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THE STAYING POWER OF THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Roger M. Baron*

I. INTRODUCTION

The Soldiers' and Sailors' Civil Relief Act of 1940 extends numerous protections to persons in the military service of the United States. Its provisions are authorized by Congress' duty to provide for the national defense under the rationale that military personnel should be encouraged to devote their entire energy to the defense of the United States free of civil legal proceedings and transactions which might otherwise prejudice their civil rights.

The provisions of the Soldiers' and Sailors' Civil Relief Act (the Act or the S & SCRA) are not intended to discharge the civil liabilities of military personnel, but rather merely to suspend their enforcement. Conversely, causes of action belonging to military personnel are preserved by the tolling provision of the S & SCRA which provides that the period of military service shall not be included in computing time toward the running of statutes of limitation. The tolling provision applies to actions or proceedings "by or against any person in military

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* Associate Professor of Law, University of South Dakota. The author wishes to thank Lois Gregoire and Peter Del Caro for their assistance in the preparation of this article.

2. Id.
5. Id. Kerrin v. Kerrin, 218 P.2d 1004 (Cal. 1950); but see Runge v. Fleming, 181 F. Supp. 224 (N.D. Iowa 1960) (effect of stay was tantamount to a complete defeat of claims of an alleged illegitimate child who was denied social security benefits because father died while in military and, at time of death, was not furnishing economic support to alleged child).
service." Accordingly, the S & SCRA also extends protection to the civil adversaries of military personnel.8

The protections afforded by the S & SCRA are extensive. The Act prescribes special procedures for default judgments against military personnel,9 and similar procedures for eviction proceedings,10 mortgage foreclosures,11 termination of leases,12 and numerous other aspects of the military person's civil rights and liabilities.13 Perhaps the most critical aspect of the S & SCRA, however, is its provision authorizing a stay of "any action or proceeding in any court."14 The stay is authorized regardless of whether the person in military service is the plaintiff or defendant.15

This article focuses on the stay provision of the Act which exists in its present form as it was enacted in 1940. The historical development of the stay is discussed together with a thorough review of the last three decades of reported cases applying or refusing to apply the stay provision.

The S & SCRA provision for a stay applies to any civil action or proceeding.16 However, in reviewing the cases it becomes clear that paternity, divorce and post-divorce cases comprise the highest percentage of litigation which has arisen under the S & SCRA.17 Among a wide variety of other civil cases, the next highest concentration of cases appears to concern

7. Id.
8. The adversary of a soldier may run afoul of the statute, however, if a dismissal for failure to prosecute in the event the action is filed but not pursued in timely fashion. Ricard v. Birch, 529 F.2d 214 (4th Cir. 1975); see also Zitomer v. Holdsworth, 449 F.2d 724 (3d Cir. 1971) (dismissal for failure to prosecute affirmed where case was nine years old and had been on court's "deferred list" for six years notwithstanding the fact its original placement in the "deferred list" was because defendant was on active duty in the military service).
10. Id. § 530.
11. Id. §§ 532-533.
12. Id. § 534.
14. Id. § 521. The text of this statute is reproduced in the text accompanying infra note 20; courts subject to the S & SCRA are referenced in 50 U.S.C. app. § 512 (1990).
15. Id.
16. Id.
17. See generally Annotation, Soldiers' and Sailors' Civil Relief Act of 1940 as Amended as Affecting Matrimonial Actions, 54 A.L.R.2d 390 (1957) (pertaining to "matrimonial actions" affected by the S & SCRA).
negligence actions. A wide variety of other civil cases have also arisen.

The last three decades of reported cases have demonstrated that the nature of the issues to be tried in the civil action is highly relevant to stay requests. In particular, the nature of the issues to be resolved has become the single most important factor in determining whether or not the military person's ability to litigate is adversely affected by reason of military service.

Overzealous and unreasonable attempts to utilize the stay to postpone and defeat liability have resulted in limited and restrictive interpretations of the S & SCRA. The liberal interpretations of the Act, on the other hand, can often be traced to difficult cases turning on the harshness of the result which would otherwise fall upon the affected military person. There are, of course, a few situations of apparent injustice.

Advanced communication technology and the introduction of the videotape deposition suggest solutions in some situations. Yet the overall problem remains. It is anticipated that litigation over the stay protection provided by the S & SCRA will not decrease. The right to personally appear and be afforded a day in court is too fundamental to be finessed by technology.

II. THE 521 STAY

Article II of the S & SCRA is entitled "General Relief." The second subsection of Article II has been enacted as 50 U.S.C. app. 521 and provides as follows:

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 [sections 501 to 591 of this Appendix], 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.\textsuperscript{20}

This provision, as well as all other provisions of the S & SCRA, has been made specifically applicable to all courts in the "United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States."\textsuperscript{21}

A "person in military service" is defined in detail by the S & SCRA to include persons on active duty in the Army, Navy, Marine Corps, Coast Guard and certain officers of the Public Health Service.\textsuperscript{22} Reservists not on active duty do not qualify.\textsuperscript{23} Civilians employed by a military service are not covered by the Act.\textsuperscript{24}

It has been recognized that the stay provision of the Act is only available in situations where the person in military service is an actual party to the case.\textsuperscript{25} Accordingly, in situations where there is a military defendant who has not been served with process, remaining co-defendants have not been permitted to invoke the 521 stay.\textsuperscript{26} This treatment is consistent with that portion of the S & SCRA which permits the plaintiff to proceed against non-military co-defendants, by leave of court, though the action may be stayed as to the military defendant.\textsuperscript{27}

As indicated in the language of 521,\textsuperscript{28} the court may stay a proceeding \textit{sua sponte}. Litigants desiring a stay would be ill-advised, however, to rely on the trial court doing so on its own.\textsuperscript{29} The courts have not generally been sympathetic to the S & SCRA arguments raised for the first time in collateral

\begin{itemize}
\item[20.] Similar stay provisions are found elsewhere in the S & SCRA. \textit{E.g.}, 50 U.S.C. app. §§ 530(2), 531(3) (1990).
\item[21.] \textit{Id.} § 512.
\item[22.] \textit{Id.} § 511(1).
\item[28.] \textit{See supra} text accompanying note 20.
\item[29.] "We cannot conclude that the trial court abused its discretion by not \ldots\textit{sua sponte} ordering a stay of proceedings." Roqueplot v. Roqueplot, 410 N.E.2d 441, 443 (Ill. App. Ct. 1980).
\end{itemize}
challenges or in post-trial proceedings where the military litigant had an opportunity to request a stay prior to trial.

III. THE DISCRETIONARY NATURE OF THE STAY

The stay afforded under 521 does not automatically attain as a result of a party litigant's military status. A civil legal action or proceeding must be stayed "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." The discretionary nature of the stay as found in this language has been described by the Supreme Court as the "very heart of the policy" of the 1940 Act which was in fact a substantial re-enactment of the 1918 Act. Clearly, the stay afforded by the S & SCRA is one which vests judicial discretion in the trial court, discretion which should be exercised in the event of prejudice to the military party. A more automatic form of relief described as a "rigid and undiscriminating suspension of civil proceedings" had been rejected by Congress, as shown in the legislative history of the 1918 Act. Prior experience with automatic stay laws provided by most states in the Civil War era had proven that they were unnecessary and actually detrimental to the soldier's ability to secure credit for himself and his family.

30. Id.; Coffey v. Coffey, 467 S.W.2d 586 (Ky. 1971).
   In view of the fact no motion for a continuance or motion to stay the proceedings was made by Strong and . . . the record contains no evidence that the trial court was informed of Strong's alleged active duty prior to his motion for new trial, we hold that the trial court had before it no basis for exercising its discretion on the issue of whether to stay the proceedings. Therefore, there was no abuse of discretion.
33. Boone v. Lightner, 319 U.S. 561, 565 (1943). It has also been described as "the key to the whole scheme" of the S & SCRA. Id. at 567 n.2 (quoting S. 2859, 65th Cong., 1st Sess. (1918)).
34. Id. at 565.
35. Id. at 560.
36. Id. at 565.
37. See generally id. at 567 n.2.
The discretionary nature of the 521 stay was recognized by the Supreme Court during World War II in *Boone v. Lightner*, the only United States Supreme Court case to address the 521 stay. Boone had been sued in North Carolina state court for his alleged malfeasance as trustee of a fund for his minor daughter. Although personally served in North Carolina, he was stationed in Washington, D.C. as a result of his military service. At trial, Boone's counsel sought a continuance, invoking the stay provision of the S & SCRA. The motion was denied. Boone's counsel withdrew from his representation, and an adverse judgment of $11,000 was entered against Boone, who was not present. The North Carolina Supreme Court affirmed, as did the United States Supreme Court. In what has come to be oft-quoted language, the Supreme Court held that "[t]he Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service." The "unless" clause of 521 requires that the availability of the 521 stay be predicated upon prejudice to the military person's ability to litigate. The Court noted that the S & SCRA "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," but upheld the trial court's conclusion that Boone's absence on the day of trial was a conscious decision motivated by litigation.

The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off.

*Id.* at 567 (quoting S. 2859, 65th Cong., 1st Sess. (1918)).

39. *Id.* at 561-62.
40. *Id.* at 561-62.
41. *Id.* at 562.
42. *Id.* at 563.
43. *Id.* at 564.
44. *Id.* (citing the North Carolina Supreme Court, 22 S.E.2d 426).
45. *Id.* at 561.
46. *Id.* at 565.
47. See *supra* text accompanying note 32.
49. *Id.* at 575.
strategy.\textsuperscript{50} The Court noted that Boone, who himself was a lawyer,\textsuperscript{51} was able to be present at his own deposition in Washington and depositions of others in New York City.\textsuperscript{52} Boone’s own affidavit in the record suggested that he had not even applied for leave in order to be at trial.\textsuperscript{53} Boone had employed and orchestrated numerous counsel on his behalf both before and after the trial\textsuperscript{54} at which he could have sought “vindication,”\textsuperscript{55} but instead “he sought to escape the forum and postpone the day.”\textsuperscript{56}

In the wake of \textit{Boone v. Lightner}, litigation over the 521 stay has evolved around two significant questions: (1) which party carries the burden of showing prejudice or lack thereof to the military person, and (2) are the nature of the issues in the pending civil case such that the military litigant’s absence is more or less likely to be prejudicial? The first question was addressed in \textit{Boone v. Lightner}\textsuperscript{27} and has been the subject of widely divergent views ever since World War II. The latter has uniquely formed its own personality over the last three decades.

\section*{IV. BURDEN OF SHOWING PREJUDICE}

The Supreme Court was requested in \textit{Boone v. Lightner} to hold that the \textit{burden} of showing that Boone’s military service would not materially affect his ability to defend be placed on Boone’s opponents.\textsuperscript{58} The Court noted that no reference is made in 521 nor in the S & SCRA as to who must carry the burden of showing that the military litigant will or will not be prejudiced.\textsuperscript{59} Instead of resolving the issue, the Court simply

\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.} at 572.
\item \textsuperscript{52} \textit{Id.} at 573.
\item \textsuperscript{53} \textit{Id.} at 572.
\item \textsuperscript{54} \textit{Id.} at 574-75.
\item \textsuperscript{55} \textit{Id.} at 575.
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.} at 569-70.
\item \textsuperscript{58} \textit{Id.} at 565.
\item \textsuperscript{59} \textit{Id.} at 569.
\end{itemize}
held that the *placement* of the burden of persuasion lies with the trial court as part of the discretionary nature of the 521 stay.\(^{60}\) Even though the *Boone* opinion appears to place this decision within the discretion of each individual trial court, states have formulated differing philosophies as to placement of the burden. An analysis of the cases indicates the evolution of three general rules: (1) the burden of proving prejudice lies with the party resisting the stay; (2) the military litigant must show "something more" than merely being in the military; and (3) the burden is on the military litigant to show actual unavailability and that his rights would be adversely affected because of his absence from trial.

A. *Burden on Opponent of Military Litigant*

A number of courts have taken the view that upon a *mere* showing of military service, the burden falls upon the opponent to demonstrate that the military litigant's ability to represent himself is *not* adversely affected. For example, in *Chaffey v. Chaffey*,\(^ {61}\) the California Supreme Court reversed a modification of custody order because the trial court had denied the defendant's application for a 521 stay. The court held that "when a prima facie showing for relief is made, the statute, in effect, places the burden of persuasion, if not of proof, upon the party *resisting* a postponement."\(^ {62}\) Relief from the adverse custody order was granted to the defendant father who had taken his children with him to Guam even though he did so in defiance of a one-day-old ex parte temporary restraining order.\(^ {63}\) The California Supreme Court noted that the father had requested a 521 stay on the day of the modification hearing, supported by counsel's affidavits\(^ {64}\) asserting that his military duties in Guam rendered it impossible for him to be present. In upholding the policies of the S & SCRA, the court observed, "it is, of course, common knowledge that a military

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60. "We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment." *Id.* at 570.
62. *Id.* at 368.
63. *Id.* at 367.
64. *Id.*
man on active duty, particularly when overseas, is not a free agent.\textsuperscript{65}

Florida's courts also place the burden on the party who opposes postponement of a trial because of military absence to show that the serviceman’s ability to conduct a defense is not materially affected.\textsuperscript{66} In \textit{Coburn v. Coburn},\textsuperscript{67} the critical custody aspect of a dissolution of marriage proceeding was reversed by the Florida District Court of Appeal because of the lower courts' denial of a postponement until the defendant’s father would return from Germany. The father had physical custody of the parties’ children in Germany. A letter was sent on his behalf from the Army’s Staff Judge Advocate in which a 521 stay was requested.\textsuperscript{68} The letter was filed April 9, 1980.\textsuperscript{69} The trial court delayed the proceedings for over a year after receipt of the letter, but ultimately heard the case in the father’s absence in July 1981, apparently in an effort to resolve the custody dispute prior to the start of the 1982-83 school year.\textsuperscript{70} The court awarded permanent custody to the mother, ordering the father to deliver the children “no later than one week prior to the commencement of the fall school year.”\textsuperscript{71} In reversing the custody award, the Florida appellate court noted that “[t]he Florida cases are in accord that the act should be construed liberally in the soldier’s favor.”\textsuperscript{72}

In Texas, a World War II vintage case law similarly suggests that once a party shows he is in the military, he is “entitled as a matter of right to a stay” with the burden shifting to the opposing side or party to show that his “ability to prosecute or defend is not materially impaired by such military service.”\textsuperscript{73} Although this rule has generally been followed by Texas courts,\textsuperscript{74} the Texas Supreme Court has endorsed the \textit{Boone} rationale which affords to the trial court itself the ulti-

\textsuperscript{65} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 948.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 948-49.
\textsuperscript{71} Id. at 949.
\textsuperscript{72} Roark v. Roark, 201 S.W.2d 862, 863 (Tex. Ct. App. 1947).
mate discretion in deciding how the burden of proof should be placed. At least one recent Texas case has approved the trial court's placement of the burden on the military litigant who "had greater access to the evidence supporting his position."

The state of Georgia has experienced a considerable amount of litigation concerning 521 stays. The interpretation of the Georgia courts, unique unto Georgia itself, basically falls under the category of placing the burden on the opponent of the military litigant subject to some qualifications. A strong line of Georgia cases recognizes that the bare statement that the applicant is actively serving in the military, with nothing more, requires as a matter of law, that the court grant the stay. If the applicant undertakes, however, to do more than simply point out his active status in the military, such as attempt to show his own impairment, he then falls subject to the rule that his evidence will be construed most strongly against him. As a result, "[t]he court may attach significance not only to what the affiant said but also to what he failed to say about the facts within his knowledge." Affidavits which simply assert unavailability and prejudice in conclusionary terms are not sufficient to invoke the 521 stay. Recent cases suggest that the prudent military litigant in Georgia is wise to simply assert the bare statement of active military service and allow his opponent to utilize interrogatories and other discovery devices to gain more information as to availability and the extent of prejudice.

75. Womack v. Berry, 291 S.W.2d 677, 682 (Tex. 1956).
79. Id.
81. Vlasz, 343 S.E.2d at 753.
B. "Something More"

Illinois cases indicate that the military litigant needs to allege “something more” than merely being in the military in order for a 521 stay to be granted. Illinois decisions fall short of putting the entire burden on the military litigant. Instead the holdings are calculated to encourage cooperation by the military litigant in setting a date in the reasonable future for disposition of the action.

The genesis of this position can be traced to *Slove v. Strohm*, wherein a paternity judgment was rendered against the defendant who was a Marine stationed at Quantico, Virginia and subsequently transferred to Camp LeJeune, North Carolina. The defendant sought a 521 stay on four occasions throughout the proceedings but never “indicated when he would be available and present in Chicago to defend the instant action.” Judgment was rendered against the defendant and affirmed on appeal, with the court observing that the defendant “was given an opportunity to set a date at some time in the reasonable future, but declined to do so.”

Interpreting 521 in light of *Boone v. Lightner*, the appellate court stated, “it is clear ... that the petitioner must allege something more than his mere being in the military service.” A subsequent Illinois decision attempted to find “some balancing between the parties’ rights,” but did not hesitate to affirm the denial of a stay where the defendant had been granted stays on three prior occasions.

The continued emphasis in Illinois under the “something more” criteria appears to be on coordinating a suitable trial

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84. 236 N.E.2d at 326.
85. *Id.* at 327.
86. *Id.* at 327-28.
87. *Id.* at 328.
88. 319 U.S. 561 (1943).
89. 236 N.E.2d at 327 (emphasis added).
91. *Id.* at 134. “A party must establish ... that his military status is the proximate cause of his inability to be present for trial.” *Id.* at 135.
date. In *Gross v. Harrell*, the appellate court affirmed the trial court's grant of a continuance on a mere showing that the defendant was in the military service in Korea, but further instructed the trial court to set a date certain for trial upon the defendant's return and to grant "no further continuances . . . for any reason having to do with his military service."  

C. *Burden on Military Litigant*

There have been a few isolated decisions from various jurisdictions holding that the military litigant has the burden of showing all affirmative conditions and negating possible solutions to his absence prior to successfully invoking the 521 stay. Under this burden, the military litigant should be prepared to show his actual unavailability, that his rights would be adversely affected because of his absence at trial, and that he has attempted unsuccessfully to obtain leave in order to be present at trial. State appellate courts in Louisiana, Arizona, South Dakota, and Nebraska, as well as a federal district court in Illinois, have placed these burdens entirely upon the military litigant. In meeting this burden, the military litigant should be prepared to make his showing in affidavit form based on the affiant's first-hand knowledge.

92. 477 N.E.2d 753.
93. *Id.* at 754.
94. *Id.* at 755.
95. Mayfair Sales v. Sams, 169 So. 2d 150, 152 (La. Ct. App. 1964) ("The Courts have universally held the burden of showing that a defendant will be materially affected in conducting his defense because of his military service remains with the defendant and it is not up to the plaintiff to disprove same.").
96. Norris v. Superior Court of Mohave County, 481 P.2d 553, 555 (Ariz. Ct. App. 1971) ("The movant, in order to invoke the protection of the Act, must make a showing of his actual unavailability and that his rights would be adversely affected because of his absence from the trial.").
97. Palo v. Palo, 299 N.W.2d 577, 579 (S.D. 1980) ("Here appellant not only failed to show that he was unable to obtain leave, but he also failed to show that he had not even tried to obtain leave.").
99. Hackman v. Postel, 675 F. Supp. 1132, 1134 (N.D. Ill. 1988) ("Counsel's affidavits do not state that Postel has made any attempt to secure leave to attend the trial, nor does the letter . . . from Postel's commanding officer state that Postel is unable to be present.").
100. "Hibbard's motion for a stay was not verified and was signed by his attorney. The record before this court does not reflect that Hibbard presented any competent factual evidence, by way of affidavit or otherwise, in support of the stay." *Hibbard*, 431 N.W.2d at 640.
In *Tabor v. Miller*, the Court of Appeals for the Third Circuit upheld the trial court's denial of a stay where the military defendant never claimed it would be impossible to appear at trial and never suggested that the trial be scheduled during his Christmas leave or on a weekend. More than five years had elapsed since the accident giving rise to the lawsuit had occurred. It was also clear that the military defendant was only a nominal defendant whose complete defense was controlled and manipulated by his liability insurance carrier—which carrier had rejected an offer to settle within the policy limits. Some courts have subsequently cited *Tabor v. Miller* as authority for the proposition that the burden of completely satisfying 521 rests entirely with the military litigant. It appears, however, that such an interpretation of the Third Circuit's opinion in *Tabor v. Miller* is inappropriate for two reasons. First, the Third Circuit made no such ruling on the placement of the burden, but merely affirmed the result as lying "within the bounds of [the trial court's] discretion." Second, the reliability of *Tabor v. Miller* on such an issue is greatly diminished by virtue of the fact the military defendant was only a nominal defendant with no personal financial risk of loss.

Curiously, *Tabor v. Miller* may be the only case in the last three decades where application for a writ of certiorari was sought in the United States Supreme Court. With certiorari in *Tabor* being denied, *Boone v. Lightner* remains the most recent Supreme Court opinion involving the 521 stay.

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102. 389 F.2d at 647.
103. *Id.*
106. *Tabor*, 389 F.2d at 647.
107. *See supra* note 104 and accompanying text.
V. NATURE OF THE ISSUES AS AFFECTING PREJUDICE

In determining whether or not the military litigant is prejudiced in his ability to prosecute or defend, the nature of the issues in the pending civil case becomes highly relevant. Cases reported over the last three decades demonstrate that this has indeed become the single most determinative factor in resolving 521 stay requests. For example, in Cooper v. Roberts, the Kentucky Court of Appeals upheld the denial of a stay in a proceeding involving real estate jointly owned by five brothers and sisters, only one of whom was in the Air Force. Denial of the 521 stay was deemed proper because the sole issue in that case was whether the land could be divided without a reduction of its value, and the only relevant testimony would be that given by experts.

Another case which demonstrates how the nature of the issues affects the availability of the 521 stay is Shelor v. Shelor. The defendant was a Marine under orders to report to Guantanamo Bay, Cuba for a thirty-month tour of duty. The defendant’s ex-wife brought an action to modify child support to which the defendant raised several equitable defenses and requested a 521 stay. The trial court granted the stay, simultaneously denying a motion for temporary modification. On appeal, the Georgia Supreme Court affirmed the stay as to the modification proceeding but directed the trial court to adjudicate the motion for temporary modification. The court pointed out that lesser evidentiary burdens are placed on a plaintiff seeking temporary relief on child support and such interlocutory relief would not prejudice the defendant’s rights upon the ultimate determination of the permanent modification request.

111. Id. at 911-12.
112. 383 S.E.2d 895 (Ga. 1989).
113. Id. at 895-96.
114. "Because of the interlocutory nature of the relief, the serviceman’s ability to conduct his defense to the action brought against him . . . is generally not materially affected by determination of the interlocutory relief sought." Id. at 896.
A. Liability Insurer as Real Defendant

The stay requests which are most susceptible to unfavorable consideration are those arising in cases involving liability insurance where the military defendant is only a nominal defendant with little or no personal financial risk of loss. The 521 stay has been utilized by many insurers "as a means of postponing and perhaps defeating liability." Courts have not hesitated to recognize that the liability insurer controls and manipulates the defense of the military defendant through its investigators and retained counsel. Authority for denying stays in such cases stems as far back as Boone v. Lightner, wherein the Supreme Court recognized that insurance companies might seek to take undue advantage of the 521 stay.

Discovery of the existence of liability insurance posed a problem for some time, even in cases involving military litigants. However, in 1970 the Federal Rules of Civil Procedure were amended so as to expressly permit the discovery of the existence and contents of any such insurance agreement. Most state rules now follow the federal rules in this regard.

Denial of a stay is most apt to occur in situations where the opposing party has agreed to look only to the insurance coverage for payment. The same rationale for denial of a stay has also been used against an insurance company seeking...

115. See also supra notes 101-04 and accompanying text.
118. 319 U.S. 561 (1943).
119. "Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war." Id. at 569.
122. "Plaintiff's counsel agreed to limit recovery to the amount of liability insurance coverage." Underhill v. Barnes, 288 S.E.2d 905, 907 (Ga. Ct. App. 1982). "Also at the hearing the plaintiff stated in a binding and enforceable fashion ... that the absent serviceman defendant will not be asked to pay any portion of any judgment which is not payable by his liability insurer." McCoy v. McSorley, 168 S.E.2d 202, 203 (Ga. Ct. App. 1969).
the advantage of a 521 stay in the name of its subrogee in pursuit of a subrogation claim against a bankruptcy estate.\textsuperscript{123}

\subsection*{B. \textbf{Personal Injury Claims}}

In situations not involving manipulation by liability insurers, the courts have generally been more receptive to 521 stay requests,\textsuperscript{124} especially if there are no eyewitnesses to the alleged tort other than the parties.\textsuperscript{125} The military litigant should be alert to the fact that the stay requests remain discretionary with the court and instances of denial do exist.\textsuperscript{126}

\subsection*{C. \textbf{Disputes Over Financial Obligations}}

In cases involving rather insignificant financial obligations, the trend of the reported cases has been the denial of 521 stay requests.\textsuperscript{127} Similarly, where the relevant issues in the pending civil case are simply the "reasonableness of charges"\textsuperscript{128} or the computation of "debits and credits,"\textsuperscript{129} stay requests have been denied. At least one court has recognized the unique argument that the military defendant's position was not materially affected but actually \textit{enhanced} by his military service because he was earning a substantially larger salary as a captain than as a civilian and hence in a better position to repay a loan.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{123} Murphy v. Wheatley, 360 F.2d 180 (5th Cir. 1966).
\item \textsuperscript{124} \textit{E.g.}, Marts v. Cauley, 166 S.E.2d 46 (Ga. Ct. App. 1969).
\item \textsuperscript{125} Starling v. Harris, 151 S.E.2d 163 (Ga. Ct. App. 1966).
\item \textsuperscript{126} See Norris v. Superior Court of Mohave County, 481 P.2d 553, 555 (Ariz. Ct. App. 1971) (denying a stay request filed by the military plaintiff stationed in Germany); \textit{cf.} Gross by Gross v. Harrell by Harrell, 477 N.E.2d 753, 754 (Ill. App. Ct. 1985) ("We are afraid that Martin has come dangerously close to using the Act . . . as a sword against persons with legitimate claims against servicemen.").
\item \textsuperscript{127} \textit{E.g.}, Mayfair Sales, Inc. v. Sams, 169 So. 2d 150 (La. Ct. App. 1964) (grant of stay reversed in suit on NSF check in the amount of $256.04).
\item \textsuperscript{128} Jaramillo v. Sandoval, 431 P.2d 65, 66 (N.M. 1967) (paternity action where fact of paternity was adjudicated with defendant's presence, but court resolved final issues of the hospital and doctor bills, as well as future support, in defendant's absence).
\item \textsuperscript{129} Coy v. Raabe, 462 P.2d 214, 217 (Wash. 1970) (Opponent of military litigant to be repaid money advanced in purchasing and maintaining real estate in the litigation involving the exercise of military litigant's option to purchase. "The question at issue involved the debits and credits attributable to Raabe. We do not believe Coy's presence or absence could have materially affected that determination.").
\item \textsuperscript{130} Hempstead Bank v. Collier, 289 N.Y.S.2d 797 (N.Y. Sup. Ct. 1967) (decided under both the S & SCRA and New York Military Law).
\end{itemize}
In cases involving significant amounts of money, the courts appear to be more cautious in assessing the potential prejudice to the military defendant.\textsuperscript{131} It should also be noted that disputes over financial obligations may trigger other provisions of the S & SCRA not addressed in this article. For example, in \textit{Richardson v. First National Bank of Columbus},\textsuperscript{132} the military defendant's house trailer was seized upon the commencement of the creditor's suit. The case was continued four times over one and one-half years\textsuperscript{133} because of the defendant's absence in military service, although the soldier's family had lost possession of the trailer shortly after suit was filed as a result of their inability to post a bond.\textsuperscript{134} The only assertion of military service came in the form of a plea of abatement.\textsuperscript{135} The final judgment for the creditor was affirmed on appeal, with the appellate court pointing out that the procedure the defendant should have utilized was not a plea in abatement, but a request to vacate or stay the seizure\textsuperscript{136} of the trailer under 531 of the S & SCRA.\textsuperscript{137} Section 531 is entitled "Installment Contracts for Purchase of Property" and its protections extend to both real and personal property.\textsuperscript{138}

The S & SCRA also affords special protections in cases of eviction\textsuperscript{139} and mortgage foreclosures.\textsuperscript{140} Notably, in addition to the 521 stay, there are individualized stay provisions for eviction proceedings,\textsuperscript{141} repossessions,\textsuperscript{142} and mortgage foreclosures.\textsuperscript{143} These individualized stay provisions are not analyzed in this article.

\begin{itemize}
  \item \textsuperscript{131} Mays \textit{v. Tharpe \& Brooks, Inc.}, 240 S.E.2d 159 (Ga. Ct. App. 1977) (Denial of stay was reversed on appeal. Defendant was sued on his guarantee of a $48,000 note executed by Rondak Construction Company.).
  \item \textsuperscript{133} \textit{Id.} at 678.
  \item \textsuperscript{134} \textit{Id.} at 677.
  \item \textsuperscript{135} \textit{Id.} at 680.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.} at 679 (discussing the remedies afforded by the S & SCRA).
  \item \textsuperscript{138} 50 U.S.C. app. § 531(1) (1990).
  \item \textsuperscript{139} \textit{Id.} § 530.
  \item \textsuperscript{140} \textit{Id.} § 532.
  \item \textsuperscript{141} \textit{Id.} § 530(2).
  \item \textsuperscript{142} \textit{Id.} § 531(3).
  \item \textsuperscript{143} \textit{Id.} § 532(2).
\end{itemize}
D. Domestic Relations Matters

1. Divorce

An analysis of the 521 stay as applied to divorce proceedings reveals that the less complicated the divorce proceeding, the greater the chance it will be adjudicated. For example, in *Palo v. Palo*, the South Dakota Supreme Court affirmed the divorce judgment against the husband in Germany. There were no children and no issues of support. The sole issues were granting the divorce and dividing the property. Interestingly, both parties were in the military service and physically present in South Dakota prior to the lapse of the sixty-day cooling off period. The wife, who was also stationed in Germany, managed to return to South Dakota on borrowed leave time and borrowed funds. The husband's request for a stay was denied and the divorce judgment was affirmed on appeal.

Divorce cases involving the custody of children and the assessment of support obligations are more likely to be stayed. However, in some situations the divorce itself may be granted with stays being granted as to the more weighty issues.

2. Child Support

The issues involved in the setting of child support are of such a nature that more and more courts are recognizing that the presence of the military litigant is not essential to the setting of child support or its subsequent modification.

144. 299 N.W.2d 577 (S.D. 1980).
145. "The trial court granted appellee a divorce from appellant and divided the parties' property." *Id.* at 578.
146. *Id.*
147. *Id.*
148. *Id.*
149. Kramer v. Kramer, 668 S.W.2d 457, 458-59 (Tex. Ct. App. 1984) (Both parties were also military personnel, but "it is clear that the child was in Cuba.").
150. Smith v. Smith, 149 S.E.2d 468, 471 (Ga. 1966) ("It was error to deny the . . . stay . . . and to enter a judgment for temporary alimony.").
152. Jaramillo v. Sandoval, 431 P.2d 65 (N.M. 1967) (defendant's obligation as
By comparison, child support is frequently set in the absence of a litigant under the procedures of the Revised Uniform Reciprocal Enforcement of Support Act. Furthermore, there has been an effort by the federal government in recent years to force the states to adopt uniform guidelines for use in child support determinations. As a result, child support issues tend to be closely confined to financial data and, accordingly, are even more susceptible in today's world to being litigated in the absence of a party litigant.

3. Custody

Most courts have recognized that the resolution of custody disputes requires the presence of the military litigant. This would be especially true where the children are under the present physical custody of the absent military litigant or under his or her legal custody.

Even in situations where the litigant does not have legal or physical custody but possesses a significant claim, the litigant has been afforded the protection of the 521 stay. For example, in Derby v. Kim, custody of the three-year-old daughter had been vested with the mother at the time of the divorce. Upon the subsequent death of the mother, the maternal grandmoth-
er was awarded permanent custody at a hearing in the absence of the father who had requested a 521 stay. In his motion for a stay, the father asserted that he could be available as early as January 19, 1976, but that he could not be present at the December 30, 1975 hearing date because he had used all of his leave time for 1975. The trial court denied his motion for a stay, but the Georgia Supreme Court reversed. Under Georgia law, when a parent having custody dies, legal custody reverts to the other parent unless the surviving parent is shown to be unfit or have lost parental rights.

The Georgia Supreme Court pointed out, "it should have been obvious from the nature of the issues to be litigated . . . that the father's presence was important." Military litigants involved in custody disputes should also be alert to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA) which apply when more than one state is involved. The UCCJA and the PKPA are not analyzed in this article.

4. Paternity

Clearly, the nature of the issues in a paternity suit warrants the presence of the military defendant. The Mississippi Supreme Court recognized in Mathis v. Mathis that "a paternity suit is of such a personal and intimate nature that it is implicit that appellant's absence materially affects his defense unless a specific finding is made to the contrary." The adverse judgment of paternity was rendered while the defendant was serving in the Navy in waters off Vietnam. In reversing the judgment, the Mississippi Supreme Court indicated that the defendant should be given a reasonable opportunity to defend, but that his failure to appear at his first reasonable op-

160. Id. at 157.
161. Id.
162. Id. at 158.
163. E.g., Brown v. Brown, 493 So. 2d 961 (Miss. 1986). See id. at 964 n.1 for discussion of UCCJA implications.
165. 236 So. 2d 755 (Miss. 1970).
166. Id. at 756-57.
167. Id. at 756.
portunity warranted a final disposition of the case in his absence. A similar result was attained in Stringfellow v. Whichelo, a Rhode Island case where the defendant appeared on the first three days of trial, but was unable to be present thereafter because his military leave of absence had expired. The trial court proceeded in the defendant's absence on a default basis and the Rhode Island Supreme Court eventually sustained the defendant's exception to such proceedings, relying on the 521 stay provision of the the S & SCRA. The court noted that prejudice to the absent defendant was easily found in the record. The trial court itself had expressed concerns "about the necessity of respondent's presence for his own protection," thereby giving the Rhode Island Supreme Court a basis from which to conclude that the trial court "inferentially found that respondent's military service materially affected his ability to defend the case."

Although the absence of the defendant in a paternity action is highly prejudicial, the courts have also recognized the needs of the child and have accordingly shown little patience to military defendants who fail to cooperate in making themselves available in reasonable fashion.

5. Contempt Proceedings

The courts have shown little sympathy to military litigants in contempt proceedings where there has been a failure to comply with one or more of the court's previous orders.

168. Id. at 757.
170. The hearing took place on January 5, 6 and 12, 1966. His leave expired on January 17, 1966. Id. at 859.
171. Id. at 860.
172. Id.
173. Id.
174. "However, should the trial court determine within its discretion that appellant fails to appear at the first reasonable opportunity to do so after the rendition of this opinion, then the chancellor may finally dispose of the case." Mathis v. Mathis, 236 So. 2d 755, 757 (Miss. 1970); "He was given an opportunity to set a date at some time in the reasonable future, but declined to do so . . . . [The S & SCRA] may not be used as a sword against persons with legitimate claims against servicemen." Slove v. Strohm, 236 N.E.2d 326, 328 (Ill. App. Ct. 1968); see also Theresa G. v. Eric L., 506 N.Y.S.2d 948 (Fam. Ct. 1986) (denying a stay pending the respondent's return from Germany at some unspecified future date).
Continued contemptuous behavior has, on at least one occasion, additionally influenced the court to exercise its discretion against a 521 stay in a related modification proceeding. In Hibbard v. Hibbard, the father failed "to comply with the court's visitation orders" and "for nearly 3 years intentionally and effectively denied visitation of his minor children with their natural mother." The mother's response was to institute a modification of custody proceeding in which she was successful.

The father's contemptuous behavior not only served as the grounds warranting the change in custody, but also influenced the court adversely in its consideration of his request for a 521 stay of the modification proceeding.

E. Defense of a Judgment

Occasionally a military litigant may find him or herself in the position of having to defend a favorable judgment. Existing case law indicates that the litigant's ability to defend a judgment while on appeal is not materially affected by military service. It has also been held that a litigant's ability to defend against a motion to vacate or set aside a judgment is not adversely affected by reason of military service if the grounds asserted are jurisdictional in nature.

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Again, appellant misconstrues the nature of the proceedings in this case. . . . the only matters the trial court decided were that appellant had failed to comply with the visitation provisions of a custody order. . . . The Soldiers' and Sailors' Civil Relief Act was passed to give extra protection to military personnel. It certainly did not give a license to a serviceman to ignore lawful civil orders . . . .

Id. at 436. See also Roberts v. Fuhr, 523 So. 2d 20, 29 (Miss. 1987) (the father was not allowed to invoke the S & SCRA because, inter alia, he was in contempt of a visitation order from a Mississippi court—relief from which court he himself originally sought and to which court he had "submitted himself . . . throughout the years of this controversy.") and Wheless v. Wheless, 169 S.E.2d 813 (Ga. 1969) (denial of stay deemed harmless error where husband won on contempt issues).

176. 431 N.W.2d 637 (Neb. 1988).
177. Id. at 639.
178. Id.
179. Id. at 640.
180. Kesler v. Kesler, 682 S.W.2d 44, 45 n.1 (Mo. Ct. App. 1984) ("We have concluded the ability of husband to prosecute this appeal, as would be true in most every appeal, was not materially affected by his military service.").
VI. ESTOPPEL, WAIVER, AND BAD FAITH

Where a military litigant remarries in reliance on the validity of a divorce decree, he may be estopped from subsequently requesting that the decree be vacated because of non-compliance with the the S & SCRA. It has also been held that a military litigant who seeks the aid of court may be estopped from subsequently invoking the 521 stay in regard to selective portions of that court's disposition.

Waiver of the opportunity to apply for a 521 stay may occur if the military litigant has previously indicated a willingness to try the case in absentia. A 521 stay has also been denied where it appeared the military litigant had acted in bad faith by failing to have previously proceeded with the action when given the opportunity to do so.

On at least one occasion a military litigant involved in a multi-state divorce dispute found that the state court of his choosing (Mississippi) granted his wife a stay of proceedings because of the "gamesmanship" in which he was engaged. His "gamesmanship" was simply successfully invoking the 521 stay in the state court of her choosing (California). His "gamesmanship" did not serve to deny him the 521 stay in California, but it appeared to create a reciprocal common law stay for his non-military spouse in Mississippi.

183. "Chancellor Malski overruled Roberts' motion for a stay on grounds that Roberts should not be permitted to selectively invoke the protection of the S & SCRA, after having so recently sought, to his benefit, the services of the Mississippi Courts." Roberts v. Fuhr, 523 So. 2d 20, 28 (Miss. 1987). See also discussion of Roberts, supra note 175.
184. "It would further appear that the defendant has waived his right to utilize [521] in that he has appeared in the action on at least two occasions through attorneys of his own choice and . . . indicated that they were prepared to try the matter even in the absence of the defendant." Deacon v. Witham, 499 N.Y.S.2d 317, 319 (1985).
185. "In the instant case, we agree . . . that the Appellant was guilty of bad faith, and did not diligently prosecute his action when he had full opportunity to do so." Robbins v. Robbins, 198 So. 2d 471, 475 (Fla. Dist. Ct. App. 1967). "Based upon the record before this court with its strong suggestions of bad faith on the part of the Debtor, this court will not indefinitely postpone the trial of this matter as requested by Debtor." In re Diaz, 82 B.R. 162, 165 (Bankr. M.D. Ga. 1988) (debtor was available for trial five weeks before he was required to report to Germany but did not request trial prior to departure).
VII. THE PLAUSIBLE NATURE OF THE REQUEST

Success in invoking a 521 stay is directly related to the reasonableness of the request. The more plausible the request, the more likely it will be granted.\footnote{187} Unreasonable requests or repeated requests for a stay may be an indication that the litigant is attempting to utilize the S & SCRA as part of his or her litigation strategy, which the Supreme Court has declared is an unworthy use of the Act.\footnote{188}

Unreasonable requests for a 521 stay are frequently seen in those cases where the military defendant is a nominal defendant only, subject to the control of the liability insurer who is conducting the defense. For example, in \textit{Underhill v. Barnes},\footnote{189} the defendant requested a stay for the entire “period of the defendant’s service in the Navy plus sixty days.”\footnote{190} Notably, the defendant had not even enlisted in the Navy until after the accident giving rise to the lawsuit.\footnote{191} The trial court denied the stay and the Georgia appellate court affirmed, observing that plaintiff’s counsel had agreed to limit recovery to the amount of liability insurance coverage and that the trial of the case had been pending for five years.\footnote{192} Similar results have been seen in other cases where the nominal defendants had tendered requests for “indefinite stays.”\footnote{193}

The 521 stay may be entered anytime during the period of the litigant’s military service “or within sixty days thereaf-

\footnotesize{187. Bond v. Bond, 547 S.W.2d 43 (Tex. Ct. App. 1977) (finding the trial court’s denial of a stay for two weeks until the appellant was retired from the Air Force to be an abuse of discretion).

188. “We think . . . that the absence of [Boone] . . . on the day of judgment was dictated wholly by litigation strategy . . . But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.” Boone v. Lightner, 319 U.S. 561, 575 (1943).


190. \textit{Id.} at 906.

191. \textit{Id.}

192. \textit{Id.} at 907.

193. Hackman v. Postel, 675 F. Supp. 1132, 1133 (N.D. Ill. 1988) (The court denied a motion for indefinite stay, noting that “[t]he fact that the movant is insured and is represented by counsel . . . is a factor to be considered.”); Tabor v. Miller, 389 F.2d 645. (3d Cir. 1968); \textit{see also supra} notes 101-06 and accompanying text.}
The stay may be ordered for any length of time up to "the period of military service and three months thereafter." It has been recognized that the S & SCRA was not intended "to shield a defendant from trial for such duration as his voluntary, peacetime enlistment might provide, or as long thereafter as he might choose to stay on active duty." The reasonableness of the stay request is, of course, affected by the location of the military litigant's station of duty. It has been generally recognized that the military services have been "extremely cooperative" in making stateside personnel available for court appearances. Tours of duty overseas are rarely greater than two years in length. Within these parameters the courts have generally accommodated military personnel serving in places like Germany, Korea, and Vietnam, with significant grants of stay designed to coincide with their ultimate return to the United States. There are cases, however, where the overseas defendant has been expected to return for trial prior to the conclusion of his or her overseas tour of duty.

195. Id. § 524.
198. Id.
199. Coburn v. Coburn, 412 So. 2d 947 (Fla. Dist. Ct. App. 1982) (by virtue of the relief given in appellate court, appellant secured a de facto stay of almost two years—the trial court had denied appellant's request for a 521 stay and was reversed on appeal).
202. Norris v. Superior Court, 481 P.2d 553 (Ariz. Ct. App. 1971) (denying relief from trial court's denial of stay but instructing trial court to give "ample time" to the litigants in Germany to comply with discovery orders); see also Hibbard v. Hibbard, 431 N.W.2d 637 (Neb. 1988) (affirming adverse judgment against husband stationed in England where husband failed to use 38 day leave stateside to resolve pending action filed by ex-wife).
VIII. PROCEDURAL MATTERS

A. Discovery Devices

In recent years, the tools of discovery have taken on a greater role in resolving 521 stay requests both as to the issue of prejudice to the military litigant and as to his or her eventual availability for trial.

Use of the video tape deposition has also been suggested as a possible solution to the military litigant's absence. In Keefe v. Spangenberg, the court denied the defendant's request for a stay, but granted a one month continuance to enable the defendant to arrange for leave or furlough. Alternatively, the court suggested the use of a video tape deposition, noting that the defendant's "testimony, appearance, mannerisms, intonations and other means of presenting his defense and evaluating his credibility will be before the jury."

Video tape depositions are authorized by the Federal Rules of Civil Procedure and are certainly a credible and effective way of presenting the testimony of non-party witnesses. However, a party's ability to either prosecute or defend an action requires much more than just preserved testimony. There is no substitute for being personally present during the course of a trial or hearing. Countless trial decisions are predicated upon the events as they arise. A video tape deposition does not afford the party litigant spontaneity in his or her representation at trial.

203. "[P]laintiff would not be precluded from seeking information . . . that might show that his ability to conduct his defense would not materially be affected by his military service . . .." Vlasz v. Schweikhardt, 343 S.E.2d 749, 753 (Ga. Ct. App. 1986).

204. "Tharpe should under proper discovery procedure be able to determine when Dr. Mays will be available to defend in a future court proceeding . . .." Mays v. Tharpe & Brooks, 240 S.E.2d 159, 161 (Ga. Ct. App. 1977).


206. Id. at 50.

207. Id. See also In re Diaz, 82 B.R. 162, 165 (Bankr. Ga. 1988) ("Court reporters may take depositions in Germany including video tape depositions for use at trials in this country.").

B. Preservation of Other Defenses

Occasionally the first response submitted by a military defendant to a claim filed against him is a request for a 521 stay. This may be done pro se or with the assistance of counsel. Military personnel should be cautious in proceeding in such a manner because a few courts have held that a request for a 521 stay, by itself, constitutes a general appearance to the action, with the defendant waiving his right to challenge the court's exercise of personal jurisdiction over him. Under the Federal Rules of Civil Procedure and most state court rules the defense of lack of jurisdiction over the person of the defendant, as well as certain other defenses, are waived if not asserted in the first motion or responsive pleading filed on behalf of the defendant. Nothing contained in the S & SCRA serves to negate such a waiver.

IV. CONCLUSION

The 521 stay afforded by the Soldiers' and Sailors' Civil Relief Act is clearly of a discretionary nature designed to accommodate the military litigant who is truly prejudiced in his ability to prosecute or defend the lawsuit to which he is a party. Unfortunately, some courts have placed too much of a burden on the military litigant in establishing prejudice. A few of those decisions were affected by other factors such as the manipulation of the nominal military defendant by his liability insurer or contemptuous conduct by the party invoking the stay. The burden should not fall entirely on the movant for a 521 stay to show all affirmative conditions and negate all possible solutions. The assertion of a litigant's military service should cause a sufficient amount of inquiry by the court

and parties that an accurate determination of prejudice or lack thereof is made.

Undoubtedly, the 521 stay has been invoked on a number of occasions for unworthy purposes and the courts have responded by denying those requests for a variety of reasons. Those reasons include bad faith, estoppel, waiver, a recognition of who is the real litigant, and whether or not the stay is sought purely for strategic reasons.

The nature of the issues to be litigated in the pending civil action is highly relevant and has become the single-most important point of inquiry in resolving stay requests. Many issues warrant the personal appearance of the military litigant. It is hazardous to attempt to list or define the universe of issues where the personal appearance of the litigant is warranted because such a list may omit truly significant issues. Certainly included in that universe are custody disputes, paternity actions, and numerous other significant civil controversies. Excluded from that universe might be minor financial controversies, child support issues, simple divorce proceedings, and appeals.

In cases involving liability insurers and nominal military defendants, it is suggested that only plausible requests for a stay should be entertained and that courts should not hesitate to determine at as early a stage as possible who is controlling the defense. Attempts to utilize 521 to postpone and defeat liability should not be tolerated.214

The courts have demonstrated that they are receptive to plausible requests for 521 stays. The unreasonable attempts to invoke 521 have generated a significant amount of case law and have been the focus of the discussion in this article.

Truly reasonable requests for a 521 stay should be honored by the courts and, where the issues warrant, every effort should be made to schedule a hearing date so that the military litigant will have a realistic opportunity to be present. There is no adequate alternative to having a party physically present for his day in court. A video tape deposition may be an attractive way to preserve and present testimony, but it falls far short of

214. "Where it is reasonable to infer that an insurance company is attempting to use § 521 as a means of postponing and perhaps defeating liability . . . the trial court is justified in refusing to injure the plaintiff for the sole advantage of the insurance company." Hackman v. Postel, 675 F. Supp. 1132, 1134 (N.D. Ill. 1988).
enabling a party to prosecute or defend his case at trial. Countless decisions by a party in the trial of a case are predicated upon events as they develop. The opponent of an *absent* party will always have the edge.\textsuperscript{215}

\footnotesize