



UNDERSTANDING MILITARY AND VETERAN'S ISSUES IN AB1058 CASES

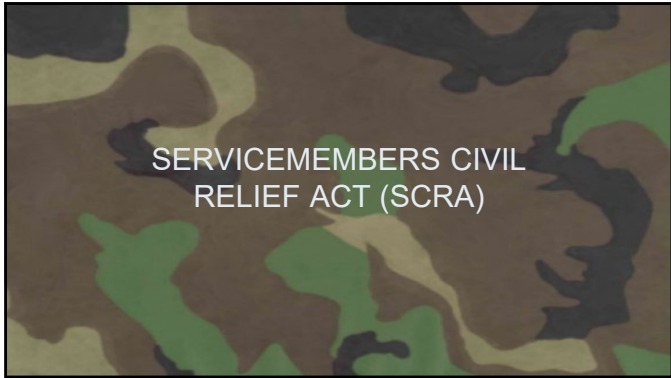
AB 1058 Conference
Burbank, CA
August 29, 2019

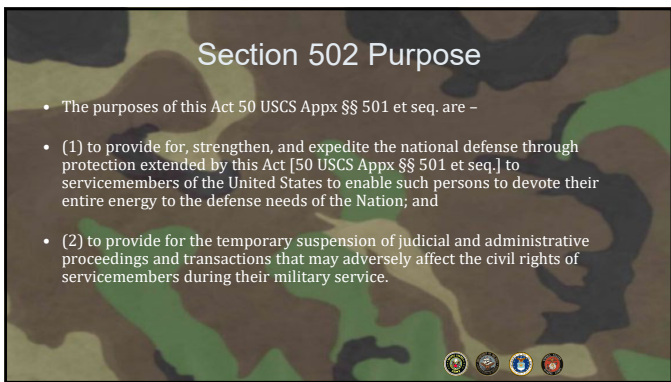
Hon. Adam Wertheimer, Commissioner, San Diego
Colonel Sarah T. Schaffer, USMCR, CFLS

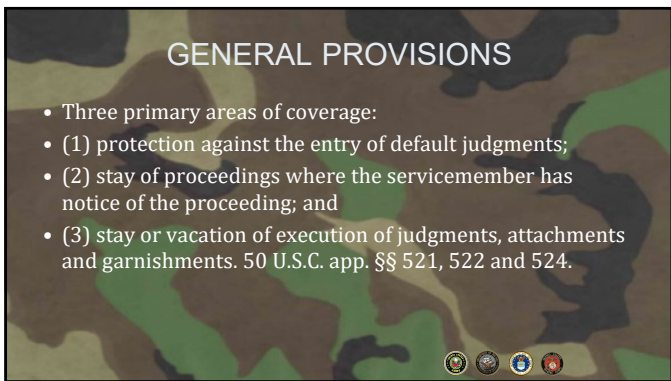
TOPICS COVERED

- The Absent Servicemember
 - Servicemembers Civil Relief Act (SCRA)
 - Deployment Issues/Rules
- Military Pay and Benefits (Active Duty and Reserve)
- Military Health Insurance Benefits
- Military Retirement
- Veteran Benefits
- GI Bill
- Military Support Guidelines
- Resources For The Court and FLF

THE ABSENT SERVICEMEMBER









GENERAL PROVISIONS

- Action for compliance with a contract when stayed under the SCRA, contractual penalties do not accrue during the period of the stay. 50 U.S.C. app. § 523.
- The SCRA also provides in most instances that a landlord cannot evict a servicemember or dependants from a primary residence without a court order.




GENERAL PROVISIONS

- A servicemember may terminate residential and automotive leases if he or she is transferred after the lease is made. 50 U.S.C. app. § 535.
- A court may also extend some of the protections afforded a servicemember under the SCRA to persons co-liable or secondarily liable on the servicemember's obligation. 50 U.S.C. app. § 513.




INTEREST LIMITATION

- (1) LIMITATION TO 6 PERCENT- An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service.



INTEREST LIMITATION

- (2) **FORGIVENESS OF INTEREST IN EXCESS OF 6 PERCENT-** Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.



INTEREST LIMITATION

- (b) **Implementation of limitation(1) Written notice to creditor** - In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.

INTEREST LIMITATON

- (2) **Limitation effective as of date of order to active duty** - Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.

INTEREST LIMITATION

- **(c) Creditor protection** - A court may grant a creditor relief from the limitations of this section if, in the opinion of the court, the ability of the servicemember to pay interest upon the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of the servicemember's military service.

Section 521

- § 521. Protection of servicemembers against default judgments
- (a) Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.




"Appearance" Defined

- What constitutes an "appearance"?
 - Defined by state law
- Code of Civil Procedure §1014. Appearance.
- A defendant appears in an action when the defendant answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, moves for reclassification pursuant to Section 403.040, gives the plaintiff written notice of appearance, or when an attorney gives notice of appearance for the defendant. After appearance, a defendant or the defendant's attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon the defendant.




Section 521

- Comments:
 - Only for defendants or respondents
 - Intended for defendants or respondents who have been served but not yet appeared
 - Confusingly, a served defendant or respondents who has not yet appeared could elect relief under 522 if the person has "actual notice" (personal service as opposed to service by publication?)




Important Note

- SCRA default guidance applies to all of the following:
 - Final Judgments
 - Interim Orders
 - Court Orders
 - Administrative Support Orders but not to administrative enforcement remedies, such as liens, wage withholdings, etc.



Section 521

- § 521. Protection of servicemembers against default judgments
- (b)(2) Appointment of attorney to represent defendant in military service. If in an action covered by this section it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.



Section 521

- Situation: A served defendant who has not yet appeared
- Usual Request: Default judgment
- 521 Requirement: Special Affidavit
- § 521. Protection of servicemembers against default judgments
- (b) Affidavit requirement.
- (1) Plaintiff to file affidavit. In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit--
- (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
- (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.



Section 521 Affidavit

- So, technically, it is *always* required when default judgment requested.
- This is MORE than is required to be disclosed by petitioner's counsel on on Judicial Council Form for Entry of Default (FL-165 & FL-620).

3. The parent against whom judgment is sought is not in the military service or in the military service of the United States as defined in section 511 et seq. of the Servicemembers Civil Relief Act (50 U.S.C. Appen. § 511) and is not entitled to the benefits of such act.

From FL-620 "Request to Enter Default - Governmental"




Section 521

- § 521. Protection of servicemembers against default judgments
- (b)(3) Defendant's military status not ascertained by affidavit. If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act [50 USCS Appx §§ 501 et seq.].




Section 521

- Comments on 521(b)(3):
 - This provides the option of requiring a bond before allowing if there is an issue.
 - Practically, these questionable cases will usually come to the Pro Bono Panel.




Section 521

- § 521. Protection of servicemembers against default judgments
- (d) Stay of proceedings. In an action covered by this section in which the defendant is in military service, the court shall grant a stay of proceedings for a minimum period of 90 days under this subsection upon application of counsel, or on the court's own motion, if the court determines that--
 - (1) there may be a defense to the action and a defense cannot be presented without the presence of the defendant; or
 - (2) after due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.




Section 521

- Comments on 521(d):
 - No required form for application; may be made by way of pleadings, or verbally at hearing.
 - Stay is mandatory if person qualifies.
 - Stay can be 90 days, but can be longer.
 - Stay should be granted if appointed counsel cannot contact the person (appointed counsel required to "exhaust all efforts to determine whether the person is a servicemember, whether the person is in military service, and to contact the person.")
 - Assuming no appearance, subsequent stays fall under this section as well.




Section 521

- Recap of Section 521
 - A petitioner is required by the court to file an affidavit stating whether or not the respondent is in military service or that the petitioner is unable to determine whether the respondent is in military service.
 - If it appears that the respondent is in military service, the court may not enter a default judgment until after appointing an attorney to represent the defendant.




Section 521

- Recap of Section 521 continued
 - If the court is unable to determine whether the defendant is in military service, it may require the plaintiff to file an indemnity bond before entering a default judgment.
 - Appointed counsel may request and the court must grant a stay of proceeding for a minimum period of 90 days if a defense cannot be presented without the presence of the defendant or counsel cannot contact the defendant.




Section 522

- § 522. Stay of proceedings when servicemember has notice
 - (a) Applicability of section. This section applies to any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section--
 - (1) is in military service or is within 90 days after termination of or release from military service; and
 - (2) has received notice of the action or proceeding.




Section 522

- Comments on 522(a):
 - Confusion as to when 521 vs. 522 apply.
 - Practically speaking, only 522 (not 521) can apply in the following situations:
 - If it is a plaintiff/petitioner at issue.
 - If the defendant/respondent has actually appeared.
 - If the party is not in military service currently, but was within the last 90 days.
 - Note that 521(f) gives a defendant/respondent an election under 521 or 522 if the defendant/respondent has "actual notice."




Section 522

- § 522. Stay of proceedings when servicemember has notice
- (b) Stay of proceedings.
- (1) Authority for stay. At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, the court may on its own motion and shall, upon application by the servicemember, stay the action for a period of not less than 90 days, if the conditions in paragraph (2) are met.
- (2) Conditions for stay. An application for a stay under paragraph (1) shall include the following:
 - (A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.
 - (B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.



Section 522

- Continued Comments on 522(b):
 - Stay is mandatory if person qualifies.
 - Stay can be 90 days, but can be longer.



CHILD CUSTODY AND VISITATION

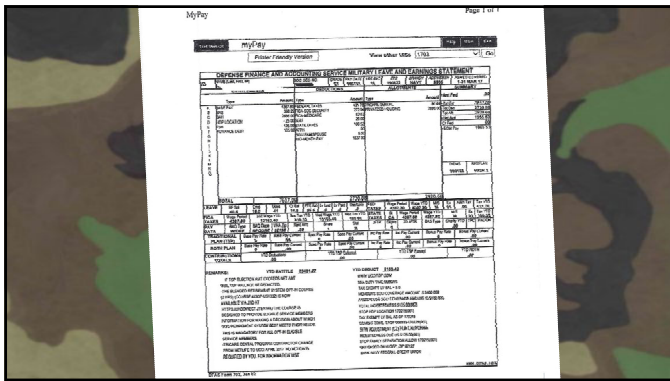
- b) Deployment of military member
 - i. Change in parenting plan- make orders to ensure deployed party can maintain frequent and continuing contact by whatever means are reasonable.
 - ii. Legal Custody determinations- “temporary” change.
- c) Move-away due to transfer orders of military service member
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CHILD CUSTODY AND VISITATION

- d) Move-away due to transfer orders of new spouse
- e) Joinder of third parties
- f) Visitation requests of third party family members (grandparents, step-parents etc.)

ACTIVATION TO SERVICE

- Family Code 3651 (c)(2) – Process and form (FL-398) to modify child and spousal support due to reduction in income from being called to active duty.
- Family Code 3653 (c) Retroactivity of order per FC 3651
- Family Code 17440 DCSS obligation to work with military and activated servicemembers to implement FC 3651 and the DCSS process to do so.



MILITARY PAY AND BENEFITS

- Special Pays and Tax Rules
- BAH Rules Do You Get It or Not? With Dependents? BAH Differential?
- ID Cards for Children – Incidental Benefit to Custodial Parent

MILITARY PAY & BENEFITS (RESERVE)

RESERVE PAY

- Start with W-2
- Drill Pay
- Annual Training Pay
- Travel Pay, Per Diem and Allowances.
 - Income?
 - Necessary Job Related Expenses?

MILITARY HEALTH INSURANCE BENEFITS

HEALTH INSURANCE

- Health insurance provided by a SM for their dependents is called Tricare.
- Health insurance for the military and their children is administered through DEERS (Defense Eligibility Enrollment System).
- DEERS registration is required for Tricare eligibility.

HEALTH INSURANCE

- Continued Health Benefits Coverage
 - 10 U.S.C. 1078(a)
- Former Spouse Protection
 - Retired Pay and/or Annuity Pay


MILITARY RETIREMENT

- NDAA 17
- New Rule for Division
 - Frozen Benefit Rule
- Supreme Court Case
 - Howell v. Howell, 137 S. Ct. 1400 (2017)

MILITARY RETIREMENT (CONT.)

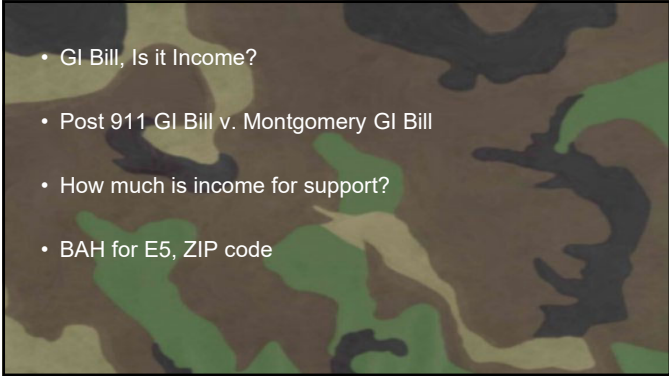
- Concurrent Receipt Disability Pay
 - Phase-in Almost Complete
- Combat Related Special Compensation
- CRSC is a special compensation for combat-related disabilities. It is non-taxable, and retirees must apply to their Branch of Service to receive it.
- CRDP is a restoration of retired pay for retirees with service-connected disabilities, and it is taxable. No application is required. Eligible retirees receive CRDP automatically.



VETERAN'S BENEFITS 

- VA disability compensation – CAN use for support
- VA disability pension – CANNOT use for support
- To distinguish between the two pensions, look to the veteran's award letter. If the veteran is receiving countable "disability compensation," those words will appear in the letter. If the veteran is receiving an exempt need-based pension, the letter will refer to "countable income."









MILITARY SUPPORT GUIDELINES

- United States Marine Corps
 - Volume 9 MCO P5800.16
 - LEGADMINMAN
 - Family Support
- United States Navy
 - MILPERSMAN 1754-030
 - Family Support



MILITARY SUPPORT GUIDELINES

- United States Army
 - Army Regulation 608-99, paragraph 2-6
 - Family Support
- United States Air Force
 - Air Force Instruction 36-2906, Personal Financial Responsibility, paragraph 3.2.1
 - Family Support



THE END
