upon the tract entered or settled upon for the period of such service. From the effective date of this Act no contest shall be initiated on the ground of abandonment and no allegation of abandonment shall be sustained against any such person, unless it shall be alleged in the preliminary affidavit or affidavits of contest and proved at the hearing in cases initiated subsequent to the effective date of this Act that the alleged absence from the land was not due to such military service. If such person is discharged on account of wounds received or disability incurred in the line of duty, the term of his enlistment and any period of hospitalization due to such wounds or disability shall be deducted from the required length or residence, without reference to the time of actual service. No patent shall issue to any such person who has not resided upon, improved, and cultivated his homestead for a period of at least one year. (50 U.S.C. App. § 562.)

7-4. Same; Death or Incapacity During or Resulting from Service as Affecting Rights; Perfection of Rights

Section 503

(1) If any person whose application for a homestead entry has been allowed or who has made application for homestead entry which may thereafter be allowed or who has a valid settlement claim dies while in military service or as a result of such service, his widow, if unmarried, or in the case of her death or marriage, his minor children,

or his or their legal representatives, may proceed forthwith to make final proof upon such entry or upon an application which is allowed after the applicant's death, or upon a homestead application thereafter allowed based on a valid settlement claim, and shall be entitled to receive a patent for such land. The death of such person while in military service or as a result of such service shall be construed to be equivalent to a performance of all requirements as to residence and cultivation upon such homestead or claim, notwithstanding the provisions of section 502 of this Act.

(2) If such person is honorably discharged and because of physical incapacities due to such service is unable to return to the land, he may make final proof without further residence, improvement, or cultivation, at such time and place as the Secretary of the Interior may authorize and receive a patent to the land entered.

(3) The Act of July 28, 1917 (40 Stat. 248), is repealed. (50 U.S.C. App. § 563.)

7-5. Desert-land Entries; Suspension of Requirements

Section 504

(1) No desert-land entry made or held under the desert-land laws prior to the entrance of the entryman or his successor in interest into military service shall be subject to contest or cancellation for failure to make or expend the sum of \$1 per acre per year in improvements upon the claim or to effect the reclamation of the claim during the period the entryman or his successor in interest is engaged in military service or during a period of six-months thereafter any period of hospitalization because of wounds or disability incurred in the line of duty. The time within which such entryman or claimant is required to make such expenditures and effect reclamation of the land shall be exclusive of his period of service and the six-months' period and any such period of hospitalization.

(2) If such entryman or claimant is honorably discharged and because of physical incapacities due to such service is unable to accomplish reclamation of, and payment for, the land, he may make proof without further reclamation or payments under such rules as the Secretary of the Interior may prescribe and receive patent for the land entered or claimed.

(3) In order to obtain the benefits of this section, such entryman or claimant shall, within six months after the effective date of this Act or within six months after his entrance into military service, file or cause to be filed in the land office of the district in which his claim is situated a notice that he has entered military service and that he desires to hold the desert claim under this section. (50 U.S.C. App. § 564.)

7-6. Mining Claims; Requirements Suspended

Section 505

(1) The provisions of section 2324 of the Revised Statutes of the United States, which require that on each mining claim located after May 10, 1872, and until patent has been issued therefor not less than \$100 worth of labor shall be performed or improvements made during each year, shall not apply during the period of his service, or until six months after the termination of such service, or during any period of hospitalization because of wounds or disability incurred in line of duty, to claims or interests in claims which are owned by a person in military service and which have been regularly located and recorded. No mining claim or any interest in a claim which is owned by such a person and which has been regularly located and recorded shall be subject to forfeiture by nonperformance of the annual assessments during the period of such military service, or until six months after the termination of such service or of such hospitalization.

(2) In order to obtain the benefits of this section, the claimant of any mining location shall, before the expiration of the assessment year during which he enters military service, file or cause to be filed in the office where the location notice or certificate is recorded a notice that he has entered such service and that he desires to hold his mining claim under this section. (50 U.S.C. App. § 565.)

7-7. Mineral Permits and Leases; Suspension of Operations and Term of Permits and Leases

Section 506

(1) Any person holding a permit or lease on the public domain under the Federal mineral leasing laws who enters military service may, at his election, suspend all operations under his permit or lease for a period of time equivalent to the period of his military service and six months thereafter. The term of the permit or lease shall not run during such period of suspension nor shall any rentals or royalties be charged against the permit or lease during the period of suspension.

(2) In order to obtain the benefit of this section, such permittee or lessee shall, within six months after the effective date of this Act, or six months after his entrance into military service, notify the Bureau of Land Management by registered mail of his entrance into such service and of his desire to avail himself of the benefits of this section.

(3) This section shall not be construed to supersede the terms of any contract for operation of a permit or lease. (50 U.S.C. App. § 566.)

**7-8. Right to Take Action for Perfection, Defense, etc.,
of Rights as Unaffected; Affidavits and Proofs**

Section 507

Nothing in this article shall be construed to limit or affect the right of a person in military service to take any action during his period of service which may be authorized by law or the regulations of the Department of the Interior for the perfection, defense, or further assertion of rights initiated or acquired prior to the date of entering military service. It shall be lawful for any person while in such service to make any affidavit or submit any proof which may be required by law or the practice of regulations of the Bureau of Land Management in connection with the entry, perfection, defense, or further assertion of any rights initiated or acquired prior to entering such service, before the officer in immediate command and holding a commission in the branch of the service in which the person is engaged. Such affidavits shall be as binding in law and with like penalties as if taken before an officer designated by the Secretary of the Interior of a United States land office. The Secretary of the Interior may issue rules and regulations to effectuate the purposes of section 501 to 512, inclusive. (50 U.S.C. App. § 567.)

7-9. Irrigation Rights; Residence Requirements Suspended

Section 508

The Secretary of the Interior is hereby authorized, in his discretion, to suspend as to persons in military service during the period while this Act remains in force and for a period of six months thereafter or during any period of hospitalization because of wounds or disability incurred in line of duty that provision of the act known as the "Reclamation Act" requiring residence upon lands in private ownership or within the neighborhood for securing water for the irrigation of the same, and he is authorized to permit the use of available water thereon upon such terms and

conditions as he may deem proper. (50 U.S.C. App. § 568.)

7-10. Distribution of Information Concerning Benefits of Article; Forms

Section 509

The Secretary of the Interior shall issue through appropriate military and naval channels a notice for distribution by appropriate military and naval authorities to persons in the military service explaining the provisions of this article except as to sections 500, 513, and 514 hereof and shall furnish forms to be distributed in like manner to those desiring to make application for its benefits, except as to said sections. (50 U.S.C. App. § 569.)

7-11. Homestead Entryman Permitted to Leave Entries to Perform Labor

Section 510

(1) During the pendency of any war in which the United States may be engaged while this Act remains in force any homestead entryman shall be entitled to a leave of absence from his entry for the purpose of performing farm labor. The time actually spent in farm labor shall be counted as constructive residence, if within fifteen days after leaving his entry to engage in such labor the entryman files a notice of absence in the land office of the district in which his entry is situated, and if at the expiration of the calendar year the entryman files in that office a written statement under oath and corroborated by two witnesses giving the date or dates when he left his entry, the date or dates of his return, and the place where and person for whom he was engaged in farm labor during such period or periods of absence.

(2) Nothing in this section shall excuse . . . If such entryman or claimant is honorably discharged and because of physical incapacities due

to such service is unable to accomplish reclamation of, and payment for, the land, he may make proof without further reclamation or payments under such rules as the Secretary of the Interior may prescribe and receive patent for the land entered or claimed.

7-12. Land Rights of Persons Under 21

Section 511

Any person under the age of twenty-one who serves in the military service while this Act remains in force shall be entitled to the same rights under the laws relating to lands owned or controlled by the United States, including the mining and mineral leasing laws, as those over twenty-one now possess under such laws. Any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service. Applications for entry may be verified before any officer in the United States or any foreign country authorized to administer oaths by the laws of the State or Territory in which the land may be situated. (50 U.S.C. App. § 571.³)

7-13. Extension of Benefits to Persons Serving with War Allies of the United States

Section 512

Citizens of the United States who serve with the forces of any nation with which the United States may be allied in the prosecution of any war in which the United States engages while this Act remains in force shall be entitled to the relief and benefits afforded by sections 501 to 511, inclusive, if such service is similar to military service as defined in this Act, and if they are honorably discharged and resume United States citizenship or die in the service of the allied forces or as a result of such service. (50 U.S.C. App. § 572.)

FOOTNOTES

1. An entryman is one who makes an entry onto homestead or desert-land as an initial step to acquiring ownership under the public land laws of the United States. Indian Cove Irr. Dist. v. Prideaux, 25 Idaho 112, 114, 136 P. 618, 620 (1913).

2. S. Rep. No. 2109, 76th Cong., 3d Sess. 3 (1940).

3. This section should be read in conjunction with § 104 on the same subject, a discussion of which is found in para. 2.5, supra.

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