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SENATE BILL NO. 1357

Offered January 20, 2015

A BILL to amend and reenact § 8.01-15.2 of the Code of Virginia, relating to the Servicemembers Civil Relief Act; duty of counsel to exercise due diligence in representation of a servicemember.

Patron—Reeves

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-15.2 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-15.2. Servicemembers Civil Relief Act; default judgment; duty of counsel appointed to represent servicemember.

A. Notwithstanding the provisions of § 8.01-428, in any civil action or proceeding in which the defendant does not make an appearance, the court shall not enter a judgment by default until the plaintiff files with the court an affidavit (i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (ii) 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. Subject to the provisions of § 8.01-3, the Supreme Court shall prescribe the form of such affidavit, or the requirement for an affidavit may be satisfied by a written statement, declaration, verification or certificate, subscribed and certified or declared to be true under penalty of perjury. Any judgment by default entered by any court in any civil action or proceeding in violation of Article 2 Title II of the Servicemembers Civil Relief Act (50 U.S.C. app. § 527 521 et seq.) may be set aside as provided by the Act. Failure to file an affidavit shall not constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of process or entry of default judgment, a servicemember for the purposes of as defined in 50 U.S.C. app. § 502 511.

B. Where appointment of counsel is required pursuant to 50 U.S.C. app. § 521 or 522 the Servicemembers Civil Relief Act, the court may assess attorneys' reasonable attorney fees and costs against any party, including a party aggrieved by a violation of the Act, as the court deems appropriate, and shall direct in its order which of the parties to the case shall pay such fees and costs. Such fees and costs shall not be assessed against the Commonwealth unless it is the party that obtains the judgment.

C. Any counsel appointed to represent a defendant pursuant to the Servicemembers Civil Relief Act shall exercise due diligence to faithfully represent the interest of the servicemember, to locate and communicate with the servicemember, to conduct an investigation of the reasonably discoverable facts in the case, to determine whether or not the servicemember has a defense to any of the allegations in the suit, and to present that information to the court.

1. Due diligence in locating the servicemember includes:

- a. Requesting that the plaintiff provide documents and records from its collection activities;
- b. Identifying the last known command of the servicemember, including the name and address of the commanding officer, and contacting such officer;
- c. Identifying the names and address of relatives of the servicemember if any are listed in the plaintiff's files, and contacting such persons;
- d. Determining whether the servicemember has died or has been hospitalized;
- e. Identifying the servicemember's last known residences and contacting such residences by telephone;
- f. Conducting Internet searches to locate the servicemember;
- g. Contacting the local military legal assistance office for the servicemember's service branch, providing the office with a copy of the appointment order, and requesting assistance in locating the servicemember; and
- h. Sending letters to the servicemember's branch of the armed services.

2. Due diligence in investigating reasonably available facts includes,

- a. Reviewing the court's files; and
- b. Requesting and reviewing all of the plaintiff's materials related to the transaction or interaction with the servicemember, including electronic and paper contracts, applications, correspondence, memoranda, and other documents.

3. Due diligence in determining whether the servicemember has a defense to the allegations includes analysis of the relevant facts and applicable law, including jurisdiction, the Virginia Consumer Protection Act (§ 59.1-196 et seq.), landlord and tenant law pursuant to Chapter 13 (§ 55-217 et seq.)

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59 of Title 55, the Virginia Residential Landlord and Tenant Act (§ 55-248.2 et seq.), the Uniform
60 Commercial Code, and the Servicemembers Civil Relief Act (50 U.S.C. § 501 et seq.). Counsel should
61 also determine whether the plaintiff would be unduly prejudiced by delaying the case until the
62 servicemember returns.

63 D. Upon request by counsel appointed pursuant to the Servicemembers Civil Relief Act, the plaintiff
64 in a civil action shall promptly deliver all discoverable electronic and print files, records, documents,
65 and memoranda regarding the transactional basis for the suit. The plaintiff shall also deliver all
66 documents or information concerning the location of the servicemember.

67 E. Counsel appointed pursuant to the Servicemembers Civil Relief Act shall not be selected by the
68 plaintiff or counsel for the plaintiff or have any affiliation with the plaintiff.