"may not repay the loans—and thus the 'loan obligation [will] remain unsatisfied'—until either: (1) she completes the prepayment procedures outlined in ELIHPA; or (2) the loan period expires."[32] Accordingly, the court concluded that Schroeder must continue to use the property for low-income housing until she completes ELIHPA's procedural requirements or until 2034.[33]

The District Court's Decision Declining to Quiet Title

After deciding that ELIHPA's requirements applied to the loans, the Ninth Circuit held that the district court did not abuse its discretion in declining to quiet title to Schroeder's property on equitable grounds.[34] Because the suit involved a contract between Schroeder and the federal government, the court applied federal common law. For the purposes of deciding the merits of the quiet title action, the court assumed that a quiet title action was available.[35]

The court first established that equitable relief was "not appropriate where an adequate remedy exists at law."[36] In this case, the court stated, an adequate remedy existed because Schroeder could seek damages for ELIHPA's repudiation of the existing loan contract.[37] Additionally, the court found that Schroeder had not shown a need for equitable relief, agreeing with the district court's conclusion that "the importance of preserving that which ELIHPA seeks to preserve"—*i.e.*, low-income housing units—outweighs the burden to owners of complying with ELIHPA.[38]

Conclusion

The *Schroeder* decision makes clear that an owner may not circumvent RHS prepayment restrictions through a quiet title action. Owners may seek prepayment through ELIHPA's required procedures or bring claims for damages due to ELIHPA's adverse effect on contracts in existence at the statute's enactment. However, the court has ruled that prepayments that do not follow ELIHPA's procedures will not be accepted, and quiet title actions will not allow owners to work around the law. While some may have believed that quiet title claims offered a way around prepayment requirements, *Schroeder*, which follows an earlier Ninth Circuit decision in DBSI/TRI IV Ltd. Partnership v. United States,[39] appears to have put this idea to rest in the Ninth Circuit. ■

[32]*Id.* (citing *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002)).
[33]*Id.* at *6.
[34]*Id.*
[35]*Id.*
[36]*Id.* (citing *Mort v. United States*, 86 F.3d 890, 892 (9th Cir. 1996)).
[37]*Id.* Under the Tucker Act, damages are available to compensate owners for contracts breached as a result of ELIHPA. *Id.* (quoting *DBSI/TRI*, 465 F.3d at 1041 n.8 (citing *Franconia Assocs. v. United States*, 536 U.S. 129 (2002))).
[38]*Id.* (quoting Schroeder v. United States, 2007 WL 3028432, at *2 (D. Or. Oct. 17, 2007).
[39]465 F.3d 1031 (9th Cir. 2006).

United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls*

On June 19, 2009, the United States filed an amicus brief supporting affirmance of a district court's judgment holding that local eviction control laws are not preempted by federal regulations governing tenancy termination under the Housing Choice Voucher program.[1] In *Barrientos v. 1801-1825 Morton, LLC*, a landlord had sought to evict voucher tenants for reasons permissible under federal regulation but prohibited under the Los Angeles Rent Stabilization Ordinance (LARSO).[2] Though the appeal remains pending in the Ninth Circuit, the United States' brief and subsequent Notice issued by the U.S. Department of Housing and Urban Development (HUD) provide strong support for the position that HUD regulations cannot be interpreted to give federally assisted tenants fewer protections than they would receive as unassisted tenants.

Background

Morton Gardens is a sixty-six-unit apartment complex in the City of Los Angeles.[3] It was developed in 1971 through a federal mortgage-secured loan under Section 236 of the National Housing Act, and as such was subject to a use agreement requiring that the units be rented to low-income households and limiting the amount of rent that could be charged.[4] In 1998, Morton Gardens' prior owner prepaid the Section 236 loan, extinguishing the use agreement.[5] As a result, tenants who lived in Morton Gardens at the time of prepayment became eligible to receive enhanced vouchers.[6] Enhanced vouchers resemble those issued under the tenant-based Housing Choice Voucher

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[1]Brief for the United States as *Amicus Curiae* Supporting Affirmance of the District Court's Judgment, Barrientos v. 1801-1825 Morton, LLC, No. 07-56697 (9th Cir. Nov. 13, 2007) (hereinafter "Brief for the United States"). For a more detailed discussion of the decision issued at the district court level, see NHLP, *Local Eviction Controls and Enhanced Voucher Statute Protect Voucher Holders*, 37 Hous. L. Bull. 180 (2007).
[2]Los Angeles Municipal Code § 151.01 *et seq.*
[3]Order re Plaintiff's Motion for Summary Judgment, Barrientos v. 1801-1825 Morton, LLC, No. 06-6437, slip. op. at 3 (C.D. Cal. Sept. 11, 2007) (hereinafter, "Sept. 2007 order").
[4]*Id.*
[5]*Id.*
[6]Pursuant to annual appropriations acts passed during the late 1990s and permanent legislation passed in 1999, enhanced vouchers become available to tenants residing in buildings when owners prepay their federally secured mortgages. Pub. L. No. 106-74, § 538, 113 Stat. 1047, 1122 (1999) (establishing Section 8(t) of the United States Housing Act, codified at 42 U.S.C. § 1437f(t)).

(HCV) program, with two important distinctions: the payment standards for enhanced vouchers can be higher to cover the new market rent,[7] and enhanced voucher holders have a federal statutory right to remain in their homes.[8] The plaintiffs in the present case are sixteen enhanced voucher holders and six HCV program participants, who moved into the property after the prepayment.[9]

In June 2006, the owner served on each voucher tenant a "Ninety Day Notice to Terminate Tenancy."[10] The notice cited the reason for termination as "a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate."[11] Pursuant to 42 U.S.C. § 1437f(o), during the lease term, an owner participating in the HCV program "shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, *or for other good cause*…"[12] HUD's voucher regulations state that, after the initial lease term, "other good cause…may include…a business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental)."[13] Though the general provisions of Section 1437f(o) apply to enhanced voucher tenants as well, HUD has not issued regulations defining "other good cause" as it pertains to the enhanced voucher program.

The LARSO, which governs most rental housing in the City of Los Angeles including voucher units, does not recognize a landlord's desire to raise the rent as a permissible ground for eviction.[14] The question therefore arose as to whether the owner could evict the tenants for reasons unrecognized by local law.[15] In the tenants' view, the owner was attempting to transform this "minimum nationwide floor of protection against no-cause evictions …into a preemptive ceiling that precludes Tenants from enjoying the benefits of the same LARSO eviction controls that their unassisted neighbors enjoy."[16]

In September 2007, the federal district court granted a preliminary injunction allowing the tenants to remain in their apartments and entered summary judgment for the tenants on two grounds.[17] In granting summary judgment to the enhanced voucher tenants, the court found that applicable statutory provisions "unambiguously provide enhanced voucher tenants a right to remain in tenancy when the rent is raised."[18] Therefore, HUD's voucher regulations allowing for evictions based on the "desire to lease the unit at a higher rental" do not apply to enhanced voucher tenants.[19] Second, the court examined whether the LARSO's eviction controls protected the six standard voucher tenants from eviction. Finding that an actual conflict exists between the LARSO and HUD's regulation regarding whether an owner may evict based on the desire to raise rents,[20] the court then held that HUD exceeded its statutory authority by defining "other good cause" to include the desire to raise rent.[21] According to the court, the HUD regulations contradicted Congressional intent to "minimize disturbance of the private relationship under state law between the unit owner and the tenant"[22] and to leave local rent control laws in place.[23]

In ruling on a motion for reconsideration, the court further clarified what may constitute "good cause" for eviction, prompted by the owner's attempt to rely on additional grounds—the desire to avoid the costs of Section 8 program requirements. While noting that this issue was not presented by the summary judgment record, the court nevertheless found that avoiding program compliance costs cannot constitute "good cause" for eviction.[24] The court reasoned that good cause "demands more than a bare desire to opt out of the program—whether for excessive costs or some other programmatic reason."[25] More significantly, the court found that Congress intended Section 8 tenancies to mirror the unassisted rental market.[26] The court reasoned that "[l]imiting evictions to those defined in LARSO places assisted and unassisted tenants on equal footing" and therefore owners seeking to evict voucher holders based on "business or economic reasons" must be limited to the reasons enumerated in the LARSO.[27] Because the cost of program compliance is not a ground

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[7]*See generally* NHLP, Hud Housing Programs: Tenants' Rights § 15.4.2.4 (3d ed. 2004).

[8]*See* 42 U.S.C.A. § 1437f(t)(1)(B) (Westlaw June 29, 2009).

[9]The National Housing Law Project, the Legal Aid Foundation of Los Angeles, and Munger, Tolles & Olson LLP are counsel to tenant Plaintiffs-Appellees.

[10]Sept. 2007 order at 5.

[11]*Id*.

[12]42 U.S.C.A. § 1437f(o)(7)(C) (Westlaw June 29, 2009) (emphasis added).

[13]24 C.F.R. § 982.310(d)(1)(iv), (d)(2) (2009).

[14]Sept. 2007 order at 2-3.

[15]Similar questions were raised before the New York Court of Appeals in Rosario v. Diagonal Realty, L.L.C., 872 N.E.2d 860 (N.Y. 2007). That case examined whether the 1998 Congressional amendments eliminating the endless lease requirement in the Section 8 program enabled owners to refuse to offer a renewal lease as required by local law. The court held that federal law does not preempt local rent and eviction protections. *See also* NHLP, *New York's Highest Court Rules NYC Voucher Owners Must Offer Assisted Renewal Leases*, 37 Hous. L. Bull. 158 (2007).

[16]Appellees' Brief, Barrientos v. 1801-1825 Morton, LLC, No. 07-56697, 1 (9th Cir. Nov. 13, 2007).

[17]Sept. 2007 order at 44.

[18]*Id*. at 17 (analyzing the language and history of 42 U.S.C. § 1437f(t)).

[19]*Id*. at 19 (citing 24 C.F.R. § 982.310(d)(iv)).

[20]*Id*. at 22.

[21]*Id*. at 41.

[22]*Id*. at 37-38 (quoting S. Rep. No. 97-139 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 396, 552).

[23]*Id*. at 39.

[24]Order re. Defendant's Motion to Reconsider and Amend the Court's September 12, 2007 Order, Barrientos v. 1801-1825 Morton, LLC, No. 06-6437, 18 (C.D. Cal. Oct. 24, 2007).

[25]*Id*.

[26]*Id*. at 14.

[27]*Id*.

for eviction in the LARSO, the court found that it was also impermissible to evict the tenants on that basis.[28]

The owner appealed to the Ninth Circuit in November 2007.[29]

Oral Argument

Before a panel consisting of Judges O'Scannlain, Rymer and Wardlaw of the Ninth Circuit, counsel presented oral argument on March 2, 2009.[30] The court spent a significant amount of time focusing on conflict preemption, attempting to determine whether the LARSO's eviction controls can exist simultaneously with HUD's "other good cause" eviction provisions.[31]

There are two types of conflict preemption. The first exists when it is not possible to comply with both federal and state or local requirements. The second, primarily involved in this appeal, concerns the so-called "frustration of purpose" doctrine. This test, as laid out by the Supreme Court, asks whether "the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal statute or regulation.[32]

The owner argued that the LARSO stands in actual conflict with HUD regulations.[33] One judge responded that it seemed possible to comply with both HUD regulations and the LARSO by terminating the underlying lease only for reasons recognized by both the LARSO and federal law. When another judge inquired as to why municipalities should not be able to provide greater protections beyond the federal standard, the owner replied that doing so would destroy incentives for building owners to participate in the voucher program and that HUD intended this regulation to apply nationwide.[34] The judge then pointed out that the federal regulations did not expressly prohibit local laws protecting voucher tenants.[35] On rebuttal, the owner subsequently reiterated its position that the substantive grounds for lease termination are defined by federal law and that state and local law govern only the procedural grounds for a landlord to regain possession.[36]

During argument, tenants sought to clarify for the court that different regulations apply to enhanced voucher holders and standard voucher holders, and that both are subject to local protections such as the LARSO. Tenants emphasized that the regulatory "other good cause" definitions apply to the regular voucher program, but that HUD has been silent on such detailed definitions under the enhanced voucher program.[37] And where HCV regulations apply to enhanced vouchers, those regulations must be interpreted in light of Congress's subsequent creation of the enhanced voucher right to remain.[38] Analogizing to local rent controls, tenants argued that this right to remain would be taken away if landlords were allowed to raise rents beyond what local law allows.[39] The only rate restriction in the enhanced voucher program is that the rents must be "reasonable," which in a rent control jurisdiction requires rents that are comparable to other rent-controlled units.[40]

The court spent a significant amount of time focusing on conflict preemption, attempting to determine whether the LARSO's eviction controls can exist simultaneously with HUD's "other good cause" eviction provisions.

Tenants then turned to the issue of conflict preemption, arguing that the purpose behind HUD's "other good cause" regulation was to bring federal law more closely in line with state and local law.[41] The purpose was not, contrary to the owner's position, to allow landlords to maximize rents.[42] Rather, HUD created the option of evicting based on desire to raise rents because it worried that owners would not join the voucher program if federal laws were more restrictive than local laws.[43] HUD was thus aiming to close the gap between local and federal law, which tenants argued the LARSO also does by applying its restrictions equally to assisted and unassisted housing.[44] Therefore, enforcement of the LARSO would be consistent, and not in conflict, with the purpose of HUD regulations. To support its argument that conflict preemption does not exist, tenants cited both case law[45] and HUD's 1999 regulatory amendments stating that its regulations do not preempt state and local prohibitions on discrimination against tenants based on their status as Section 8 voucher holders.[46] Finally, tenants argued that the

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[28] *Id*. at 10.
[29] Appellees' Brief, *supra* note 16.
[30] Audio recording: Oral Argument for Barrientos v. 1801-1825 Morton LLC (Mar. 2, 2009) (hereinafter "Oral Argument, Mar. 2, 2009"), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002882.
[31] *Id*.
[32] Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 156 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[33] Oral Argument, Mar. 2, 2009.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. *See also* 42 U.S.C.A. § 1437f(t)(1)(B).
[39] Oral Argument, Mar. 2, 2009.
[40] 42 U.S.C.A. § 1437f(o)(10)(C).
[41] *Id*.
[42] *Id*.
[43] Appellees' Brief, *supra* note 16, at 22.
[44] Oral Argument, Mar. 2, 2009.
[45] *See* Chevron USA, Inc. v. Hammond, 726 F.2d 483, 488 (9th Cir. 1984) (stating, "if we are left with a doubt as to congressional purpose, we should be slow to find preemption"); Kargman v. Sullivan, 552 F.2d 2, 7 (1st Cir. 1977) (finding that the existence of local rent control rates lower than federal regulations permit "does not, of itself, present an impermissible actual conflict with federal law").
[46] 24 C.F.R. § 982.53(d).

permissive language of the regulations does not automatically result in preemption, as the HUD regulations state only that a landlord "may" evict for the enumerated reasons, but not that he "must" do so.[47] Because of their permissive nature, the regulatory eviction provisions do not automatically create direct conflict with local laws such as the LARSO; one would need to go further and find a policy conflict.[48] None can exist here where the policy is to bring laws governing assisted tenancies in line with those governing unassisted tenancies.[49]

At the conclusion of argument, the panel suggested that the views of the United States might be helpful in resolving the federal preemption question. Approximately six weeks later, the court solicited input from the United States regarding the "frustration of purpose" conflict preemption issue. In its letter to the Attorney General, the court inquired, "Do local eviction controls …pose an obstacle to the accomplishment and execution of the full purposes and objectives of HUD's definition of 'good cause' to terminate assisted tenancies as including the desire to raise rents, set forth in 24 C.F.R. § 982.310(d)(iv)?"[50] The cities of Los Angeles, San Francisco and New York City, all of which have local eviction protections that could be impaired by an adverse preemption ruling, communicated their concerns to HUD Secretary Shaun Donovan, who directed HUD to file a brief clarifying that the federal regulations do not preempt local protections.

United States Files Amicus Curiae Brief

On June 19, 2009, the United States filed the requested amicus curiae brief, agreeing with tenants and the district court that HUD regulations do not preempt the LARSO or other local eviction controls. In examining whether the frustration of purpose doctrine creates conflict preemption in this case, the United States reviewed the history behind HUD's Section 8 voucher program regulations. It found that HUD did not originally intend to create "a comprehensive regulatory definition of good cause" but that HUD eventually did so to provide assurance to landlords considering Section 8 program participation.[51] Thus, HUD issued regulations that it hoped would make "minimal demands on the owner beyond the normal requirements of an unsubsidized tenancy."[52] The resultant regulations defining "other good cause" used the permissive "may," which the Supreme Court has interpreted to mean "may or may not."[53] The United States therefore argued that the LARSO's prohibition on eviction for the reason in question does not conflict with HUD regulations, as regulations dictate that "an owner's desire to raise the rent during the term of a lease 'may'—or may *not*—constitute 'good cause' for termination of tenancy."[54] As further support for its position, the United States pointed to other Section 8 regulations that expressly recognize local rent controls.[55]

Despite agreeing with the district court's final judgment in favor of the tenants, the United States disagreed with that court's reasoning on several points. The United States did not believe that either the language or intent of the "good cause" regulations conferred upon landlords a "right" to terminate a Section 8 tenancy for the permissibly defined reasons.[56] Based partially upon the purported existence of such a "right," the district court had found HUD regulations stood in actual conflict with the LARSO.[57] The United States argued that the court erred in interpreting HUD regulations as granting owners a "right" to terminate, focusing again on their permissive language.[58] Under this reasoning, there could be no conflict between the regulations and the LARSO, and therefore HUD did not exceed its statutory authority in defining "good cause" and so the "good cause" regulation was still valid.[59]

The United States also argued that its interpretation of its own "ambiguous" regulation is entitled to weight,[60] citing the recent Supreme Court decision in *Wyeth v. Levine*.[61] There, the Court recognized that federal agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed decisions" regarding how state or local law will impact the agency's regulations.[62] The United States argued that its analysis was entitled to weight because it met the *Wyeth* test of being "thorough, consistent, and persuasive."[63]

Although the question of the federal regulation's applicability to enhanced voucher tenants was not directly raised by the court's briefing request, the United States voiced its general agreement with the lower court's analysis that the earlier regulation should not deny tenants the right to remain subsequently conferred by statute.[64]

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[47]Oral Argument, Mar. 2, 2009; *see also* 24 C.F.R. § 982.310(d)(1)(iv).
[48]Oral Argument, Mar. 2, 2009 (citing Sprietsma v. Mercury Marine, 537, U.S. 51, 67 (2002) (finding no conflict preemption in the absence of an "'authoritative' message of a federal policy")).
[49]Oral Argument, Mar. 2, 2009.
[50]Letter from Molly C. Dwyer, Clerk of Court, United States Court of Appeals for the Ninth Circuit, to the Honorable Eric H. Holder, Jr., Attorney General of the United States, U.S. Department of Justice (Apr. 17, 2009).
[51]Brief for the United States at 17 (citing 49 Fed. Reg. 12,215, 12,233 (Mar. 29, 1984)).
[52]*Id.* (citing 49 Fed. Reg. 12,233).
[53]*Id.* at 19 (citing Rowland v. California Men's Colony, 506 U.S. 194, 201 (1993)).
[54]*Id.*
[55]*Id.* at 20-21 (citing 24 C.F.R. § 982.509).
[56]*Id.* at 24.
[57]Sept. 2007 order at 33.
[58]Brief for the United States at 24.
[59]*Id.* at 24-25.
[60]*Id.* at 27.
[61]129 S. Ct. 1187 (2009).
[62]*Id.* at 1201.
[63]Brief for the United States at 28 (citing *Wyeth*, 129 S. Ct. at 1201).
[64]*Id.* at 10, note 5.

HUD Issues Notice on Lease Terminations in Housing Choice Voucher Program

Just days after joining *Barrientos* as amicus curiae, the federal government issued a HUD Notice clarifying how state and local eviction controls apply to voucher lease terminations.[65] The Notice reiterates the United States' position in *Barrientos* that the language of the regulations defining "other good cause" is permissive rather than mandatory.[66] The Notice specifically gives the example that the federal regulation permitting landlords to terminate voucher leases because of a desire to raise the rent does not preempt any local ordinances that might prohibit such lease termination.[67] "In summary," the Notice states, "nothing in 24 C.F.R. 982.310(d)(1) pre-empts any applicable State or local laws that restrict or prohibit the termination of tenancy. This applies to all Housing Choice Vouchers."[68] However, the Notice does nothing to clarify the meaning of "other good cause" in the enhanced voucher program in light of the subsequently enacted statutory right to remain.

Conclusion

Although the decision in *Barrientos* remains pending, the United States' brief and HUD's new Notice have important implications. These actions provide critical assurance to Section 8 tenants nationwide that they will not be less protected than their unassisted neighbors solely by virtue of their participation in a federal housing program. The *Bulletin* will follow future developments in this case. ■

[65] *See* State and Local Law Applicability to Lease Terminations in the Housing Choice Voucher (HCV) Program, PIH 2009-18 (June 22, 2009).
[66] *Id*.
[67] *Id*.
[68] *Id*.

Courts Find Private Right of Action Under the Servicemembers Civil Relief Act*

With the advent of the foreclosure crisis and the apparent permanence of American military mobilization, the protections afforded by the Servicemembers Civil Relief Act (SCRA)[1] have become increasingly important to those on active duty in our Armed Forces. The Pentagon has estimated that 75% of servicemembers are renters, and thus may be at risk of losing their residences because of defaulting landlords.[2] Many servicemembers who own their homes are facing foreclosure, with one study indicating that foreclosures are four times more likely to occur in military towns.[3] The SCRA provides tenants and homeowners with defenses to adverse actions by creditors, mortgagees or landlords, but a major concern has been whether the judiciary will recognize a private right of action under the SCRA. Most recently, courts have held that a private right of action does exist and have provided servicemembers much-needed relief in the face of economic uncertainty.[4] This article delineates the protections of the SCRA, with specific attention to foreclosure, examines recent cases determining that the SCRA contains an implied private right of action, and discusses possible future developments related to the SCRA.

Background

In December 2003, President Bush signed the SCRA, replacing the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940.[5] The SCRA serves as a source of benefits and obligations for servicemembers related to consumer transactions, including homeowner and tenant rights, mining claims, installment contract limitations, life insurance protections and tax deferral procedures.

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[1] Servicemembers Civil Relief Act, 50 U.S.C.A. app. §§ 501-96 (Westlaw June 17, 2009) [hereinafter SCRA or the Act]; *see also* NHLP, *The Servicemembers Civil Relief Act of 2003*, 34 Hous. L. Bull. 42 (2004).
[2] *See* Michael J. Carden, *Foreclosure Protection for Military: Law Gives Military Renters More Protection Against Foreclosures*, Army.com, June 11, 2009, http://www.army.com/news/item/5322.
[3] Kathleen M. Howley, *Foreclosures in Military Towns Surge at Four Times U.S. Rate*, Bloomberg.com, May 27, 2008, http://www.bloomberg.com/apps/news?pid=20601109&refer=home&sid=awj2TMDLnwsU. However, this study has been criticized. *See e.g.*, Karen Jowers, *Are Service Members Perceived as a Higher Foreclosure Risk?*, Armytimes.com, http://www.armytimes.com/money/financial_advice/military_foreclosures_061908w/.
[4] *See, e.g.*, Batie v. Subway Real Estate Corp., 2008 WL 5136636 (N.D. Tex. Mar. 12, 2008); Hurley v. Deutsche Bank Trust Co. Americas, 2009 WL 701006 (W.D. Mich. Mar. 13, 2009).
[5] Soldiers and Sailors Civil Relief Act, 50 U.S.C. § 512 (1940) (replaced by Servicemembers Civil Relief Act, 50 U.S.C.A. app. § 501 (2003)).