



UNC
SCHOOL OF LAW

NORTH CAROLINA
BANKING INSTITUTE

Volume 16 | Issue 1

Article 3

2012

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Recommended Citation

Margot F. Saunders & Johnson M. Tyler, *Past, Present and Future Threats to Federal Safety Net Benefits in Bank Accounts*, 16 N.C. BANKING INST. 43 (2012).

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PAST, PRESENT AND FUTURE THREATS TO FEDERAL SAFETY NET BENEFITS IN BANK ACCOUNTS

MARGOT F. SAUNDERS *

JOHNSON M. TYLER **

Allene Bellendier, a disabled 70-year-old widow, used to have her Social Security benefit deposited directly into her SunTrust Banks Inc. account.

But she closed her account last year after the bank froze it twice. Though she was able each time to get the account released with the help of a legal-aid lawyer, the process took weeks, leaving her without money for food, medicine or mortgage payments. When her food ran out, she says, she searched the house for loose change and found a few dollars in a piggy bank she was saving for Christmas presents.

She had a heart attack and says she lost nearly \$600 in penalties and fees to companies where she had bounced checks as a result of the hold. Mrs. Bellendier now has her granddaughter cash the check at Wal-Mart; Mrs. Bellendier buys money orders to pay her monthly bills.

SunTrust declined comment.¹

* Margot Saunders is “of counsel” to the National Consumer Law Center, after serving as Managing Attorney of the Center’s Washington office from 1991 to 2005. She has testified before Congress on dozens of occasions regarding a wide range of consumer law matters, including predatory lending, payments law, electronic commerce, and other financial credit issues. The National Consumer Law Center wishes to thank the Borchard Foundation Center on Law and Aging for its generous support of our work on this article.

** Johnson M. Tyler has helped Social Security recipients at South Brooklyn Legal Services for the past twenty-three years. Much of his recent work has focused on protecting Social Security recipients from debt collectors. He would like to dedicate this article to his father, Victor M. Tyler, who knows a thing or two about credit cards and banks.

1. Ellen E. Schultz, *Closing the Benefits Loophole*, WALL ST. J., May 30, 2009, at C1.

Legal Aid lawyers throughout the nation have hundreds of similar stories to tell about the harsh effects of the garnishment of government benefits on their low-income clients. In fact, dozens of these stories from all over the country have been described to the Congress.² But because of a recently passed new rule by the U.S. Department of the Treasury (“Treasury”),³ the problems illustrated by these stories have been partly, but not fully addressed. This Article explains the need for the new interim final rule by the Treasury (the “Interim Rule”), the threats still facing low-income recipients of federal benefits from bank accounts, and some methods of dealing with those threats.

I. INTRODUCTION

The Social Security system was created over seventy-five years ago to “save men and women from the rigors of the poor house,”⁴ and to protect them from “the hardships of existence.”⁵ To ensure that money paid by Social Security would be available for these purposes, Congress also protected these benefits from creditors.⁶ Similar protections were applied to other federal benefit programs, such as veterans’ benefits and Supplemental Security Income (“SSI”).⁷ These exemption laws are intended to ensure that a disabled, elderly, or impoverished person can eat, buy medicine, and remain housed.

2. See, e.g., *Protecting Social Security Benefits from Predatory Lending and Other Harmful Financial Institution Practices: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 110th Cong. app. (2008) [hereinafter *Protecting Social Security Benefits*], available at http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/CFA_sign_on_to_NCLC_testimony_on_Social_Security_and_predatory_lending_6-24-08.pdf (statement of Margot Saunders, Counsel, Nat’l Consumer Law Ctr.).

3. Garnishment of Accounts Containing Federal Benefit Payments, 31 C.F.R. pt. 212 (2011).

4. *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

5. *United States v. Silk*, 331 U.S. 704, 711 (1947).

6. See 42 U.S.C. § 407(a) (2006).

7. Social Security is the most common federal payment that is exempt from debt collection. Indeed, ninety percent of all U.S. Treasury payments to individuals are Social Security payments. U.S. GEN. ACCOUNTING OFFICE, GAO-02-913, ELECTRONIC TRANSFER, USE BY FEDERAL PAYMENT RECIPIENTS HAS INCREASED BUT OBSTACLES TO GREATER PARTICIPATION REMAIN 7 (2002), available at <http://www.gao.gov/new.items/d02913.pdf>. Other federal payments exempt from collection include (but are not limited to) retirement payments to former federal employees, veterans’ benefits, and Seamen and Railroad worker benefits.

Despite these statutory protections, seizure of these exempt federal payments directly from bank accounts has been made easier by changes in bank lending practices, technology, and how federal benefits are delivered. These seizures have grown, particularly over the past ten years, both by banks where the exempt funds are deposited and by judgment creditors. Until recently, tens of thousands of bank accounts of Social Security recipients were seized each month by creditors,⁸ leaving elderly and disabled recipients penniless and without any funds for food, shelter, or medicine.

The new Interim Rule ends much of this bank seizure nightmare.⁹ Yet at the same time, gaps in the Interim Rule allow both predatory banks and cash-hungry states to continue to leave benefit recipients penniless. Part II of this article describes the problems recipients have suffered from bank freezes of Social Security funds,¹⁰ along with an explanation for the exponential growth of these problems. Part III outlines Treasury's momentous new Interim Rule and the significant ways in which it addresses the problems illustrated in Part II. Part IV describes the issues that are raised by gaps in the coverage of the Interim Rule as well as some proposed solutions to these problems.

II. SOCIAL SECURITY PAYMENTS AND CREDITORS OF THE RECIPIENTS

In the early part of the twentieth century, old age, disability, or the death of a breadwinner impoverished large numbers of Americans.¹¹ To stem this industrial age phenomenon, the Social Security Act was

8. Editorial, *Bank Customers Win One (Soon)*, N.Y. TIMES, Mar. 11, 2011, at A26, available at www.nytimes.com/2011/03/11/opinion/11fri3.html.

9. Garnishment of Accounts Containing Federal Benefit Payments, 31 C.F.R. pt. 212 (2011).

10. The terms "seizures," "freezes," and "garnishments" are similar but have slightly different connotations in the context of this Article. A "seizure" is a taking, which may be temporary or permanent. A "freeze" is not a taking, but simply the bank placing a hold on funds in the account so that the owner cannot access the funds. The freeze is generally a preliminary step to the seizure. "Garnishment" refers to the legal process authorized by state law that authorizes a judgment creditor to order a bank to first freeze and then seize funds in a bank account owned by the judgment debtor. The temporary measure of freezing is generally authorized by state law to preserve the funds in the account for a period of time (generally, only a few days) during which the owner of the account – the judgment debtor – can, presumably, challenge the garnishment of these funds. However, a challenge is only possible if the owner of the account receives notice of the garnishment, understands it, has access to an attorney, and access to the court. See *infra* notes 73-74 and accompanying text.

11. See SOCIAL SECURITY BD., PUB. NO. 15, WHY SOCIAL SECURITY? (1937), available at <http://www.ssa.gov/history/whybook.html>.

enacted in 1935. It was designed to insulate Americans forever from daily tragedies seen all too often during the Depression – hunger, unpaid rent, eviction notices, “furniture and bedding on the sidewalk, [and] the old lady weeping over it”¹²

Nevertheless, life for many Social Security recipients in the twenty-first century remains a struggle to survive.¹³ They face relentless increases in the costs of essentials such as medical care and housing. Social Security, a social insurance program that seniors have paid into during their working lives, constitutes a critical lifeline for many. “Nearly half of all seniors would be living below the poverty line were it not for Social Security.”¹⁴ In 2011, the Social Security Administration will pay more than \$738 billion in retirement, disability, and supplemental income benefits to nearly 60 million recipients.¹⁵ As of August 2011, about 38 million of those recipients were aged sixty-five or older.¹⁶

However, even with Social Security income, “close to four out of five senior households do not have economic security sufficient to sustain them through their lives.”¹⁷ Most government benefit payments are relatively small. For example, at the beginning of 2011, the average monthly Social Security retirement payment was only about \$1,177.¹⁸

12. Frances Perkins, Sec. of Labor, Address at U.S. Social Security Admin. Headquarters, Baltimore, MD: *The Roots of Social Security* (Oct. 23, 1962), available at <http://www.ssa.gov/history/perkins5.html>.

13. See, e.g., Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 170-72 (2007); WEST VIRGINIA CTR. ON BUDGET & POL’Y., LONG TERM CARE PARTNERSHIP & WIDER OPPORTUNITIES FOR WOMEN, ELDERS LIVING ON THE EDGE: WHEN BASIC NEEDS EXCEED INCOME IN WEST VIRGINIA 1 (2010), available at http://www.wvpolicy.org/downloads/WV_Elder_Policy_Brief060210.pdf (“[T]oday’s elders are pressured by increasing housing, health care, food and utility expenses while the value of their assets and their incomes are eroded by weaknesses within the economy.”).

14. Loonin & Renuart, *supra* note 13, at 170.

15. OFFICE OF RETIREMENT AND DISABILITY POLICY, SOCIAL SECURITY ADMIN., PUB. NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 3, 29 (2011), available at http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2011/fast_facts11.pdf.

16. *Id.* at 30.

17. TATJANA MESCHÉDE ET AL., LIVING LONGER ON LESS: THE NEW ECONOMIC (IN)SECURITY OF SENIORS 1, 12 (2009), available at <http://iasp.brandeis.edu/pdfs/LLOLReport.pdf> (using a Senior Economic Security Index comprised of housing costs, healthcare expenses, household budget, home equity, and household assets to evaluate seniors’ economic situation).

18. *Frequently Asked Questions: Average Monthly Social Security Benefit for a Retired Worker*, SOCIALSECURITY.GOV, http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/13/kw/%22average%20monthly%20benefit%22 (last updated Jan. 7, 2012 4:53 AM).

Yet many recipients – especially those with low incomes, meager savings, and little or no coverage by private pensions – depend upon those benefits to buy food, shelter, medicine, and other items necessary for survival. Social Security benefits account for more than eighty-eight percent of all income received by the poorest forty percent of the senior population.¹⁹

A. Section 407(a): The Anti-Alienation Provision

To preserve federal Social Security benefits for their intended recipients, Congress provided that the benefits cannot be seized to pay debts, as such seizures would result in the loss of these subsistence funds. The anti-alienation provision states:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.²⁰

The United States Supreme Court has consistently “liberally construed” exemption statutes, including section 407(a), so as to protect the intended beneficiaries.²¹ With respect to section 407(a), the Supreme Court has taken a largely unwavering view of its expansive reach. In *Philpott v. Essex County Welfare Board*,²² the state seized a retroactive social security payment²³ to repay itself for welfare payments. The county argued it was unfair to allow the welfare

19. See EMPLOYEE BENEFIT RESEARCH INST., EBRI DATABOOK ON EMPLOYEE BENEFITS, CHAPTER 7: SOURCES OF INCOME FOR PERSONS AGED 55 AND OVER, available at <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2007.pdf> (last updated Nov. 2011).

20. 42 U.S.C. § 407(a) (2006).

21. See, e.g., *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962).

22. 409 U.S. 413 (1973).

23. Monthly benefits for Social Security are owed retroactively for up to six months before the month a recipient filed an application for benefits. See *Retroactive Effect of Application*, ONLINE SOCIAL SECURITY ADMIN. HANDBOOK § 1513, http://www.ssa.gov/OP_Home/handbook/handbook.15/handbook-1513.html (last updated Apr. 19, 2010).

recipient to keep his retroactive payment as it allowed for double dipping and the state needed the money to pay for the truly needy.²⁴ The Supreme Court rejected such reasoning, stating that the exemption language in 407(a) was “all-inclusive” and imposed a “broad bar” against any use of legal process to take social security, even when the creditor was the state.²⁵ The Court saw no indication that Congress created an implied exception allowing states to be treated more preferentially than other creditors.²⁶

Similarly, in *Bennett v Arkansas*,²⁷ the Supreme Court rejected Arizona’s attempt to take a prisoner’s Social Security benefits to repay itself for the expense of imprisoning the recipient. The fact that the state provided for “all” the prisoner’s needs made no difference.²⁸ “Section 407(a) unambiguously rules out any attempt to attach Social Security benefits.”²⁹

B. *Turn of the Century Changes that Undermine Section 407(a)*

Until the end of the Twentieth Century, section 407(a) was effective in protecting Social Security payments from creditors. But that changed dramatically due to changes in lending, debt collecting, and electronic banking.

1. Deregulation of Credit Cards Triggers Explosive Growth of Debt among Impoverished Americans in the Twenty-first Century

In 1978, the Supreme Court ruled that a credit card’s interest rate was governed by the usury law of the state in which the bank issuing the credit card was incorporated.³⁰ As a result, credit card banks flocked to South Dakota and Delaware, which had no usury laws. At the time, credit cards were rarely issued to the truly poor.³¹ That

24. See *Philpott*, 409 U.S. at 415-16.

25. *Id.* at 416-17.

26. *Id.* at 416.

27. 485 U.S. 395 (1988).

28. *Id.* at 398.

29. *Id.* at 397.

30. *Marquette vs. First Omaha Services*, 439 U.S. 299, 318-19 (1978).

31. See generally JENNIFER WHEARY & TAMARA DRAUT, DEMOS, WHO PAYS? THE WINNERS AND LOSERS OF CREDIT CARD DEREGULATION 1 (2007), available at http://www.demos.org/sites/default/files/publications/whopays_Demos.pdf (explaining how

changed in 1996 when the Supreme Court upheld a regulation that defined credit card “penalty fees” as “interest.”³² This decision allowed a credit card bank to skirt state and local anti-gouging laws that capped late payment and over-limit fees.

After 1996, credit card banks began issuing cards to low-income people who would make late payments or go above their balance limit and thus generate huge profits unrelated to the interest earned on unpaid balances accrued from the use of the card to purchase goods.³³ These fees were such easy money that one company, Providian Financial Corporation, put the wrong zip code on its pre-printed payment envelope to delay receipt of its customers’ payments, thereby insuring late-payment fees.³⁴

Included among the new card holders were many Social Security recipients who lived from check to check.³⁵ Many used their credit cards as “plastic safety nets” for medical bills, car repair, and other unexpected emergencies.³⁶ When one compounded those debts with various penalty fees and twenty-nine percent interest rates,³⁷ the

the “democratization” of credit has caused the very poor (households with \$10,000 or less annual income), and the poor (households with annual income between \$10,000 and \$24,999) to have access to credit, while the costs of this credit are generally far more than the costs for higher income households).

32. *Smiley v. Citibank*, 517 U.S. 735, 746-47 (1996).

33. The average late payment and over limit fee increased from \$13 and \$13, respectively, in 1995 before *Smiley* to \$34 and \$31, respectively, after *Smiley*. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-929, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS NEED FOR MORE EFFECTIVE DISCLOSURE TO CONSUMERS 5 (Sept. 2006), available at <http://www.gao.gov/new.items/d06929.pdf>.

34. *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs*, 110th Cong. 12 (2007) [hereinafter *Examining the Credit Card Industry*], available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=2654a8e5-b161-4766-ac28-6d48b7598762 (statement of Michael D. Donovan, Partner, Donovan Searles, LLC).

35. The rapid rise in credit card usage among older Americans after *Smiley* is illustrated by an increase in the average credit card debt among the elderly from \$2,000 in 1992 to \$5,844 in 2007. Loonin & Renuart, *supra* note 13, at 168.

36. See TAMARA DRAUT ET AL., DEMOS, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 18-19 (Oct. 2005), available at http://archive.demos.org/pubs/PSN_low.pdf (showing that seventy-five percent of households lacking medical coverage for all their members carried debt on a credit card compared to fifty-five percent of families that had medical coverage for all members of the household).

37. *Examining the Credit Card Industry*, *supra* note 34, at 1, available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=d4fcd94-c9d7-4df7-bf10-dd69ad008c0f (statement of Elizabeth Warren, Prof., Harvard L. Sch.).

results were outstanding balances many times the money actually borrowed by the debtors. In some cases, the balance increased dramatically despite months or years of payments.³⁸ As a result, many low-income Social Security recipients defaulted on their credit cards in the 2000s.³⁹

2. Debt Buyers Leverage Twenty-first Century Technology and Sue

Changes in debt collection also contributed to the bank freeze crisis. Until the late 1980's, creditors of consumer debt typically sought to collect debts extra-judicially. That is, they turned their uncollected bills over to collectors who often badgered the debtors by mail and phone.⁴⁰ Since these collections were generally out-of-court, the creditor could not force a Social Security recipient to turn over a portion of his payment. Instead, persuasion was the key.

In the 2000s, a "new breed of collector" – the debt buyer – transformed how the industry collected debts.⁴¹ Debt buyers purchased defaulted debt for pennies on the dollar.⁴² They then regularly brought

38. Consider the classic case of Ruth Owens, a consumer from Cleveland, Ohio who did try to repay her debt, but was driven hopelessly into default by her credit card lender. In May 1997, Ms. Owens stopped using her credit card, made no further purchases or cash advances, and tried to pay off her debt to her credit card lender. At that time, she owed \$1,963. From May 1997 until her account was sent for collection in May 2003, not one penny of Ms. Owens' \$3,492 in payments went to reduce her balance. Instead, the credit card lender charged Ms. Owens various fees that consumed all of her payments and caused her debt to grow even larger:

Over-limit Fees \$1,518.00
Late Fees \$1,160.00
Credit Insurance \$369.62
Interest and Other Fees \$6,008.66
 Total \$9,056.28

Despite having received substantial payments for six years, the lender claimed that Ms. Owens still owed \$5,564 when it filed a collection lawsuit against her. In other words, after having paid \$3,492 on a \$1,963 debt, Ms. Owens' balance grew to \$5,564. *Discover Bank v. Owens*, 822 N.E.2d 869 (Ohio Mun. 2004).

39. See DRAUT ET AL., *supra* note 36, at 12-14; see generally NAT'L CONSUMER LAW CTR., COST OF CREDIT §11.8 (4th Ed. 2009) (explaining the types of fees and charges and how they added up in a way to facilitate non-payment and default).

40. Robert M. Hunt, *Collecting Consumer Debt in America*, FED. RESERVE OF PHILA. BUS. REV., Second Quarter 2007, at 12-16, available at http://www.philadelphiafed.org/research-and-data/publications/business-review/2007/q2/hunt_collecting-consumer-debt.pdf.

41. Ameet Sachdev, *Debt Collectors Pushing to Get Their Day in Court*, CHI. TRIB., June 8, 2008, at C1.

42. Hunt, *supra* note 40, at 14-15.

suit to collect the debts. Such litigation was cost effective due to state civil procedure rules that favored creditors⁴³ as well as desktop publishing that transformed the drafting of pleadings into mill work.⁴⁴

Consequently, the number of debt collection suits skyrocketed in the 2000s. In Cook County, Illinois, for example, debt collection suits doubled over eight years to 130,000 annually.⁴⁵ In Minnesota, judges approved 28,979 debt-related seizures in 2009, compared with 9,135 in 2006.⁴⁶ In Fort Worth, Texas, 1,000 debt collection suits were filed in a single month in 2007, mostly by debt buyers.⁴⁷ In Massachusetts, 575,000 debt buyer lawsuits were filed from 2000 to 2005, equal to one suit for every eleven residents of that state.⁴⁸ Those numbers paled next to New York City's, where over 2.5 million consumer lawsuits were filed over five years, mostly by debt buyers.⁴⁹

Winning these lawsuits was easy. Nationally, debt collectors are believed to have won as many as ninety percent of their cases because the debtor failed to respond to the suit;⁵⁰ in many cases because the debt collector failed to notify the debtor of the suit.⁵¹

43. For example, Minnesota allows a debt collector to serve a summons and complaint on a debtor without purchasing an index number from court or even setting foot in court. If the debtor fails to answer, the debt collector automatically wins and is allowed to garnish the debtor's account. Sam Glover, *Poverty Law: Has the Flood of Debt Collection Lawsuits Swept Away Minnesotans' Due Process Rights?*, 35 WM. MITCHELL L. REV. 1115, 1116 (2009). See also *infra* notes 54-55.

44. Hunt, *supra* note 40, at 15-16; see, e.g., *Poughkeepsie Sav. Bank v RS Paralegal & Recovery Servs.*, 139 Misc.2d 256 (N.Y. Sup. Ct. 1990), *rev'd* 160 A.D. 2d 857 (N.Y. App. Div. 1990) (explaining that Poughkeepsie Savings Bank sought protection from the influx of computer generated information subpoenas from debt collector).

45. Sachdev, *supra* note 41.

46. Chris Serres & Glenn Howatt, *Justice Denied as Debt Seizures Soar*, MINNEAPOLIS STAR TRIB., <http://www.startribune.com/investigators/101723868.html?page=all&prepage=1&c=y#continue> (last updated Mar. 24, 2011, 5:32 PM).

47. Teresa McUsic, *Unpaid Credit-Card Bills Giving Rise to Lawsuits*, FORT WORTH STAR-TELEGRAM, Aug. 31, 2007.

48. Michael Rezendes & Francie Latour, *No Mercy for Consumers: Firms' Tactics are One Mark of a System that Penalizes Those Who Owe*, BOS. GLOBE, July 30, 2006, http://www.boston.com/news/special/spotlight_debt/part1/page2.html.

49. MFY LEGAL SERVS., JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 3 (2008), available at http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf.

50. JON LEBOWITZ ET AL., THE FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 7 (2010), available at <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

51. *Id.* at 8-12.

Once a creditor obtained a judgment, it could unleash two weapons envied by telephone collectors: an information subpoena with which to locate a debtor's bank account and a restraining notice with which to seize the account.⁵² In thirty-two states, creditors with judgments could inexpensively blanket every bank with information subpoenas since such subpoenas did not need to be endorsed by a court, clerk, or other tribunal.⁵³ In at least two states, Ohio and New York, a lawyer for a creditor could canvas banks electronically or by phone without having to serve any papers.⁵⁴ After an information subpoena was served, the bank had to answer or face contempt charges.⁵⁵ A bank's failure to honor a creditor's garnishment notice (generally accompanied by an information subpoena) could make the bank liable to the creditor for the entire amount of the judgment.⁵⁶

52. For example, in California, a creditor with a judgment may compel a debtor to appear in court and answer all questions about income and assets. CAL. CIV. PROC. CODE § 708.110(a) (West 2011). The judgment creditor's notice of the hearing puts an automatic lien on all of the debtor's property. CAL. CIV. PROC. CODE § 708.410(a) (West 2011); see also CAL. CIV. PROC. CODE §§ 708.250, 708.320(a), 697.710 (West 2011). Illinois has a similar statute. 735 ILL. COMP. STAT. 5/2-1402 (2011). And in New Jersey, the court can issue an arrest warrant for a debtor who fails to answer an information subpoena regarding his bank accounts. N.J. COURT RULE 6:7-2(g).

53. States where an attorney for a judgment creditor can serve an information subpoena on a bank without going to court include: California, Colorado, Delaware, Florida, Idaho, Indiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See *50 State Statutory Surveys: Civil Laws: Civil Procedure, Subpoenas*, 0020 SURVEYS 17 (Westlaw 2011).

54. *Lee v. Javitch, Block & Rathbone, LLP*, 522 F. Supp. 2d 945, 948-49 (S.D. Ohio 2007) ("[O]nce a judgment is obtained, firm employees contact area banks . . . [using] an automated telephone system that can confirm [with a bank] if an account is open that matches the debtor's name and Social Security number . . ."); N.Y. C.P.L.R. 5224(a)(4) (MCKINNEY 2011) (allowing electronic service of information subpoena); see also, Lucette Lagnado, *Cold-Case Files: Dunned for Old Bills, Poor Find Some Hospitals Never Forget*, WALL ST. J., June 8, 2004, at A1 ("[C]ollection-firm lawyers now can electronically zap a bank a long list of unpaid court judgments. The bank matches the identities against a database of account holders.").

55. 30 AM. JUR. 2D. *Executions* § 645 (2011). Indeed, under Illinois law, a bank that fails to answer a third party information subpoena is liable for the entire amount of the judgment, even when the judgment debtor's account is overdrawn when the subpoena is served. *All-Steel Emps. Credit Union v. Singh*, 804 N.E.2d 657 (Ill. App. Ct 2004).

56. *Aspen Indus., Inc. v. Marine Midland Bank*, 421 N.E.2d 808, 811 (N.Y. 1981) (stating that a violation of a restraining notice can subject the garnishee to liability where a judgment creditor sustained damages as a result of the garnishee's disobedience of the notice); *Bank of Aspen v. Fox Cartage, Inc.*, 533 N.E.2d 1080, 1083 (Ill. 1989); *American Mach. & Foundry Co. v. Star Lanes Corp.*, 248 N.W.2d 645, 646 n.1 (Mich. Ct. App. 1976).

3. Child Support Enforcement – Heavy Hand of the State

States also leveraged technology to aid in collecting unpaid child support by garnishing parents' bank accounts. In 1996, Congress required all banks to develop computer bank matching programs to locate accounts involving parents who had failed to pay their child support.⁵⁷ Pursuant to that law, all child support enforcement agencies stopped serving paper information subpoenas on banks. Instead, they served an electronic file containing the names of hundreds of thousands who owed child support. The banks then ran those names electronically through its databases, alerting the state child support enforcement office whenever a match was found.

The new rules requiring electronic exchanges for child support collections spurred banks to develop technologies to process other paper information subpoenas more efficiently. Banks developed means to conduct electronic bank matching for other types of debtors because it was such an inexpensive and efficient method of processing information subpoenas.

In New York, pursuant to a law enacted in 2000, electronic bank matching was extended to non-child support debts. Creditors with judgments in New York have been able to electronically match the names of debtors against bank databases rather than serve individual information subpoenas by hand. This practice is referred to as “blitzing the banks” by one of New York’s largest debt collectors.⁵⁸ Since there is no limit on how often a creditor could ask a bank to search its records,⁵⁹ and the cost of running such searches is minimal, a debt buyer with a New York judgment can cheaply locate and freeze a bank account.

57. *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (codified at 42 U.S.C. § 666(a)(17) (2006)).

58. Lagnado, *supra* note 54.

59. By 2006, banks in New York were inundated with so many information subpoenas from creditors that New York amended its rule to require the attorney serving the information subpoena to attest to “a reasonable belief” that the bank has some information about the debtor. N.Y. C.P.L.R. 5224(a)(3)(i) (MCKINNEY 2011).

4. EFT 99 – Mandatory Deposit of Federal Payments.

The third development that set the stage for the bank freeze crisis was the electronic banking revolution. In 1996, Congress passed a law, commonly known as EFT-99,⁶⁰ requiring the conversion of all federal payments, including Social Security benefits, from paper to electronic by 1999.⁶¹ Mandatory direct deposit of federal payments has saved substantial amounts of money to the Treasury.⁶² Aware that some Social Security recipients might find electronic payment difficult, when passing the law Congress allowed Treasury to establish a waiver system such that beneficiaries could opt-out of electronic deposit by simply asserting to the Social Security Administration (“SSA”) that it caused a “hardship.”⁶³ The waiver system established allowed recipients to continue receiving a paper check simply by request – making the waiver automatically apply whenever this request was made. Despite other advantages of direct deposit – no need to go to the bank, guaranteed delivery, and safety – many Social Security and SSI recipients did not sign up. In 2011, fifteen years after direct deposit was unveiled, postal carriers were still delivering checks to more than twenty percent of all federal benefit recipients.⁶⁴ Many of those receiving paper checks had no bank accounts. And many of these unbanked recipients were distrustful of banks, fearing unexpected fees that would whittle away their much needed money, or garnishment of the funds in their accounts.⁶⁵

In an effort to save more money and require direct deposit,

60. See, e.g., Comment from Donald S. Clark, Sec’y, Fed. Trade Comm’n, on Notice of Proposed Rulemaking, 31 C.F.R. pt. 208 (Dec. 18, 1997), available at <http://www.ftc.gov/be/healthcare/docs/V980001%20Treas%20Electronic%20Payments.PDF> (commenting on the use of EFT to the Treasury Department).

61. 31 U.S.C. § 3332 (2006); 31 C.F.R. Pt. 208.3 (1998).

62. Treasury says it spent \$125 million delivering paper checks to 11 million benefit recipients in 2009. That works out to be \$11.36 per recipient per year, or \$.95 for each check to each recipient. See Management of Federal Agency Disbursements, 75 Fed. Reg. 34394, 34399 (proposed June 17, 2010) (to be codified at 31 C.F.R. pt. 208), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-06-17/pdf/2010-14614.pdf>. Indeed, in 2008, Treasury spent 98 cents to issue a paper check, as compared with 10 cents to issue an electronic payment. *Protecting Social Security Benefits*, supra note 2, available at <http://www.treasury.gov/press-center/press-releases/Pages/hp1052.aspx> (statement of Gary Grippio, Deputy Assistant Sec’y for Fiscal Operations, U.S. Dep’t of the Treasury).

63. 31 U.S.C. § 3332(f)(2)(A)(i) (2006).

64. Management of Federal Agency Disbursements, 75 Fed. Reg. at 34395.

65. *Id.*

Treasury has since rescinded its liberal waiver rules, and recipients of federal payments who sign up after May 1, 2011, are now required to use electronic deposit. With very few exceptions, all existing benefit recipients must make the switch to electronic deposit by March 1, 2013.⁶⁶

While direct deposit has saved taxpayer money, it has had one unanticipated downside: the creation of millions of bank accounts that debt buyers and other creditors can easily find and seize.

C. *Social Security Benefits in Peril.*

By the mid-2000s, creditors (mostly debt buyers) have been increasingly successful in seizing Social Security deposited in bank accounts. While no precise figures are available, one analysis estimated that one million Social Security and SSI recipients default on credit card debts every year, making such Social Security and SSI recipients at risk of suit and bank account garnishment.⁶⁷ Another study documented over 10,000 garnishments of direct deposit payments at just eight banks in a one-year period.⁶⁸ Extrapolating from this figure, it meant that at least once every six minutes, an elderly or disabled American was being left penniless by a creditor. Legal Aid offices across the country were inundated with complaints from seniors and the disabled that creditors had seized their electronically deposited Social Security payments.⁶⁹

66. *Id.* at 34,396, 34,399.

67. "If we assume that Social Security and SSI recipients carry and default on credit cards at the same rate as the general population (the [2008] rate is 5.7% of all credit cards are in default) this means about 2.85 million of the country's 50 million Social Security recipients would have judgments taken against them for credit card debts just in the last year. We can then reduce that number by 50% to make up for the fact that the assumption is based on an extrapolation, but this still means that well over 1 million recipients of Social Security and SSI have credit card judgments applied against them each year." *Protecting Social Security Benefits*, *supra* note 2, at 4 n.8 (statement of Margot Saunders, Counsel, Nat'l Consumer Law Ctr.).

68. Social Security reported 12,734 bank garnishments among 6,554,764 bank accounts that received direct deposit at eight banks. OFFICE OF INSPECTOR GEN., SOCIAL SECURITY ADMIN., CONG. RESPONSE REPORT, FINANCIAL INSTITUTIONS DEDUCTING FEES AND GARNISHMENTS FROM SOCIAL SECURITY BENEFITS, No. A-15-08-28031, at C-3 (July 2, 2008), available at <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-15-08-28031.pdf>. Bank mergers and other technological issues prevented a number of banks in the study from accurately counting the number of bank garnishments. At the time of the study, over 45.9 million Social Security recipients received direct deposit. *Id.* at 9. If one extrapolates the restraint rate (0.19%) at the eight banks against all direct deposit social security accounts in the nation, 89,170 accounts would be restrained annually.

69. Legal Aid lawyers from eleven states - Alabama, Georgia, Illinois, Michigan,

These seizures were the result of banks honoring garnishment orders requested by judgment creditors.

1. Rising Threat to Benefits in Bank Accounts: Garnishments

Creditors garnish bank accounts using state court proceedings. Armed with a judgment that the defendant debtor owes a certain amount of money, the creditor petitions a judge or court clerk *ex parte* for a garnishment order. In at least five states, it is even easier. In Alaska, Minnesota, New York, Nevada, and Oregon, the creditor's lawyer need only sign a garnishment order and mail it to the bank.⁷⁰

Once a bank receives a garnishment order, it is generally required by state law to deduct the amount claimed in the judgment from all bank accounts in which funds are held for the debtor. If the balance is less than the amount in the garnishment order (which is typically the case), the entire balance is frozen or seized (depending upon state law) and then turned over to the creditor when the time period for the debtor's objections have expired.

Constitutional considerations require that the state garnishment procedure include notice to the debtor of the garnishment order, and of the means available to the debtor to challenge the order and to claim an exemption, such as that for social security payments.⁷¹ Creditors are

Mississippi, Montana, Nevada, New Jersey, New York, Pennsylvania, and Virginia - submitted case studies to Congress documenting the bank freeze problem. *Protecting Social Security Benefits*, *supra* note 2, at 16 (statement of Margot Saunders, Counsel, Nat'l Consumer Law Ctr.). Other states where the bank freeze problem was reported in media outlets or court documents included Arizona, Connecticut, Florida, Massachusetts, Minnesota, Nebraska, Oregon and the District of Columbia.

70. ALASKA STAT. § 09.38.065 (2010); MINN. STAT. §§ 551.041, 571.72 (2010); NEV. REV. STAT. § 31.450 (1973); N.Y. C.P.L.R. 5222 (MCKINNEY 2011); OR. REV. STAT. § 18.635 (2007 & Supp. 2008).

71. *Aacen v. San Juan Cnty. Sheriff's Dep't*, 944 F.2d 691, 697 (10th Cir. 1991); *McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2d Cir. 1985) (finding that a reference to exemptions and fact that procedures exist, and a suggestion to contact Legal Aid Society, is sufficient); *Dionne v. Bouley*, 757 F.2d 1344, 1350-52 (1st Cir. 1985); *Finberg v. Sullivan*, 634 F.2d 50, 56-57 (3d Cir. 1980); *Jacobson v. Johnson*, 798 F. Supp. 500, 503-05 (C.D. Ill. 1991); *Neeley v. Century Fin. Co. of Arizona*, 606 F. Supp. 1453, 1461 (D. Ariz. 1985); *Reigh v. Schleigh*, 595 F. Supp. 1535, 1551-57 (D.Md. 1984), *rev'd on other grounds*, 784 F.2d 1191 (4th Cir. 1986); *Clay v. Edward J. Fisher, Jr., M.D., Inc.*, 584 F. Supp. 730, 732-34 (S.D. Ohio 1984); *Harris v. Bailey*, 574 F. Supp. 966, 968-71 (W.D. Va. 1983); *Deary v. Guardian Loan Co., Inc.*, 534 F. Supp. 1178, 1185-89 (S.D.N.Y. 1982); *Betts v. Tom*, 431 F. Supp. 1369, 1378 (D. Haw. 1977); *Collection Prof'ls, Inc. v. Logan*, 695 N.E.2d 1344, 1348-49 (Ill. App. Ct. 1998) (holding that amended Illinois postjudgment garnishment statute provided due process of law when it required debtors to be notified of garnishment,

also required to advise debtors that if the account contains exempt benefits, that consumers can make an exemption claim in court.⁷² However, quite often, the creditor fails to provide this notice, and the debtor is unaware of the seizure of the bank account until an attempt to withdraw money fails.⁷³ Further, as discussed in Part II.C.4, most debtors give up pursuing an exemption claim because it is so complicated, intimidating, and time consuming.⁷⁴

2. Another Major Threat: Bank Fees

For the vast majority of Social Security recipients, a bank garnishment not only left them penniless, it also likely triggered significant overdraft fees that they could ill-afford to pay. Checks and pre-authorized electronic deductions bounced because the funds in the account were seized by the bank pursuant to the garnishment order. Such was the case of a woman in Georgia who saw \$217 of her \$1,012 disability payment instantly disappear from her bank account because of bounced check fees charged by the bank after it had frozen her Social

exemptions, procedure for claiming them, and hearing within two days of service of garnishment summons); *Dorwart v. Caraway*, 966 P.2d 1121, 1143-45 (Mont. 1998), *rev'd on other grounds by Trustees of Indiana Univ. v. Buxbaum*, 69 P.3d 663 (Mont. 2007); *see also Zeppieri v. New Haven Provision Co.*, 163 F. Supp. 2d 126 (D. Conn. 2001) (holding that Connecticut post judgment bank execution statute met due process standards by requiring bank to send exemption claim form to debtor promptly after receiving execution); *Hutchinson v. Cox*, 784 F. Supp. 1339 (S.D. Ohio 1992) (finding a denial of due process where judgment debtor not informed of exemptions and right to hearing during post judgment execution); *Roy v. Smith*, 735 F. Supp. 313 (C.D. Ill. 1990); *Kirby v. Sprouls*, 722 F. Supp. 516 (C.D. Ill. 1989); *State of Wash. v. Thompson*, 6 S.W.3d 82 (Ark. 1999) (allowing a hearing for a child support obligor who missed deadline when notice was confusing and inconsistent as to procedure for requesting hearing); *Imperial Bank v. Pim Elec., Inc.*, 39 Cal. Rptr. 2d 432 (Cal. Ct. App. 1995) (finding that giving notice of possible exemptions at time of seizure satisfied due process); *First Union Nat'l Bank of Fla. v. Knyal*, 874 So. 2d 716 (Fla. Dist. Ct. App. 2004) (requiring notice of right to exemptions, procedure for claiming them, and right to hearing); *First Resolution Inv. Corp. v. Seker*, 795 A.2d 868 (N.J. 2002) (rejecting constitutional challenge to New Jersey notice procedure but recommending rule changes to give debtors more information about how to contest garnishment); *see generally* NAT'L CONSUMER LAW CTR., COLLECTION ACTIONS § 12.3.3 (2nd Ed. 2011) (stating that states generally require that the debtor receive notice of garnishment either contemporaneous with or immediately following garnishment).

72. *Finberg v. Sullivan*, 634 F.2d 50, 56-62 (3d Cir. 1980); *Dionne*, 757 F.2d at 1350-52; *McCahay*, 774 F.2d at 549; *Harris*, 574 F. Supp. at 971; *Deary*, 534 F. Supp. at 1185-89.

73. *Lincoln Fin. Servs., Inc. v. Miceli*, No. 2342/01, 2007 WL 2917242 (N.Y. Dist. Ct. Oct. 9, 2007); *Ultra Thin, Inc. v. Lane*, 210 P.3d 872 (Okla. Civ. App. 2009); *TBF Fin., LLC v. Houston*, 680 S.E.2d 662 (Ga. Ct. App. 2009).

74. *See infra* Part II.C.4.

Security funds due to a garnishment order.⁷⁵ Banks also charge large fees – typically \$125.00 – for processing the garnishment order. Banks charge both bounced check fees and garnishment processing fees even when the account holder is destitute and can prove in court that the account only contains exempt federal funds. For example, U.S. Bank refused to waive its \$75 legal processing fee for an impoverished Montana woman even after the creditor returned the pathetically small contents of the account (\$207) that were entirely from Social Security benefits.⁷⁶ Similarly, the North Star Bank of Minnesota refused to return \$260 in fees to an agoraphobic Army veteran after Legal Aid succeeded in having his exempt deposits returned.⁷⁷

Because bounced checks and automated electronic payments often are re-submitted multiple times after the original bounce, bank garnishments were small gold mines for banks. For example, a creditor seeking to collect a small judgment froze a seventy-two-year-old New Yorker's account at Chase bank that contained \$929.54, most of which was Social Security. Prior to the garnishment, the woman had written five checks and authorized two recurring electronic payments from the account. Immediately, Chase began debiting the account by \$30 as each check bounced. Several checks refused by the bank because of the freeze were re-submitted automatically by Chase's computers, only to bounce again. By the sixtieth day after the freeze, Chase had eaten the entire \$929.54 balance in overdraft fees. The creditor received not a cent.⁷⁸

75. *Protecting Social Security Benefits*, *supra* note 2, at 19 (statement of Margot Saunders, Counsel, Nat'l Consumer Law Ctr.); *see also* Teresa Dixon Murray, *New Federal Rule Protects Accounts of Seniors, Vets*, CLEVELAND PLAIN DEALER (May 11, 2011), available at 2011 WLNR 9808579 (explaining that an Ohio veteran lost \$200 in fees to bank).

76. *Protecting Social Security Benefits*, *supra* note 2, at 24 (statement of Margot Saunders, Counsel, Nat'l Consumer Law Ctr.).

77. Chris Serres & Glenn Howatt, *Hounded: Minnesotans in Debt, Justice Denied as Debt Seizures Soar*, MINNEAPOLIS STAR TRIB., <http://www.startribune.com/business/101723868.html> (last updated Mar. 24, 2011, 5:32 PM).

78. *Protecting Social Security Benefits*, *supra* note 2, at 30 (statement of Margot Saunders, Counsel, Nat'l Consumer Law Ctr.).

3. Old Laws Favor Creditors

In theory, exempt federal benefits remain exempt when deposited in a bank account, provided they are readily available for the day-to-day needs of the recipient and have not been converted into a “permanent investment[].”⁷⁹ Moreover, most state laws only permit the creditor to garnish non-exempt assets.⁸⁰ Consequently, most state statutes⁸¹ and some state garnishment notices⁸² direct the garnishee – the bank – to garnish *only* non-exempt funds in the accounts. Nevertheless, banks have claimed that it was not their duty to determine which funds were exempt. As a result, even exempt funds were routinely seized by the banks. Under state laws, the debtor is supposed to be provided with a notice about the right to challenge the garnishment and then has a set amount of time within which to find an attorney, go to court, and file

79. *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 161-62 (1962).

80. See NAT'L CONSUMER LAW CTR., COLLECTION ACTIONS app. g (2nd Ed. 2011) (providing an analysis of the exemption laws of each state).

81. States where garnishee banks do not have to freeze exempt deposits include: Arizona, ARIZ. REV. STAT. §§ 12-1570(2) (2003), 12-1578(A) (2003); Arkansas, ARK. CODE ANN. § 16-110-407 (2006); California, CAL. CIV. PROC. § 704.080 (West 2009); Connecticut, CONN. GEN. STAT. § 52-352a (2005); District of Columbia, D.C. CODE. § 15-501 (2001); Idaho, IDAHO CODE ANN. § 11-201 (2010); Illinois, 735 ILL. COMP. STAT. ANN. S §§ 5/12-707 (West 2011), 5/2-1402 (West 2012); Missouri, MO. REV. STAT. § 525.080(2) (2002); Michigan, MICH. COMP. LAWS ANN. § 600.4031 (West 2000); Minnesota, MINN. STAT. ANN. §§ 571.73 (West 2010); Nevada, NEV. REV. STAT. ANN. §§ 31.249(2)(b), 31.291(3) (West 2006); New Jersey, N.J. STAT. ANN. 44:7-35 (West 1993); Oklahoma, OKL. STAT. ANN. tit. 12, § 1185 (West 2000); Pennsylvania, 42 PA. CONS. STAT. ANN. § 3111 (West 2002); South Dakota, S.D. CODIFIED LAWS § 21-18-2.1 (2004); Vermont, VT. STAT. ANN. tit. 12, § 2740 (2002); Washington, WASH. REV. CODE ANN. § 6.27.060(3) (West 2009); and Wyoming, WYO. STAT. ANN. § 1-15-406 (1977). But other states that require a garnishee bank to freeze an account known to contain exempt money are Colorado, COLO. REV. STAT. ANN. § 13-54.5-108.5 (West 2011); Florida, FLA. STAT. ANN. § 77.06 (West 2004); Hawaii, HAW. REV. STAT. §652-1 (West 1985); Iowa, IOWA CODE § 642.13 (1995); Kansas, KAN. STAT. ANN. §§ 60-735, 60-742 (2005); Kentucky, KY. REV. STAT. ANN. § 425.516 (LexisNexis 2005); Louisiana, LA. CODE CIV. PROC. ANN. art. 2411 (2002); Maine, ME. REV. STAT. ANN. tit. 14, § 3127-A (2003); Mississippi, MISS. CODE ANN. §§ 11-35-21, 11-35-23 (West 1999); Montana, MONT. CODE ANN. § 25-13-212 (2011); Nebraska, NEB. REV. STAT. § 25-1056 (2008); New Mexico, N.M. RULES ANNOTATED, 1-065.2 (2011); North Carolina, N.C. GEN. STAT. ANN. § 1C-1603(e) (West 2011); North Dakota, N.D. CENT. CODE § 28-21-12 (2006); Ohio, OHIO REV. CODE ANN. §§ 2716.13, 2716.15 (LexisNexis 2008); Oregon, ORE. REV. STAT. §§ 18.615, 18.665 (2007); Tennessee, TENN. CODE ANN. § 29-7-104 (2000); Texas, TEX. FIN. CODE ANN. § 59.008(c) (West 1998); Utah, UTAH RULES OF CIVIL PROCEDURE, § 64D(i) (2011); Virginia, VA. CODE ANN. §60.2-600 (2006); and Wisconsin, WIS. STAT. ANN. § 815.18(6)(a) (West 2007).

82. Alabama Unified Judicial System, Form C-21 Rev. 11/06 (“Process of Garnishment”) (effective Nov. 2006), Georgia, GA. CODE ANN. § 18-4-66 (2010); Mich. Ct. R. 3.101.(I)(6) (effective Sept. 1, 2009).

this challenge. There are a myriad of problems with this procedure, including the fact that many debtors never receive the notice, and even if they do, do not have access to an attorney, or the courthouse.

As a result, most of the initial freezes or seizures imposed by the banks in response to the garnishment orders resulted in the ultimate garnishment of the funds, even when those funds were exempt from garnishment. A number of court decisions have supported the argument that it is legal for the creditor to seize the account, then require that the debtor carry the burden to go to court and prove the funds in the account are exempt from garnishment.⁸³ The premise for these decisions was that the account holder (the consumer) is in the best position to know the contents of the account and to be able to marshal proof to support that assertion. The crisis was caused by the fact that until an exemption claim had been successfully proven in court, the account remained frozen and the Social Security recipient penniless. And if the consumer does not meet the state timelines to prove the funds are exempt, the funds are turned over to the creditor.

Meeting the judicially imposed requirements to prove the funds in the account were exempt was not always easy. Almost all bank accounts, at some point, received small deposits that were not exempt (a gift from a relative, a refund from a store, even interest on the amount in the account).⁸⁴ When analyzing the contents of a bank account, separating the exempt funds from non-exempt funds and determining how subsequent withdrawals affected them was challenging.⁸⁵ Accounting or tracing methods were often the product of common law, and sometimes conflicted within jurisdictions.⁸⁶ Judges had to

83. *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980); *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir. 1985); *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985); *Harris v. Bailey*, 574 F. Supp. 966 (W.D. Va. 1983); *Deary v. Guardian Loan Co., Inc.*, 534 F. Supp. 1178, 1185 (S.D.N.Y. 1982).

84. Eighty-three percent of direct deposit accounts received deposits other than Social Security during the course of a year. OFFICE OF INSPECTOR GEN., SOCIAL SECURITY ADMIN., *supra* note 68, at 7; *see also* Cheyenne Hopkins, *Senator Baucus Calls for Clearer Garnishment Ban*, AM. BANKER, Sept. 21, 2007, available at 2007 WLNR 18470330.

85. Adjudicating exemption claims involving “commingled” accounts was so challenging that federal banking regulators suggested that banks offer Social Security recipients dual accounts: one dedicated to directly deposited exempt benefits and the other to any other, non-exempt deposits such as rebate checks or birthday cash. Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273, 55,275 (Sept. 28, 2007), available at <http://files.ots.treas.gov/commenttopics/13c7cbd4-38e1-480c-9b4c-f075facfe014.pdf>.

86. *See, e.g., I-T-E Imperial Corporation-Empire Div. v. Bankers Trust Co.*, 423

determine which rule to apply and then apply it to the funds in the account.⁸⁷ Further, debt collectors advocated that any commingling extinguished the exempt nature of a deposit, a rule adopted only in a minority of jurisdictions.⁸⁸ The rule in most jurisdictions is that commingling does not extinguish an exemption,⁸⁹ provided the funds are traceable.⁹⁰ Nevertheless, these were complex and time consuming judicial hearings that required an attorney. Consumers who were judgment debtors were unlikely to have access to attorneys to help them through this process.

Adjudicating exemption claims was even more complicated if the account was jointly owned with a spouse or child. An Oklahoman, who, ironically, was a spokesperson for the Social Security Administration, learned this first hand when his eighty-year-old mother-in-law's account was garnished for the debt of the joint accountholder, her daughter.⁹¹ With joint accounts, the deposit activity, the banking

N.Y.S.2d 491 (N.Y. App. Div. 1980), *aff'd*, 412 N.E.2d 1322 (N.Y. 1980) (“The rule in New York appears to be . . . a rule of first in, first out . . . so that the earliest withdrawal is deemed applicable to the earliest deposit.”); *Deary*, 534 F. Supp. 1178 (illustrating that plaintiffs and defendants in the proceeding cannot agree on applicable accounting method in constitutional challenge to state garnishment procedures); *Bernardini v. Central Nat’l Bank of Richmond*, 290 S.E.2d 863 (Va. 1982) (using last in, first-out method).

87. *Lincoln Fin. Servs., Inc., v. Miceli*, No. 2342/01, 2007 WL 2917242 (N.Y. Dist. Ct. Oct. 9, 2007).

88. *See, e.g., In re Cauley*, 374 B.R. 311, 315 (Bankr. M.D. Fla. 2007) (applying Alabama law and holding that wages lose exemption when commingled with other funds in bank account); *Bernardini*, 290 S.E.2d at 865; *Rue & Assocs., Inc. v. White*, No. LS-1656-1, 2006 WL 2022184, at *2 (Va. Cir. Ct. July 18, 2006) (stating that Social Security benefits lose exemption when commingled with non-exempt funds in joint bank account); *see also* IDAHO CODE ANN. § 11-604 (2010) (“The exemptions [for insurance, disability, and family support are] lost immediately upon the commingling of any of the funds . . . with any other funds”); *In re Foreacre*, 358 B.R. 384, 389-90 (Bankr. D. Ariz. 2006) (stating that proceeds of homestead lose exemption when commingled with other funds in bank account). *But cf. In re Meyer*, 211 B.R. 203, 210 (Bankr. E.D. Va. 1997) (noting statutory protection for unemployment benefits and workers’ compensation benefits even if deposited and commingled).

89. *See, e.g., S & S Diversified Servs. L.L.C. v. Taylor*, 897 F. Supp. 549, 552 (D. Wyo. 1995); *NCNB Fin. Servs., Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993), *aff'd*, 45 F.3d 427 (4th Cir. 1994) (table); *In re Lichtenberger*, 337 B.R. 322 (Bankr. C.D. Ill. 2006) (using first-in, first-out method to trace Social Security funds commingled in joint checking account); *Dean v. Fred’s Towing*, 801 P.2d 579 (Mont. 1990); *In re Christensen*, 149 P.3d 40 (Nev. 2006) (choosing first-in, first-out after comparing four tracing methods); *Lincoln Fin. Servs., Inc.*, 2007 WL 2917242 (using first-in, first-out tracing for Social Security benefits in bank account); *see also Bernardini*, 290 S.E.2d 863 (using last in, first-out method).

90. *NCNB Fin. Servs., Inc.*, 829 F. Supp. 178; *Heymann v. Brechner*, No. 95 Civ. 1329 (CSH), 1996 WL 580915, at *7 (S.D.N.Y. Oct. 9, 1996).

91. *Paula Burkes, New Rules May Guard Seniors’ Benefits Personal Finance Banks*

contract, and state law on marital property all had to be examined.⁹²

There were more mundane but perilous complications to address when proving an exemption claim in court. First, was the matter of proof. Social Security recipients with frozen accounts usually brought two or three months of bank statements to court to prove the contents of the account were exempt. But when the most recent bank statement available was provided before the garnishment order, the creditor, in the words of an Iowan attorney, cannot tell if the debtor had deposited lottery winnings (or other non-exempt money) in the intervening period.⁹³ This meant another trip to the court and further delay during which the account remained frozen and the funds unavailable to the recipient.

4. Complications Caused by Civil Court Procedures

Cumbersome civil court procedures also added delay. In New York, judgment debtors – even when elderly or disabled – had to make a minimum of two court visits before an account might be released, ensuring a two to four week delay.⁹⁴ Pennsylvania followed a similar procedure, but required the hearing at the second visit to be held within five days of the initial filing (which rarely happened on a timely basis according to Legal Aid lawyers.)⁹⁵ In Ohio, unfreezing an account in court took “two to four weeks or longer” and was so intimidating that most elderly and disabled persons simply gave up.⁹⁶ Similarly, in

Would Be Held More Accountable, THE OKLAHOMAN, Aug. 15, 2010, at C1, available at 2010 WLNR 16450717.

92. See NAT'L CONSUMER LAW CTR., CONSUMER BANKING AND PAYMENTS LAW § 10.2.5.6 (4th ed. 2009 and 2011 Supp.).

93. *Parker v. Wetsch & Abbott, PLC*, Civil No. 4:04-CV-40502-CFB, 2006 WL 4846042, at *2 (S.D. Iowa July 11, 2006).

94. For example, eighty-four-year-old, wheelchair-bound Edna Croquette had to enlist her son to drive her to a Brooklyn courthouse to unfreeze her account. After spending almost five hours at the courthouse, Ms. Croquette was ordered to return in two weeks for an exemption hearing. While she later won her claim, the bank took three weeks to reverse the garnishment. All told, Ms. Croquette went five weeks without her check. *Croquette v. Daniels & Norreli*, No. 09 CIV. 5495 (E.D.N.Y. 2009) (bringing a FDCPA claim against a creditor who maintained garnishment for forty-five days on an account containing only exempt payments despite being advised multiple times that the account was not the debtor's).

95. Tim Grant, *The Check Is (Not) in the Mail: Shifting Social Security Checks to Direct Deposit Could Raise Issues for Seniors*, PITTSBURGH POST-GAZETTE, July 8, 2010, at C1, available at 2010 WLNR 13661417.

96. Murray, *supra* note 75.

Minnesota the process of trying to unfreeze an account was “hardest” on the elderly and disabled who often had to repeatedly file paperwork to have accounts unfrozen.⁹⁷ In Oklahoma, the court process was somewhat quicker – five to ten days – but still, during that time seniors lacked access to essential funds.⁹⁸

Once the judgment debtor prevailed, there could still be obstacles. For example, a creditor in New Jersey immediately consented to withdraw his bank garnishment when a Legal Aid lawyer documented that the elder’s health was in peril because she could not buy medicine. But in that state, the bank must follow the orders of a “Levy Officer” (the court clerk assigned to this duty), not the creditor’s lawyer. Consequently, two weeks generally passed before the civil servant issued the necessary paperwork “during which the elderly woman’s health deteriorated.”⁹⁹ The same thing happened to an eighty-four-year-old, wheelchair-bound New Yorker who waited three weeks for a bank to process an order to unfreeze her account.¹⁰⁰

5. Creditors Play Dirty

Unable to travel to court or intimidated by the process, many Social Security recipients pressed their exemption claims out of court directly with the creditor’s lawyer. Generally, such efforts were not successful because there was nobody watching the collector. In Pittsburg, an eighty-year-old widow faxed and mailed bank statements three times to a debt collector who pretended not to receive them.¹⁰¹ A disabled legal secretary with lupus in New York encountered a similar

97. Serres & Howatt, *supra* note 77.

98. Burkes, *supra* note 91.

99. Laura Rowley, *Unholy Alliance Fleeces Social Security Recipients*, YAHOO! FINANCE (Nov. 15, 2007), http://www.nedap.org/pressroom/documents/2007-November-15_YahooFinance.pdf; Letter from Johnson M. Tyler, Legal Servs. N.Y.C., to the U.S. Department of the Treasury et al., Proposed Rule on Garnishment of Bank Accounts Containing Federal Benefit Payments 7 (June 18, 2010), available at <http://www.legalservicesnyc.org/storage/lsny/PDFs/lsnyc%20comments%20on%20proposed%20federal%20rule%20to%20protect%20exempt%20payments%206%2018%202010.pdf>.

100. Amended Complaint and Jury Demand at 6-13, *Crockette v. Daniels & Norrell*, No. 09 CIV. 5495 (E.D.N.Y. Jan. 21, 2009) (detailing FDCPA’s claim against a creditor who maintained garnishment for forty-five days on an account containing only exempt payments despite being advised multiple times that the account was not the debtor’s).

101. Lawrence Walsh, *Elderly Woman a Wreck over Frozen Social Security Funds*, PITTSBURGH POST-GAZETTE, May 9, 2007, at B3, available at 2007 WLNR 8760606.

problem. The creditor refused to return her Social Security benefits unless she entered into a payment plan (whereby she would “voluntarily” pay a portion of her exempt moneys each month).¹⁰²

Other debtors could not afford to wait for a judge and instead ceded to a creditor’s demands in order to regain access to some of their money. As one unlucky retiree who surrendered her exempt payments to a creditor during a bank freeze explained, “I was on my knees. It was like our last dollar. I didn’t even have money to buy gas to get home.”¹⁰³

In addition, most creditors, upon learning a debtor was impoverished and survived only on Social Security, took no steps to stop future bank garnishments. Two victims of bank freezes in Minnesota had their bank accounts frozen twice by the same creditor for the same debt within six months, even after the creditor was presented with proof that the only funds in the accounts were exempt.¹⁰⁴ Similarly, in New York, a homeless mother of two had her account frozen three times over nineteen months for the same debt.¹⁰⁵ In Iowa, a collector garnished an account even after a Legal Aid lawyer provided a sworn affidavit that the account only contained directly deposited Social Security.¹⁰⁶ The same thing happened to a fifty-nine-year-old Alabaman suffering from a bad heart, depression, and anxiety. In the latter case, the Legal Aid lawyer tried to prevent the garnishment by contacting the creditor’s lawyer as well as the legal department of the bank where the exempt funds were held.¹⁰⁷

And even in cases in which the bank garnishment was unwound or netted little for the creditor, the effect of a garnishment on Social Security recipients was profound. Many Social Security recipients abandoned banking and received their benefit payments via paper

102. *Lincoln Fin. Servs., Inc., v. Miceli*, No. 2342/01, 2007 WL 2917242 (N.Y. Dist. Ct. Oct. 9, 2007).

103. Ellen Schultz, *The Debt Collector vs. The Widow: Viola Sue Kell Thought Her Social Security Benefits Were Safe in the Bank. She Was Wrong*, WALL ST. J., Apr. 28, 2007, at A1, available at <http://www.accountantforums.com/wsj-debt-collector-vs-widow-t126201.html>.

104. Serres & Howatt, *supra* note 77.

105. Complaint and Jury Demand at 5-11, *Washington v. Gutman, Mintz, Baker & Sonnenfeldt, PC*, No. 07 CIV. 4096 (E.D.N.Y. Oct. 1, 2007).

106. *Hogue v. Palisades Collection, LLC*, 494 F. Supp. 2d 1043 (S.D. Iowa 2007).

107. *Protecting Social Security Benefits*, *supra* note 2, at 18 (statement of Margot Saunders, Counsel, Nat’l Consumer Law Ctr.).

checks.¹⁰⁸ Others preferred to enter into payment plans with the creditor in which they “voluntarily” surrendered \$50 or \$100 of their \$1000 Social Security check in order to prevent a future garnishment.

6. Ongoing Garnishments

A final problem was that garnishments in at least six states captured future deposits needed to satisfy the debt, not just what was in the account when the bank received the garnishment order.¹⁰⁹ Such ongoing garnishments had devastating effects on Social Security recipients. The Social Security Administration took at least two weeks to convert an electronic payment to a paper check. Unless the garnishment happened early in the month, most recipients who contacted Social Security were unable to stop the next month’s check from sailing electronically into the frozen account. This often meant that these recipients were without any money for six weeks or longer.

The power of the ongoing garnishment order is illustrated in the case of seventy-one-year-old Waverley Taliaferro.¹¹⁰ Taliaferro’s Citibank account was garnished at the end of the month when it contained only \$47.00 in Social Security.¹¹¹ A few days after the restraint, Mr. Taliaferro’s next Social Security check was electronically deposited into the frozen account.¹¹² Because of the restraint, Citibank would not allow Mr. Taliaferro to withdraw that payment,¹¹³ even though it was clear that the funds in the account were entirely exempt

108. See Simone Baribeau, *Direct Deposit of Social Security Checks: Safe, Fast – and Disastrous, Direct Deposit of Social Security Checks Can Have Bad Consequences for the Poor with Bad Debt*, CHRISTIAN SCI. MONITOR, Mar. 12, 2007, at 13, available at 2007 WLNR 4615805; Serres & Howatt, *supra* note 77.

109. Six states that maintain a bank garnishment prospectively to capture future deposits until the judgment is satisfied are: New York, N. Y. C.P.L.R. 5222(b) (MCKINNEY 2011); Illinois, 735 ILL. COMP. STAT. 5/2-1402(f)(1) (2011); Alabama, Unified Judicial System, Form C-21 Rev. 11/06; Pennsylvania, PA. R. CIV. P. No. 3111 (2010); Iowa, IOWA CODE § 642.22 (1995); and Georgia, GA. CODE ANN. § 18-4-62 (2010).

110. *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing Before the S. Fin. Comm.*, 110th Cong. 4 (2007) [hereinafter *Frozen Out*], available at <http://finance.senate.gov/hearings/hearing/?id=ddc4ade0-eddd-ea0e-d2c7-c464d959cf5b> (accessed by clicking the link entitled, “Download a Printed Record of the Hearing”) (statement of Waverly Taliaferro, Social Security beneficiary).

111. *Id.* at 5.

112. *Id.*

113. *Id.*

Social Security funds.¹¹⁴ Mr. Taliaferro then had no money to pay rent or buy food.¹¹⁵ Twenty-three days later, the account was finally released only after a Legal Aid lawyer threatened to bring a Fair Debt Collection Practices Act¹¹⁶ suit against the debt collection firm.¹¹⁷ By then, Mr. Taliaferro had lost forty pounds as well as a chunk of his Social Security benefits to bank fees.¹¹⁸

D. Responses to Bank Freeze Problem

The overwhelming pain caused to the elderly and disabled from these bank freezes created a surge in attempts to address the problems by legal services advocates across the country. These responses were multifaceted.

1. State Action

Some advocates turned to their state legislatures. In 2002, Connecticut amended its rules so that its \$1,000 wild card exemption would automatically protect the first \$1,000 of any account receiving electronically-deposited exempt payments.¹¹⁹ In 2008, New York passed the Exempt Income Protection Act which protects the first \$2,500 of any account receiving exempt payments electronically.¹²⁰

Since judgment creditors often had to obtain court orders to garnish accounts, some advocates also worked to amend court forms to make them ineffective against an account containing only Social Security payments. Such was the case in Alabama, Michigan, the District of Columbia, Pennsylvania, and Cook County, Illinois.¹²¹

114. Every bank must list the source of any electronic deposit on a customer's bank statement. 12 C.F.R. § 205.9(b)(1)(v) (2007). Social Security deposits are universally denoted on bank statements as "US Treasury, Soc. Sec."

115. *Frozen Out*, *supra* note 110, at 5 (statement of Waverly Taliaferro, Social Security beneficiary).

116. 15 U.S.C. § 1692 (2006).

117. *Frozen Out*, *supra* note 110, at 5 (statement of Waverly Taliaferro, Social Security beneficiary).

118. *Id.*

119. CONN. GEN. STAT. § 52-367b(c) (2005).

120. 2008 N.Y. Sess. Laws Ch. 575 (A8527-A) (McKinney) (effective Jan. 1, 2009) (codified at N.Y. C.P.L.R. 5205(l) (MCKINNEY 2011)).

121. D.C. CODE § 16-552 (2002); Mich. Ct. R. 3.101(I)(6) (effective Sept. 1, 2009); Alabama Unified Judicial System, Form C-21 Rev. 11/06 ("Process of Garnishment")

Virginia amended its court form, but that form's amendment was rescinded when the Virginia Bankers Association threatened suit.¹²²

These revised forms, which ordered the bank not to garnish an account that contained only readily identifiable exempt payments (e.g., directly deposited funds from the Social Security Administration), were often ineffective. For example, most national banks ignored Virginia's revised garnishment order and instead processed garnishments against accounts holding directly deposited Social Security funds just as they had before.¹²³ Even smaller banks that tried to honor the revised notices often still had to freeze the account if the account was commingled with other, non-exempt deposits. The banks argued that they were afraid that the creditors who had obtained the garnishment orders would bring contempt actions against them for failing to follow the garnishment orders.¹²⁴

Finally, public interest lawyers and *pro se* litigants brought impact litigation to curb the bank freeze problem in several states, including Alabama, Arizona, California, Illinois, Montana, Ohio, North Carolina, New York, and Utah. Some of these cases were directed at debt collectors in hopes of requiring them to verify that the account was not exempt before issuing a restraining notice.¹²⁵ Many others were directed at banks seeking to compel them to first look at an account's deposit history before honoring a garnishment.¹²⁶ Almost all of these

(effective Nov. 2006), PA. R. CIV. P. No. 3111.1. (Revised April 7, 2007); Cook County, Illinois, Form CCM 0124 ("Citation to Discover Assets to a Third Party") (Revised June 30, 2008).

122. James W. Speer, *Protecting Disability Benefits from Creditors*, 41 CLEARINGHOUSE REV. 382, 387 (2007); see also Katie Kuehner-Hebert, *Who Determines Whether A Deposit Can Be Garnished?*, AM. BANKER, Dec. 15, 2006, available at 2006 WLNR 22374586; Rob Johnson & Ray Reed, *Observers Debate Banks' Obligations in Garnishments*, ROANOKE TIMES, Nov. 6, 2006, at A1, available at 2006 WLNR 19284516.

123. Speer, *supra* note 122, at 387.

124. See, e.g., *Frozen Out*, *supra* note 110, at 29-30 (statement of Sara A. Kelsey, Gen. Counsel, Fed. Deposit Ins. Corp.).

125. *Belser v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007) (dismissing claim where debt collector served garnishment on bank even though debtor told collector account contained only exempt Social Security); *Wetherelt v. Larsen Law Firm, PLLC*, 577 F. Supp. 2d 1128, 1133 (D. Mt. 2008) (stating that a debt collector violates FDCPA when it garnishes bank account despite sworn affidavit from debtor that her account is exempt); *Henneberger v. Cohen & Slamowitz, LLP*, 2010 WL 1405578 (W.D.N.Y. Mar. 31, 2010).

126. *Huggins v. Pataki*, No. 01 CV 3016(JG), 2002 WL 1732804 (E.D.N.Y. July 11, 2002) ("Although Huggins raises valid concerns about the advisability of New York's current garnishment process, the mere fact that banks are now better able to determine that payments are exempt does not [violate due process]"); *Gorstein v. World Savings Bank*, No.

suits failed or were removed to arbitration, where they disappeared from public view.¹²⁷ The one exception was *Mayers v. N.Y. Cmty. Bancorp.*, where the United States District Court for the Eastern District of New York allowed a constitutional challenge to New York's garnishment law to go forward.¹²⁸ In that case, three plaintiffs had their accounts frozen nine times even though the accounts contained only directly deposited Social Security funds.

2. The Wall Street Journal Spurs Congressional Hearings, and Treasury Responds.

Bank freezes were in the news as well. The Wall Street Journal covered the problem on its front page.¹²⁹ In response, Congress held hearings in 2007 and 2008.¹³⁰ At the hearings, federal bank regulators

03-55292, 2004 WL 1923596, at *10 (9th Cir. Aug. 27, 2004) ("Although section 407(a) provides strong protection to Social Security beneficiaries, it does not entitle them to sue intermediaries who have done nothing more than follow a court order that they had no role in obtaining"); *Tishaw v. AmSouth Bancorp.*, 06-cv-00882-RDP, slip op. (N. Ala. Aug. 25, 2006) (granting motion to compel arbitration of suit seeking to enjoin bank from garnishing accounts containing exempt Social Security deposits); *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 442 (6th Cir. 2006) (holding that defendant attorneys "may actually be forced to obey Ohio law and conduct some sort of preliminary investigation of a debtor's assets to determine whether they are exempt" before issuing garnishment); *Stephens v. Wachovia Corp.*, No. 3:06cv246, 2008 WL 1820928 (W.D.N.C. Apr. 21, 2008) (granting motion to compel arbitration of class action challenging bank's policy of honoring garnishments despite knowledge that accounts are exempt due to direct deposit); *Christensen v. Arizona Cent. Credit Union*, No. CV-08-0862-PHX-FJM, 2008 WL 4853414 (D. Ariz. Nov. 10, 2008) (concluding that because section 407(a) is meant to protect social security recipients from creditors, plaintiffs failed to state a claim under section 407(a) against a credit union acting as a third-party garnishee); *Walton v. U.S. Bank*, No. 2:09-CV-931, 2010 WL 3928507 (D. Utah Oct. 4, 2010) (stating that private bank was not acting under color of state law when it complied with writ of garnishment against debtor and released exempt funds to creditor).

127. All of the plaintiffs lost in the cases cited *supra* note 126, except *Todd*.

128. *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837 (CPS), 2006 WL 2013734, at *6-7 (E.D.N.Y. July 18, 2006); *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837(CPS), 2005 WL 2105810, at *11-14 (E.D.N.Y. Aug. 31, 2005) (refusing to dismiss due process claim against banks and others for failing to protect Social Security benefits in bank account from garnishment order). *Mayers* was later voluntarily withdrawn as moot following passage of New York's Exempt Income Protection Act of 2008; *see also* *Granger v. Harris*, No. CV-05-3607 (SJF)(ARL), 2007 WL 1213416 (E.D.N.Y. Apr. 17, 2007) (showing that recipient stated § 1983 claim against bank that disbursed funds to creditor, despite knowledge that funds were Social Security; state statute imposing sanctions on bank that failed to comply with restraining order was state compulsion sufficient to allege action under color of state law).

129. *Schultz*, *supra* note 103; *see also* *Baribeau*, *supra* note 108.

130. *Frozen Out*, *supra* note 110; *Protecting Social Security Benefits*, *supra* note 2.

acknowledged that consumers lacked “adequate” protections from creditors taking Social Security payments from bank accounts.¹³¹ Nevertheless, for the most part, the agencies completely failed to propose any meaningful changes that would address the problem. They all said the problem was “complex” and that no single federal agency could solve it.¹³² While a U.S. Senate bill was introduced, it provided no direction other than to highlight the need for agency leadership, and it failed to be adopted in 2008 and again in 2009.¹³³

3. Treasury Responds

One federal agency, the Treasury, stepped forward after it was persuaded that it had the ability and authority¹³⁴ to solve the problem. Part of its motivation was to protect the elderly and disabled from terrible hardship. But, Treasury also had a practical problem. Despite a five-year “Go Direct” campaign, 11 million Social Security and SSI recipients still received paper checks by mail carrier.¹³⁵ These paper checks cost taxpayers \$125 million a year.¹³⁶ Treasury acknowledged that bank garnishment deterred many of the elderly and disabled from signing up for direct deposit.¹³⁷ Thus, Treasury had to make direct deposit safe from creditors before it could amend its rules to require all federal beneficiaries to receive benefits electronically. To that end,

131. Steve Fritts, Assoc. Dir., Risk Mgmt. Policy and Examination Support Branch, Div. of Supervision and Consumer Prot., Fed. Deposit Ins. Corp., Testimony Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means (June 24, 2008), available at <http://www.knowledgemosaic.com/gateway/FDIC/Speech/2008-spjun2408.html>; *Protecting Social Security Benefits*, *supra* note 2 (statement of Steve Fritts, Assoc. Dir., Risk Mgmt. Policy and Examination Support Branch, Div. of Supervision and Consumer Prot., Fed. Deposit Ins. Corp.). Steve Fritts deserves special credit for seeking a comprehensive solution with the U. S. Treasury.

132. *Frozen Out*, *supra* note 110, at 97 (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

133. The bill would have prohibited federal agencies from spending money to promote direct deposit until the bank freeze problem was fixed. Illegal Garnishment Prevention Act of 2008, S. 2850, 110th Cong (2008); Illegal Garnishment Prevention Act of 2009, S. 1042, 111th Cong (2009).

134. 31 U.S.C. § 3332(i)(1) (2006) (requiring persons to receive federal benefits electronically and giving the Secretary of the U.S. Treasury authority to “prescribe regulations that the Secretary considers necessary to carry out” the law).

135. Management of Federal Agency Disbursements, 75 Fed. Reg. 34394, 34395 (June 17, 2010) (to be codified at 31 C.F.R. pt. 208).

136. *Id.* at 34403.

137. *Id.* at 34396.

Treasury had numerous discussions and meetings over many years with stakeholders such as banks, consumer groups, other federal agencies, and interested members of Congress.

Treasury's work culminated on April 19, 2010, when it issued a proposed rule pursuant to EFT '99 and other statutes to stop banks from honoring garnishments against accounts receiving direct deposit exempt payments.¹³⁸ Eight weeks later, Treasury issued a second proposed rule requiring *all* recipients of federal payments to receive their checks electronically by March 1, 2013.¹³⁹ On February 23, 2011, the proposed rule to protect exempt payments from bank garnishment was adopted as an Interim Final Rule, effective May 1, 2011.¹⁴⁰ A Final Rule is expected sometime in 2012.

III. THE 2011 TREASURY INTERIM RULE

The Interim Rule is one of the most revolutionary administrative actions ever taken on behalf of low-income Americans. It closes a disgraceful chapter of the 2000s which found anxious widows and gray haired men asking bank clerks how they would survive. As the New York Times noted in an editorial, the Interim Rule will shield 100,000 elderly and disabled Social Security recipients each month from "financial calamity" while at the same time "block[ing] creditors from acquiring taxpayer-provided benefits" earmarked for food, medicine, and housing.¹⁴¹

The Interim Rule automatically protects from seizure and freezing the total value of all the statutorily exempt federal benefits directly deposited in the two months preceding the garnishment order.¹⁴² This means for the average Social Security recipient, over \$2,000 of funds in the bank account will be protected from garnishment.¹⁴³

138. Garnishment of Accounts Containing Federal Benefit Payments, 75 Fed. Reg. 20299, 20310 (Apr. 19, 2010) (to be codified at 31 C.F.R. pt. 212).

139. Management of Federal Agency Disbursements, 75 Fed. Reg. at 34396.

140. Garnishments of Accounts Containing Federal Benefit Payments, 31 C.F.R. § 212.1-12 (2011).

141. Editorial, *Bank Customers Win One (Soon)*, N. Y. TIMES, Mar. 11, 2011, at A26, available at www.nytimes.com/2011/03/11/opinion/11fri3.html.

142. 31 C.F.R. § 212.6 (2011).

143. The average monthly Social Security retirement payment as of August 2011 was \$1,081.60. *Monthly Statistical Snapshot*, U.S. SOCIAL SECURITY ADMIN. (Aug. 2011), http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/.

A. How the Interim Rule Operates

The Interim Rule applies to all entities chartered under state or federal law engaging in the business of banking.¹⁴⁴ Under the Interim Rule, a bank is required to review all accounts owned by the account holder upon receipt of a garnishment order against an account holder.¹⁴⁵ The bank must determine whether any of the specified federal benefits¹⁴⁶ were electronically deposited during the preceding two months (the “lookback period”).¹⁴⁷ If the answer to this question is “yes,” then the bank must calculate the “protected amount,” which is the lesser of the sum of all exempt benefits electronically deposited into the debtor’s account during the lookback period, or the balance of the account on the day the review is conducted.¹⁴⁸

If the account contains a protected amount, the bank cannot freeze, or otherwise restrict the account holder’s “full and customary” access to that amount.¹⁴⁹ The bank must give the beneficiary the same degree of access to the protected amount that was provided before the bank received the garnishment order.¹⁵⁰ All other funds in the account will be subject to the bank’s seizure to comply with the order.

Upon determining that the account contains a protected amount, the bank must send the account holder a notice describing what the bank has done and giving some basic information about how to protect exempt benefits that exceed the protected amount.¹⁵¹ In addition, the Interim Rule protects the bank from contempt citations or similar penalties, and from any liability to the creditor, for preserving the debtor’s access to the protected amount.¹⁵²

144. 31 C.F.R. § 212.2; *see* § 212.3 (defining financial institution).

145. 31 C.F.R. § 212.6(b).

146. The benefit-paying agencies are adding new electronic markers that banks can rely on to determine whether an electronic deposit is an exempt benefit. *See* Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9941 (Feb. 23, 2011) (to be codified at 31 C.F.R. § 212.3).

147. 31 C.F.R. § 212.3.

148. *Id.*

149. *Id.* § 212.6(a).

150. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9945.

151. 31 C.F.R. § 212.7. A notice is required only if the account has a positive balance on the review date. *Id.* § 212.7(a)(2).

152. *Id.* § 212.10.

B. Benefits Covered and Exceptions for Certain Debts

In addition to Social Security, SSI, and VA benefits, the rule protects Federal Railroad retirement benefits, Federal Railroad unemployment and sickness benefits, Civil Service Retirement System benefits, and Federal Employee Retirement System benefits.¹⁵³ The Interim Rule, however, does not protect military retirement payments or other military benefits, but in announcing the Interim Rule, the agencies stated that its framework could be expanded in the future to protect these and other federal payments that are intended to be immune from garnishment.¹⁵⁴ The Interim Rule also does not protect state benefit payments, such as state employee retirement benefits, workers compensation benefits, and unemployment compensation.¹⁵⁵

The account review is not required, and there is no automatic protection of any amount, if either the federal government or a state IV-D child support agency¹⁵⁶ issues the garnishment order.¹⁵⁷ These orders must contain a special notice.¹⁵⁸ The rationale is that different exemption regimes apply in these cases. In these cases, the debtor can still assert exemptions but must do so through the customary state procedures.¹⁵⁹ As will be discussed in greater detail in Part IV, the child support exemption is too broad, as some benefits – such as SSI benefits and most VA benefits – are protected by law from garnishment for child support yet are left unprotected by the Interim Rule.¹⁶⁰ Additionally, once paper checks are no longer available, the Interim Rule's exception for child support orders will mean that all exempt federal funds – including Social Security and federal retirement funds – will be subject to one-hundred percent seizure for past-due child support. This will cause these recipients complete destitution.

On the other hand, the Interim Rule is quite clear that it covers any attempt by a state or other non-federal government entity to garnish

153. *Id.* § 212.2.

154. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9940.

155. *See* 31 C.F.R. § 212.2.

156. The IV-D child support agency is the state agency charged with enforcing child support obligations owed both to custodial parents and to the state for welfare payments.

157. *See* 31 C.F.R. § 212.4(a).

158. *Id.*

159. 31 C.F.R. § 212.7(b)(9).

160. *See infra* Part IV.

a bank account for any debt (other than child support). In its discussion regarding the Interim Rule, Treasury provides:

[T]he first action that a financial institution must take when it receives a garnishment order . . . is to determine whether the order was obtained by the United States or a State child support enforcement agency. . . . For all other orders, the financial institution is required to follow the procedures in sections 212.5 [determine if exempt payments were deposited] and 212.6 [calculate the protected amount from the lookback period.]¹⁶¹

Attempts by states and municipalities to collect debts through administrative orders¹⁶² that are not the product of civil court litigation are covered by the Interim Rule as well.¹⁶³

C. A Self-Executing Protection; Debtor No Longer Has Burden of Asserting Exemption at Any Stage

The problem that the Interim Rule is designed to address is the temporary freeze of a debtor's bank account while the bank, the parties, and the court system sort out the question of whether the funds are exempt. But the effect of the rule is much more sweeping.

The Interim Rule nullifies any requirement that the debtor take any affirmative step to assert an exemption for the protected amount. The bank has an unconditional obligation to make the protected amount available to the debtor. In addition, the bank is prohibited from complying with any court order to pay the protected amount to the

161. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9950 (Feb. 23, 2011) (to be codified at 31 C.F.R. § 212.4-6).

162. For example, a tax agency in New Mexico issues a tax levy on a bank without going to court. N. M. STAT. ANN. §§ 7-1-3(G), 7-1-31 (2011). New York's tax department similarly issues a warrant (akin to a judgment) which is followed by an administratively issued tax levy. N.Y. STATE DEP'T OF TAXATION AND FIN., PUB. NO. 125, THE COLLECTION PROCESS PROCEDURES OF THE NYS TAX DEPARTMENT TO ENFORCE COLLECTION OF FINALLY FIXED TAX LIABILITIES (2002), available at http://www.tax.ny.gov/pdf/publications/general/pub125_1002.pdf.

163. 31 C.F.R. § 212.3. In response to one commentator's concern that tax garnishments were not "judicial" orders, treasury deleted the words "to enforce a money judgment" (which implies a court, not administrative proceeding) from the proposed definition of "garnish" and "garnishment." Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9942.

creditor – even if, for example, the debtor fails to comply with a state law requirement to assert the exemption or the state court concludes that the exemption was improper.¹⁶⁴

D. Commingled Funds, Co-Owners, Lump-Sum Payments, Transferred Funds

In some states, courts have held that exempt funds lose their protected status whenever they are commingled with non-exempt funds.¹⁶⁵ The Interim Rule's protections apply whether or not the protected funds have been commingled with other funds; as long as the specified federal benefits were electronically deposited into the account during the lookback period, they are protected regardless of what other funds might be in the account.¹⁶⁶

Nor does it make any difference whether there is a co-owner on the account. The amount of Social Security benefits deposited during the lookback period is exempt, even if it was deposited in the name of the non-debtor co-owner.¹⁶⁷

The Interim Rule does not cap the amount of benefits that are protected. As a result, if the beneficiary received a lump-sum payment by electronic deposit within the two-month lookback period, it is protected regardless of its amount.¹⁶⁸ However, a lump-sum payment that remains unspent in an account will lose the Interim Rule's automatic protection after two months. If a garnishment order arrives, the beneficiary will need to invoke whatever state procedures are available to protect the remainder of the lump-sum payment. The Interim Rule does not change the nature of the exemption applicable to the benefits deposited before the two-month lookback period; the exempt benefits left unprotected in the account are still exempt under

164. 31 C.F.R. § 212.6(a) (“An account holder shall have no requirement to assert any right of garnishment exemption prior to accessing the protected amount in the account.”); *Id.* § 212.6(c) (“A protected amount calculated and established by a financial institution pursuant to this section shall be conclusively considered to be exempt from garnishment under law.”); *Id.* § 212, app. A, Model Notice to Account Holder (informing debtor that “You may use the ‘protected amount’ of money in your account as you normally would. There is nothing else that you need to do to make sure that the ‘protected amount’ is safe”).

165. COLLECTION ACTIONS, *supra* note 80, § 12.6.3.

166. 31 C.F.R. § 212.5(d)(1).

167. *Id.* § 212.5(d)(2); Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9950.

168. *See* 31 C.F.R. § 212.5(c).

federal and state law.

If the exempt funds were electronically deposited into one account and then transferred into another account, the funds are not protected. The “protected amount” under the rule is limited to funds that were electronically deposited into each account the bank holds in the name of the debtor.¹⁶⁹

E. Continuing Garnishments and Repeat Garnishments

In a few states, creditors can obtain continuing garnishments of bank accounts, requiring the bank to monitor the account and garnish funds as new deposits come in.¹⁷⁰ The Interim Rule prohibits a bank that is served with a continuing garnishment order from complying with that order’s ongoing requirements.¹⁷¹ Likewise, if the same garnishment order is served on a bank a second time, the bank is prohibited from taking any action on it.¹⁷² If the creditor obtains and serves a new garnishment order, however, the bank must go through the account review procedure again and determine if there is a protected amount.¹⁷³

Banks may perceive it as a burden to perform repeat account reviews in response to multiple garnishment orders, particularly since they are not allowed to deduct any garnishment fees from the protected amount.¹⁷⁴ For these reasons, banks may want to close a beneficiary’s bank account if repeat garnishment orders are received. While the supplementary material to the Interim Rule indicates that the Interim Rule does not address this issue,¹⁷⁵ the language of the Interim Rule requiring the bank to provide “full and customary access to the protected amount”¹⁷⁶ clearly appears to prohibit banks from closing accounts, as closing the account and sending a check for the remaining amount is not “full and customary access.” Additionally, it is likely to

169. *Id.* § 212.6(b).

170. *See supra* note 109; *see also* Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9951.

171. 31 C.F.R. § 212.6(g).

172. *Id.* § 212.6(f).

173. *Id.* § 212.6(g).

174. *Id.* § 212.6(h); *see infra* Part III.J.

175. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9946.

176. 31 C.F.R. § 212.6(a).

be a violation of the Fair Debt Collection Practices Act,¹⁷⁷ a state debt collection statute, or a state statute prohibiting unfair and deceptive practices, for a collector to threaten or issue repeat garnishments as a means of harassing a debtor who is known to have only exempt funds in the account.¹⁷⁸

F. What If the Debtor Wants to Pay the Debt?

Occasionally, a debtor may want to allow the garnishment to be implemented as a way of paying the debt. For example, the debtor may want to protect other nonexempt assets, and may be able to work out a release of the entire debt in exchange for allowing the bank to pay some part of the protected amount to the creditor. The Interim Rule allows this, but only if the bank receives an express written instruction that is both dated and provided by the account holder to the bank after the date the garnishment order is served on the bank.¹⁷⁹ These requirements are designed to ensure “that an account holder may not instruct a financial institution in advance or in a standing agreement to use exempt funds to satisfy a garnishment order.”¹⁸⁰ Other than this exception, “[t]he requirements of the rule may not be changed by agreement.”¹⁸¹

G. Advising Elders: How to Make the Most of the New Protections

Exempt funds delivered by paper checks are not protected under the Interim Rule, and can only be protected through the applicable state process.¹⁸² Beneficiaries who are receiving paper checks should consider switching to electronic deposit or to the Direct Express card discussed in the next section.¹⁸³

177. 15 U.S.C. § 1692 (2006).

178. *See Hogue v. Palisades Collection, LLC*, 494 F. Supp. 2d 1043 (S.D. Iowa 2007).

179. 31 C.F.R. § 212.10(d)(3).

180. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9949.

181. *Id.*; *see also* 31 C.F.R. § 212.8(b) (stating that rule does not invalidate terms or conditions of bank account agreements that are not inconsistent with the rule).

182. By May 1, 2011, paper checks will no longer be available – with few limited exceptions – for delivery of federal benefits to new recipients. By March 1, 2013, the same rule will be applied to existing recipients. 31 C.F.R. § 208.4 (2011).

183. *See infra* Part IV.F (explaining Direct Express cards). Social Security, SSI, and VA benefit recipients can sign up for the Direct Express Card by contacting Comerica Bank, at 1-877-212-9991 (toll-free) or by visiting www.USDirectExpress.com.

The Interim Rule will not provide full protection for benefit recipients who accumulate more than two months of benefits in their accounts, or who are expecting or have not yet spent down a lump-sum payment. These beneficiaries are vulnerable to garnishment of whatever amount exceeds the “protected amount.” For example, if an account contains \$5,000, but only two \$2,000 federal benefit payments were deposited within the last two months, only \$4,000 is the protected amount and the remaining \$1,000 balance is vulnerable. The beneficiary can withdraw cash or spend down the bank account to protect the full amount, or can rely on asserting the exemption through state court procedures.

Beneficiaries should not transfer funds from one account to another, as the protections of the Interim Rule will not follow the transferred funds. For example, if a beneficiary receives a \$1,500 electronic deposit of federal benefits into one account, and transfers \$1,000 to a different account, leaving \$500 in the first account, only the remaining \$500 in the first account is protected by the rule. The \$1,000 transferred to the second account is not protected by the Interim Rule, although state law may protect this sum if it can be traced to the exempt benefits.

If there is any chance that a beneficiary will need to rely on state exemption procedures, the account should include only exempt benefits, not any other amounts, as some courts have denied state exemptions when the exempt funds were commingled with non-exempt funds.¹⁸⁴

H. Treasury Rule Preempts Weaker State Laws but Preserves Stronger Ones

Some state exemption statutes offer greater protection for federal benefits than the Interim Rule.¹⁸⁵ The Interim Rule preempts state laws only to the extent that the state law prevents banks from complying with the rule. A state law that protects a higher amount than

184. See *supra* note 165.

185. CAL. CIV. PROC. CODE § 704.080 (West 2009) (granting an automatic exemption for up to \$2425 of directly deposited Social Security benefits); N.Y. C.P.L.R. 5205(l) (MCKINNEY 2011) (protecting a flat \$2500 if any reasonably identifiable exempt funds have been electronically deposited within forty-five days preceding service of a garnishment order); PA. R. CIV. P. NO. 3111.1 (2010) (protecting the first \$10,000 of any account into which recurring exempt benefit payments are electronically deposited).

the federal rule is not preempted if the bank can comply with both requirements.¹⁸⁶ Likewise, a state law prohibiting a bank from freezing exempt funds deposited by check is not preempted.¹⁸⁷

State laws are preempted if they would stand in the way of the automatic, self-executing protection of federal benefits that the Interim Rule requires. For example, state laws that require banks to freeze the “protected amount” or that require the benefit recipient to take affirmative steps to assert the exemption are preempted. The Interim Rule includes a safe harbor for banks that comply with it in good faith,¹⁸⁸ intended primarily to prevent creditors from using state law remedies to force garnishee banks to freeze and turn over exempt funds.¹⁸⁹ The safe harbor also protects the bank from any claim by an account holder for freezing exempt funds in the limited circumstance where a garnishment order from the federal government or a state child support enforcement agency results in the freezing of funds. Any argument that the safe harbor provides cover for a bank’s violation of a more protective state law is rebutted by the explicit language in the preemption provision: “Consistent law not preempted. This regulation does not annul, alter, affect, or exempt any financial institution from complying with the laws of any State with respect to garnishment practices, except to the extent of an inconsistency.”¹⁹⁰ There is nothing inconsistent between this rule and a state’s higher standard providing protection for exempt funds deposited by check, for example.

I. How States Should Improve Their Garnishment Protections in Response to the Treasury Rule

The Interim Rule does not depend on any action by states before it takes effect. However, it offers an opportunity for states to make

186. 31 C.F.R. § 212.9(b); *see also* § 212.5(d)(6) (stating that the bank must perform account review without consideration for any instructions to the contrary in the garnishment order).

187. *See* Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9941 (Feb. 23, 2011) (to be codified at 31 C.F.R. § 212) (“The fact that the rule does not address Treasury checks in no way affects an individual’s right to assert or receive an exemption from garnishment by following the procedures specified under the applicable law.”).

188. 31 C.F.R. § 212.10(b).

189. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9952.

190. 31 C.F.R. § 212.9(b).

related improvements in their garnishment rules. First, states will benefit if they revise their rules to incorporate the new federal requirements, so that creditors, debtors, banks, and courts do not inadvertently violate them. Second, states may want to draft language about state procedures and free legal services for banks to add, as is allowed by the federal rule, to the notice the bank is required to send the debtor about the garnishment. Third, the federal rule only protects benefits that are exempt from garnishment under federal law. To protect similar state benefits, states will have to take steps on their own. The new federal requirements create a convenient framework onto which state benefit protections can be easily added.

States may also consider exempting a flat amount, such as \$6,000, in any bank account. Banks may prefer protecting a flat amount rather than having to calculate the amount of protected benefits deposited during the two-month lookback period.¹⁹¹

Finally, states should consider amending their garnishment rules to streamline their exemption claims process when an account contains exempt deposits above the protected amount. In New York, for example, the debtor claims an exemption not by going to court (an intimidating and perhaps foreign concept), but instead by filing the claim with the bank.¹⁹² The bank then forwards all necessary paperwork to the creditor's attorney and the court. Unless the creditor contests the exemption claim, the bank must release the account eight days after receipt of the debtor's exemption claim.¹⁹³

J. The Next Frontier: Bank Setoff and Bank Fees

The Interim Rule prohibits banks from debiting fees for processing the garnishment against the protected amount.¹⁹⁴ Additionally, the rule specifically requires that the bank may only collect its processing fee on the day the account is reviewed. Thus, the bank cannot collect a fee at all if an account contains only the protected amount on the day it is reviewed, even if unprotected funds are in the

191. See Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9942 (noting bank comments).

192. N.Y. C.P.L.R. § 5222-a (MCKINNEY 2011). See Johnson M. Tyler, *Exempt Income Protection Act Better Protects Strapped Debtors*, N.Y. L.J., Jan. 27, 2009.

193. N.Y. C.P.L.R. § 5222-a(c)(3).

194. 31 C.F.R. § 212.6(h).

account at a later time.¹⁹⁵

Except for these provisions, the Interim Rule is silent about bank setoff rights, including the key question of whether a bank can use setoff as a way of taking exempt funds to repay a debt owed to it.¹⁹⁶ However, the prohibition against banks taking fees from the protected amount is solid support for an argument that banks may not setoff against exempt amounts.¹⁹⁷

Unfortunately, garnishment and fees charged by the banks for bouncing checks (called “NSF” fees) withdrawn by the banks are only two of many ways that banks infringe on the limited incomes of the elderly and disabled. Banks push other products – such as bounce protection and account advances¹⁹⁸ that are designed to harvest fees from recurring electronic payments. The legality of fees for bounce protection¹⁹⁹ and account advances is up in the air.

The Interim Rule’s protection of the benefits for food, medicine,

195. *Id.* Garnishment fees may be deducted from amounts that are not included in the protected amounts.

196. Garnishments of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. at 9947.

197. See CONSUMER BANKING AND PAYMENTS LAW, *supra* note 92, § 10.4 (examining the legality of banks’ use of setoff against exempt funds).

198. With account advance products the customer asks the bank for an “advance” of funds, which the bank schedules to deposit into the customer’s account. After funds are deposited, the bank repays itself in full for the advance plus the fee by taking some or all of the customer’s next deposit. If this deposit is insufficient to repay the bank in full, the bank keeps taking subsequent deposits. If deposits within thirty-five days do not fully cover the loan plus the fees incurred, the bank simply overdraws the customer’s account to repay itself. The bank’s withdrawals often leave the account with insufficient funds to cover checks the consumer has written, leading to a cascade of overdraft fees. “Advances” usually cost at least \$10 per \$100 loaned. While sample account advance APRs are disclosed as 120%, the actual cost incurred by the customer depends on the length of time the loan is outstanding: the shorter the repayment time, the higher the APR. Actually, APRs may reach close to 1000%. CTR. FOR RESPONSIBLE LENDING, MAINSTREAM BANKS MAKING PAYDAY LOANS 3, 11 (2010), available at <http://www.responsiblelending.org/payday-lending/policy-legislation/regulators/mainstream-banks-making-payday-loans.pdf>; see also NAT’L CONSUMER LAW CTR., BANK PAYDAY LOANS . . . THEY’RE BAAAAAACK (2009), available at http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/pr_prepaid_payday_loans.pdf.

199. Bounce protection has many features of a loan. Banks cover the amount of a check, point of sale (POS) debit card purchase, or ATM withdrawal when there are insufficient funds in the customer’s bank account. A fee, typically around \$35, is charged each time an overdraft is covered. Some banks also charge a daily fee if a customer’s account balance remains negative. Banks then take some or all of the customer’s next deposit to repay themselves the amount covering the one-time fee, and the daily fee (if applicable). CONSUMER FED’N OF AM., SURVEY OF BIG BANK OVERDRAFT LOAN FEES AND TERMS (2011), available at <http://www.consumerfed.org/pdfs/OD-14BankSurvey-ChartAugust2011.pdf>.

and rent, re-emphasizes the importance of preserving these benefits. Allowing banks that hold those exempt moneys to diminish them through “offset” and other extra-judicial measures undermines Treasury’s efforts. Indeed, Treasury’s concern that banks not take advantage of their cozy relationship with exempt federal benefits is reflected in its new garnishment rule. The Interim Rule’s prohibition against charging the processing fee is support for the legal argument that this money is to be protected from other bank fees as well.²⁰⁰

Mandatory direct deposit will bring together many low-income people with banks that peddle confusing, fee generating products to their account holders. With mandatory deposit, recipients will no longer be able to simply call the SSA to switch to a check to protect themselves from expensive products and their associated fees. The only recourse for a customer dissatisfied with the bank’s account products and fees is to open an account at another bank. Even this avenue may not be available because of ChexSystems,²⁰¹ which tells a bank if a prospective customer owes money to another bank for an overdraft or other bank fee. Banks not only report customers who have not paid for checks they wrote, but will also report consumers for not paying checks that were forged.²⁰² ChexSystems’ member banks agree to “blacklist” such prospective customers until their old bank debts are settled.

The legality of high-cost deposit account products is the subject of some debate. Violations include the prohibitions in the Electronic Funds Transfer Act,²⁰³ as well as the clear rules protecting federal benefits from assignment and seizure, are all implicated.

IV.SHORTCOMINGS IN THE TREASURY RULE: CHILD SUPPORT

Treasury made one serious and important change between its publication of the proposed rule in 2010 and the Interim Final Rule in early 2011: it exempted bank garnishment by state child support enforcement agencies from the protections of the Interim Rule. This

200. See 31 C.F.R. § 212.6(h).

201. See James Marvin Perez, *Blacklisted: The Unwarranted Divestment of Access to Bank Accounts*, 80 N.Y.U. L. REV. 1586, 1587 (2005).

202. *Id.* at 1617 n.176.

203. The Electronic Fund Transfer Act (EFTA) prohibits a bank or other lender from “condition[ing] the extension of credit to a consumer on such consumer’s repayment by means of preauthorized electronic fund transfers.” 15 U.S.C. § 1693k(1) (2006).

change is significant and will – unless changed in the Final Rule – have devastating consequences for the many elderly and disabled recipients of federal benefits who have decades old child support debts. The Interim Rule that allows such garnishment of these indigent obligors' bank accounts is subject to challenge because it violates several federal and state laws designed to ensure a modicum of income for non-custodial parents.

A. Robust Enforcement Tools Ensure That Child Support is Collected From Obligors Who Are Capable of Paying

The obligation to support one's child goes back to biblical times.²⁰⁴ To that end, child support debt is treated quite differently than other forms of debt.

Child support collectors have far more weapons in their arsenal than other debt collectors. First, child support can be withheld not only from wages but also from Social Security²⁰⁵ and some veterans' benefits.²⁰⁶ Federal²⁰⁷ and state laws²⁰⁸ limit how much can be deducted, but the maximum amount that is garnishable for both current and past due child support – sixty-five percent of the recurring income – is much more than the twenty-five percent allowed in consumer debt collection cases.²⁰⁹ For disabled veterans, to the extent benefits are garnishable, the maximum garnishment for child support is fifty percent.²¹⁰

Second, if child support arrears accumulate, bank accounts can

204. See, e.g., 1 *Timothy* 5:8.

205. 42 U.S.C. § 659(h)(1)(A)(ii)(II) (2006).

206. Veterans' benefits are accessible for child support only to the extent of a waiver of retired pay. *Id.* § 659(h)(1)(A)(ii)(V).

207. 15 U.S.C. § 1673 (2006).

208. About one-third of the states have elected to cap income garnishment for child support at fifty percent. *Basic Guidelines for Federal Agencies on Child Support Withholding*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES (Oct. 27, 2011), http://www.acf.hhs.gov/programs/cse/newhire/employer/publication/opm_iw_guidance.htm#wc.

209. See 15 U.S.C. § 1673(a)(1) (2006) (regulating consumer debt garnishments); 15 U.S.C. § 1673(b) (2006) (regulating child support garnishments).

210. Ordinarily, apportionment of more than fifty percent of the veteran's benefits would constitute undue hardship on the veteran, while apportionment of less than twenty percent of his or her benefits would not provide a reasonable amount for the custodial parent. 38 C.F.R. § 3.451 (2011).

be seized in addition to wage garnishment. In fact, federal law requires all states to locate and seize banks accounts of non-custodial parents who have fallen behind in their child support payments.²¹¹ A state's failure to comply with this requirement can trigger loss of federal funding for its child support enforcement office.²¹² As a result, the computers of every state Office of Child Support Enforcement ("OCSE") electronically search bank records four times a year for accounts of absent parents owing child support.²¹³ When an account is matched, a garnishment order is automatically issued and the account seized.²¹⁴

Third, coercive measures can be taken to force payment of child support. These include denial of professional licenses, driver's licenses,²¹⁵ and passports.²¹⁶ An obligor can also be jailed for not paying child support.²¹⁷

Together, these enforcement tools make child support evasion nearly impossible for any non-custodial parent who is working or who has a driver's or professional license needed for work. Similarly, for retired or disabled persons, these enforcement tools capture recurring federal payments and, at the same time, coerce payment by restricting the non-custodial parent's ability to travel and work. Indeed, each year, state child support enforcement agencies collect about \$26 billion in child support from 15 million non-custodial parents.²¹⁸

211. 42 U.S.C. § 666(a)(17) (2006).

212. *See* 42 U.S.C. §§ 654, 655 (2006).

213. 42 U.S.C. § 666(a)(17); *see also* DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, WHAT IS FINANCIAL INSTITUTION DATA MATCH (FIDM), *available at* http://www.acf.hhs.gov/programs/cse/ftc/fidm/parents/what_is_fidm.html (last updated Dec. 17, 2009).

214. *See* GEORGE E. PATAKI ET AL., THE N.Y. STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE DIV. OF CHILD SUPPORT ENFORCEMENT, FIN. INST. DATA MATCH HANDBOOK (2001), *available at* <http://newyorkchilddisability.com/pdfs/fidmh1.pdf>.

215. *See, e.g.*, N.Y. Fam. Ct. Act § 458-b (2011).

216. 42 U.S.C. § 652(k) (2006).

217. *See, e.g.*, *Farmer v. Farmer*, 473 N.Y.S.2d 705 (N.Y. Fam. Ct. 1984); *see also* Complaint at 43, *Miller v. Deal*, Civ. Act. No. 2011-cv 198121 (Fulton County Superior Court), *available at* <http://www.schr.org/files/post/File%20stamped%20complaint%203%2022%2011%20child%20support.pdf> (alleging that over 500 impoverished obligors languish in Georgian jail every day).

218. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2009, PRELIMINARY REPORT (2010), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary_report_fy2009/.

B. Impoverished Social Security, SSI and Veterans Benefit Recipients Have Large Arrears that Legally Cannot be Collected

Yet unpaid child support accumulates among one group – the poor. This is not surprising. Indeed, according to the Federal Office of Child Support Enforcement, seventy percent of uncollected child support is owed by non-custodial parents with no quarterly earnings or annual earnings of less than \$10,000.²¹⁹

Among this impoverished group are a large number of elderly Social Security and SSI recipients and veterans. Studies of unemployed parents who owe large child support arrears reveal the following. First, eleven percent are on Social Security or SSI.²²⁰ The study's databases did not contain information about what percentage of the indigent who owe child support receive veterans' benefits.²²¹ Social Security recipients who owed child support at the time of the study had median income of only \$750 a month, placing them below the poverty line.²²² The average income of SSI recipients was \$455 a month,²²³ and the average veteran's disability payment was about \$698 a month.²²⁴

Second, almost all of the children of these impoverished Social Security and veterans beneficiaries are now adults, so it is not as if these payments will be used to support children.²²⁵ Indeed, four out of five (eighty percent) of Social Security recipients are sixty-two and older,

219. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, *THE STORY BEHIND THE NUMBERS: WHO OWES THE CHILD SUPPORT DEBT?* 1 (2008), available at <http://www.acf.hhs.gov/programs/cse/pol/IM/2008/im-08-05a.pdf>.

220. THE LEWIN GRP., *ENHANCING CHILD SUPPORT ENFORCEMENT EFFORTS THROUGH IMPROVED USE OF INFORMATION ON DEBTOR INCOME* iii, 11 (2006); see also ELAINE SORENSEN ET AL., *THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION* (2007), available at http://www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf; *THE STORY BEHIND THE NUMBERS*, *supra* note 219.

221. THE LEWIN GRP., *supra* note 220.

222. *Id.*

223. U.S. SOCIAL SECURITY ADMIN., *FAST FACTS AND FIGURES ABOUT SOCIAL SECURITY* 23 (2007), available at http://www.ssa.gov/policy/docs/chartbooks/fast_facts/2007/fast_facts07.pdf.

224. The national average veterans disability payment was \$8,378. DEP'T OF VETERANS AFFAIRS, OFF. OF INSPECTOR GENERAL, *REVIEW OF STATE VARIANCES IN VA DISABILITY COMPENSATION PAYMENTS REPORT* iii (2005), available at <http://www.va.gov/oig/52/reports/2005/vaoig-05-00765-137.pdf>.

225. THE LEWIN GRP., *supra* note 220, at 24-25.

meaning their children are likely to be adults.²²⁶ Among the 3.3 million veterans who receive disability benefits, almost two-thirds are over fifty-five years old.²²⁷

Third, much of the debt arose because the obligor never sought a “downward modification” of the original child support order when the obligor’s income decreased due to disability, job loss, or incarceration.²²⁸ Further, the amount due is generally significantly inflated due to interest and penalties imposed by the applicable state.²²⁹

Finally, most of the debt is owed to the state, not to the adult children. Custodial parents with children on welfare are required to assign their right to child support to the state government.²³⁰ Consequently, in California for example, seventy percent of the total child support debt is owed to the state, rather than to the custodial parent.²³¹ In New York, forty-two percent is owed to the state.²³²

C. Garnishing Every Cent from a Social Security Recipient’s Bank Account for Child Support is Ill-advised and in Many Cases Illegal.

As outlined above, the OCSE can seize up to sixty-five percent of a monthly Social Security benefit before it is even sent to the recipient.²³³ Such a huge income loss can pauperize a Social Security recipient who does not have significant other income or assets. Recognizing this, thirty-nine states and the District of Columbia have

226. FAST FACTS, *supra* note 223, at 16.

227. In 2007, sixty-two percent of veterans receiving disability benefits were fifty-five or older. DEP’T OF VETERANS AFFAIRS, A STUDY OF COMPENSATION PAYMENTS FOR SERVICE CONNECTED DISABILITIES 102 (2008), available at http://www.va.gov/op3/docs/ProgramEvaluations/CompPaymentStudy/DS_VOLUME_III_Chapter_V_VI.pdf.

228. Data suggests that about one-quarter of all persons owing child support are incarcerated or disabled. SORENSON, *supra* note 220, at 5.

229. *Id.* at 55.

230. SUSAN WILSCHKE & RICHARD BALKUS, SOCIAL SECURITY ADMIN., CHILD SUPPORT PAYMENTS AND THE SSI PROGRAM, BRIEF NO. 2004-02 (2004).

231. Kelley Weiss, *High Interest Rate Driving State’s Child Support Debt*, CAL. WATCH (Apr. 21, 2011), <http://californiawatch.org/dailyreport/high-interest-rate-driving-states-child-support-debt-9929>.

232. Susan Antos, *OTDA Offers Relief to Dead-Broke Dads: Why Did So Few Respond?*, EMPIRE JUSTICE CENTER (Nov. 19, 2010), <http://www.empirejustice.org/issue-areas/child-support/income-executions-indigent-respondents/otda-offers-relief-to.html>.

233. *Basic Guidelines for Federal Agencies on Child Support Withholding*, *supra* note 208; see also 31 U.S.C. § 3716(b)(3)(A)(ii) (2006).

“self-support reserve” laws that ensure some income for impoverished non-custodial parents.²³⁴ Many set the amount of monthly income that is preserved as a percentage of the poverty line (which in 2011 was \$904.50 a month).²³⁵ For example, in Colorado, only \$50 can be deducted if the non-custodial parent’s income is below \$850.²³⁶ Whatever the formula, each state provides a mechanism whereby an obligor can challenge the amount of an income garnishment.

Bank account garnishment for unpaid child support operates independently of income garnishment, however. Bank garnishment is

234. The states with self-support reserve statutes are: Alabama, Ala. St. J. Admin. Rule 32 (2011); Arizona, ARIZ. REV. STAT. ANN. § 25-320 (2011) (West); California, CAL. FAM. CODE § 4055 (West 2011); Colorado, COLO. REV. STAT. § 14-10-115 (2011); Connecticut, Conn. Agencies Regs. §§ 46b-215a-1 to 46b-215a-5b (2011); Delaware, Del. Fam. Ct. R.C.P. 500 to 509; District of Columbia, D.C. CODE § 16-916.01 (2011); Florida, FLA. STAT. ANN. § 61.30 (West 2011); Georgia, GA. CODE ANN. § 19-6-15 (2011); Hawaii, HAW. REV. STAT. § 576D-7 (2011); Hawai’i Child Support Guidelines (2010), *available at* www.courts.state.hi.us/docs/form/oahu/child_support/csg_instructions.pdf; Idaho, IDAHO CODE ANN. § 32-706 (2011); Idaho Court Rules, Child Support Guidelines; Indiana, IND. CODE ANN., Tit. 34, Appx.; Indiana Child Support Rules and Guidelines, at Guideline 2 (2010); Louisiana, LA. REV. STAT. ANN. §§ 9:315, 9:351.14 (2011); Maine, ME. REV. STAT. ANN. tit. 19-A, § 2006 (2011); Massachusetts, MASS. GEN. LAWS, Child Support Guidelines; Michigan, MICHIGAN STATE COURT ADMINISTRATIVE OFFICE, 2008 MICHIGAN CHILD SUPPORT FORMULA MANUAL (2008), *available at* www.courts.mi.gov/scao/services/focb/mcsf.htm; Minnesota, MINN. STAT. ANN. §§ 518A.42, 518A.34 (2011); Mississippi, MISS. CODE ANN. § 43-19-101 (West 2011); Missouri, Mo. Supr. Ct. R., Civil Procedure Form No. 14; Montana, Mont. R. of Ct., Child Support Guidelines (Rules 8, 11, 13); *see also* MONT. ADMIN. R. 37.62.101 to 37.62.148 (2011); Nebraska, Neb. T.C. §§ 4-218, 4-209 (2011); New Hampshire, N.H. REV. STAT. ANN. §§ 458-C:2, 458-C:3 (2011); New Jersey, N.J. R. of Practice, Appx. 9-A to 9-H (9-F) (2011); New Mexico, N.M. STAT. ANN. § 40-4-11.1 (2011); New York, N.Y. Fam. Ct. Act, § 413(1)(d) (McKinney 2011); N.Y. COMP. CODES R. & REGS. tit. 18, § 347.10 (2011); North Carolina, N.C. GEN. STAT. § 50-13.4 (2011); CONFERENCE OF CHIEF DISTRICT JUDGES, N.C. CHILD SUPPORT GUIDELINES (2011), *available at* www.nccourts.org/Forms/Documents/1226.pdf; Ohio, OHIO REV. CODE ANN. § 3119.04 (West 2011); Oregon, OR. ADMIN. R. 137-050-0745 (2011); Pennsylvania, PA. R. CIV. PROC. 1910.16-2(e) (2011); Rhode Island, R.I. GEN. LAWS § 15-5-16.2 (2011); and Family Court Admin. Order 2007-03, *available at* cse.ri.gov/downloads/admin_order2007_03.pdf; South Carolina, S.C. CODE ANN. REGS. 114-4710, 114-4720 (2011); South Dakota, S.D. CODIFIED LAWS § 25-7-6.2 (2011); Tennessee, TENN. COMP. R. & REGS. 1240-02-04.07, 1240-02-04-05(2)(d) (2011); Utah, UTAH CODE ANN. § 78B-12-205 (2011); Vermont, VT. STAT. ANN. tit. 15, §§ 653, 654, 656 (2011); Virginia, VA. CODE ANN. § 20-108.2 (2011); Washington, WASH. REV. CODE § 26.19.065 (2011); West Virginia, W. VA. CODE § 48-13-702 (2011); Wisconsin, WIS. ADMIN. CODE § DCF 150.04 (2011); Wyoming, WYO. STAT. ANN. § 20-2-304 (2011).

235. The 2011 poverty line for a family of one is \$10,890 a year. *The 2011 HHS Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/11poverty.shtml> (last revised Feb. 2, 2012).

236. COLO. REV. STAT. § 14-10-115; *see also* IDAHO CODE ANN. § 32-706 (similar law with self-support reserve of \$800).

automated against anyone who owes child support arrears. Unlike income garnishment, proving one is too poor to have one's Social Security reduced does not stop an OCSE's computer from looking for and garnishing accounts into which Social Security is paid. Indeed, every state's OCSE computer must match and garnish bank accounts four times annually.

Mr. W's experience illustrates this. Mr. W is sixty-four years old with children who are now working adults. He used to work as a janitor and security guard until he became blind. Destitute, he failed to inform the family court that his income had dropped precipitously. Consequently, the amount of unpaid child support skyrocketed to \$44,000.²³⁷ In 2010, OCSE issued an income garnishment on SSA which reduced Mr. W's check from \$775 to \$559 a month. Unable to pay his rent, Mr. W eventually stopped the garnishment by invoking New York's state self-support reserve statute. But four months later, OSCE computers matched his account at Chase and took his Social Security payment. With a lawyer, he was able to get his money returned. But six months later, his bank account was garnished a second time by OSCE's computer.

Mr. W's experience is not isolated. In 2008, an indigent Social Security recipient sued an OCSE for garnishing his bank account twice in six months. Each time, the obligor proved he lived below the poverty line, but the OCSE did not remove him from its rolls.²³⁸ Similarly, an impoverished Vietnam veteran successfully challenged OCSE under the self-support rule when his Social Security was reduced by sixty-five percent. Despite having proven that he lived in poverty, OSCE computers garnished his bank account four times, taking not sixty-five percent but one-hundred percent of his limited federal income. The loss of access to his bank account not only made it impossible for him to pay his bills on time, but also triggered \$400 in bank fees.

Because a bank garnishment enables a state to take one hundred percent of a Social Security payment once that check is deposited into a bank account, it skirts federal law as well as state self-support reserve

237. When a non-custodial parent's income declines, the burden is upon him or her to petition the court for a downward modification. Otherwise, the child support continues as if the parent still has the income reflected in the original order but has chosen not to pay it.

238. *O'Brien v. Hansell*, No. 09-CV-629 (RRM)(JO), 2010 WL 1371366 (E.D.N.Y. Mar. 31, 2010).

laws. The Consumer Credit Protection Act²³⁹ prohibits garnishment of more than sixty-five percent of any recurring income, including Social Security payments for current and past due child support.²⁴⁰ This law reflects Congress' desire to leave some funds for the support of the non-custodial parent, even at the expense of diminishing the recovery for the needy child. The Interim Rule nullifies this protection because it allows an entire Social Security benefit payment electronically deposited into a bank account to be garnished.

D. Supplemental Security Income is Absolutely Immune

Unlike Social Security benefits, SSI benefits are not based on earnings. Instead, SSI is a needs-based program that provides a poverty-level subsistence income to destitute elders and disabled individuals.

Federal law does not allow garnishment of SSI benefits for any purpose, even child support. Because SSI is a form of welfare, it is not mentioned as "remuneration for employment" in the definition section of the federal statute that authorizes garnishment of federal benefits for child support.²⁴¹ Social Security, on the other hand, is paid to those who have worked and paid sufficient FICA taxes, so it is defined as "remuneration for employment" and can be garnished for child support.²⁴² In addition, a federal regulation provides that neither the Treasury Department nor the Social Security Administration can deduct a cent of SSI in response to a child support garnishment order.²⁴³

239. 15 U.S.C. §§ 1672, 1673 (2011).

240. The limit imposed by the CCPA is expressly made applicable to both current and past due child support in 42 U.S.C. § 666(b). The CCPA defines earnings to include "periodic payments pursuant to a . . . retirement program." The CCPA also protects money deposited into a bank account, especially when direct deposit is compulsory. Even these courts may, however, recognize a distinction between compulsory and non-compulsory deposit of wages, and hold that a compulsory direct deposit as a condition of employment renders the earnings subject to the restrictions of the CCPA even after they are deposited in a bank. *Household Fin. Corp. v. Kinder*, 444 N.E.2d 99, 100 (Akron Mun. Ct. 1982); Letter from Horace E. Menasco, Deputy Asst. Sec'y, U.S. Dep't of Labor, CCPA Letter No. 303 (Aug. 3, 1972), available at <http://www.clrc.ca.gov/pub/1973/M73-017.pdf> (stating, in response to letter from employer that paid all its employees by direct deposit, that CCPA protections apply to wages after deposit).

241. See 42 U.S.C. § 659(h).

242. See *id.*

243. 5 C.F.R. § 581.104(j) (2012) (listing SSI as "[m]oneys which are not subject to garnishment.").

Likewise, state courts that have considered the question have held that SSI cannot be garnished for child support because it is not paid as compensation for work.²⁴⁴ As the Supreme Court of Tennessee stated over twenty years ago, “SSI payments are a form of public assistance and have nothing to do with earnings a person may have had.”²⁴⁵ Indeed, most states²⁴⁶ do not even count SSI as income when determining whether a parent has the financial ability to pay child support.²⁴⁷

Taking SSI funds from a bank account to pay child support is

244. H.C.P. v. G.A.B., No. 36792, 2008 WL 2898419 (Del. Fam. Ct. Apr. 24, 2008); Dep’t of Pub. Aid *ex rel.* Lozada v. Rivera, 755 N.E.2d 548 (Ill. App. Ct. 2001); Becker Cnty. Human Servs. v. Peppel, 493 N.W.2d 573 (Minn. Ct. App. 1992); Crespo v. Crespo, 928 A.2d 833 (N.J. Super. Ct. App. Div. 2007); Green v. Redd, 2006 WL 2237700 (N.J. Super. Ct. App. Div. Aug. 7, 2006); Burns v. Edwards, 842 A.2d 186 (N.J. Super. Ct. App. Div. 2004) (stating that SSI cannot be garnished or attached for child support or alimony); Metz v. Metz, 101 P.3d 779 (Nev. 2004); Reyes v. Gonzales, 22 S.W.3d 516, 519 (Tex. Ct. of App. 2000), *cert. denied* 121 S. Ct. 2550 (2001); Barnes v. Dep’t of Human Servs., 42 So.3d 10 (Miss. 2010); *see also* Davis v. Office of Child Support Enforcement, 20 S.W.3d 273 (Ark. 2000) (stating that SSI cannot be considered income when setting child support obligation).

245. Tenn. Dept. of Human Servs. *ex rel.* Young v. Young, 802 S.W.2d 594, 597 (Tenn. 1990).

246. *See* Davis v. Office of Child Support Enforcement, 20 S.W.3d 273, 278 n.2 (Ark. 2000). The states cited in that case are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. In addition, a thirty-ninth state, Florida, exempts needs based income from child support, and thus by operation exempts SSI. FLA. STAT. ANN. § 61.31(2)(b) (2011). *But see* Whitmore v. Kenney, 626 A.2d 1180 (Pa. Super. Ct. 1993) (holding that person whose only income is SSI but who agrees that she has financial ability to pay child support can be ordered to do so). *But cf. In re Bemis v. Griggs*, 435 So. 2d 103 (Ala. Civ. App. 1983) (failing to cite the exemption for remuneration not based on employment in 42 U.S.C. § 659, and erroneously finding that SSI benefits can be a source of income for child support, but reversing contempt order because nonpayment resulted from inability to pay); Commonwealth *ex rel.* Morris v. Morris, 984 S.W.2d 840, 842 (Ky. 1999) (holding that state law does not conflict with anti-alienation provision of Social Security Act as it only requires child support order to include SSI as countable income without compelling execution, garnishment or levy against such funds); Lee v. Lee, 859 So. 2d 408 (Miss. Ct. App. 2003) (holding that order requiring father to pay child support was not abuse of discretion where trial court had reason to believe that he had earnings or earning capacity beyond his SSI benefits).

247. Whether SSI benefits can be considered when determining whether a parent has the financial ability to pay child support relates to how the child support obligation is established, and is separate from the question whether SSI benefits can be garnished for child support. Even the courts that allow SSI benefits to be considered as income generally hold that it is a separate question whether any of the state’s enforcement tools can be used to enforce the child support obligation, given the obligor’s poverty-level income.

equally prohibited. Exempt payments do not lose their exempt status when they are deposited into a bank account.²⁴⁸ The U.S. Child Support Enforcement Agency informs all persons and states seeking to collect child support that SSI funds in a bank account cannot be taken.²⁴⁹ Most courts hold that they remain exempt even when moved between accounts or commingled with other moneys, provided the movement of the exempt payments can be traced.²⁵⁰

Given the unequivocal exemption of SSI from garnishment for child support and its importance as subsistence income for the poorest of the nation's elderly and disabled, one would expect that the Interim Rule would protect it. Yet the Interim Rule requires banks to honor child support garnishment orders for accounts containing SSI.²⁵¹

This aspect of the rule will cause great harm to SSI recipients. To receive SSI, a person's financial resources (savings and owned assets) cannot exceed \$2,000 or, if married, \$3,000.²⁵² Thus, an SSI

248. *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 161 (1963). *But cf.* *State of Ohio ex rel. Miller v. Comer*, No. 75763, 2000 WL 217796 (Feb. 24, 2000) (affirming order requiring benefit recipient to reveal bank account information so that child support could be withdrawn from it each month; recipient was disabled and court's description of facts suggests that he was receiving both SSI and Social Security benefits).

249. OFFICE OF CHILD SUPPORT ENFORCEMENT, DCL-00-103 OCT 6, 2000, LETTER TO STATE IV-D DIRECTORS, RE: ATTACHMENT OF SOCIAL SECURITY BENEFITS (2000), available at <http://www.acf.hhs.gov/programs/cse/pol/DCL/2000/dcl-00-103.htm> ("Question: When SSI benefits are paid into a bank account, do they retain their character as protected benefits? Answer: Yes. The U.S. Supreme Court has held that Social Security funds deposited into a bank account "retained the quality of moneys" within the purview of section 407[.]" (citation omitted). Courts have also held that the funds remain exempt from legal process even if they are commingled in a bank account with other funds, so long as they are reasonably traceable to Social Security (citations omitted). Since the prohibition on the attachment of SSI payments is based on the same statutory provisions as apply to Social Security, . . . the reasoning in these cases would apply equally to SSI payments."); *see also id.* (SSI benefits are not subject to garnishment for support arrearages); U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT, CHAPTER 10 - ENFORCEMENT OF SUPPORT OBLIGATIONS (2002), available at <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c10.html> ("Supplemental Security Income (SSI) benefits are not attachable for child support purposes. Both Federal law and regulations specifically prohibit withholding of this income. This prohibition continues even after the benefits are deposited into the recipient's bank account." (citations omitted)).

250. *NCNB Fin. Servs., Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993), *aff'd*, 45 F.3d 427 (4th Cir. 1994); *Heymann v. Brechner*, No. 95 Civ. 1329 (CSH), 1996 WL 580915, at *7 (S.D.N.Y. Oct. 9, 1996).

251. Interim Final Rule on Garnishment of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9956 (proposed Feb. 23, 2011) (to be codified at 5 C.F.R. pt. 212.4).

252. *What is Supplemental Security Income (SSI)?*, SOCIAL SECURITY ADMIN., <http://ssa->

recipient is likely to have no other resources to fall back on if funds in a bank account are temporarily frozen as part of a child support collection action. Moreover, the typical bank garnishment fee of \$125²⁵³ represents almost twenty percent of the SSI recipient's monthly check of \$674 – the current maximum monthly benefit.²⁵⁴ If the garnishment results in bounced check charges, an even greater amount of the monthly benefit will be consumed.

The harm does not end there. Undoing the garnishment of an SSI account is difficult and time consuming. As with other exemption claims, the burden remains on the child support obligor to contact the OSCE and establish that all the money in the account is SSI. Many SSI recipients have no idea how to do this. And even when an obligor submits an exemption claim, “it takes several weeks to get the garnishment undone. Such was the case of Cirilo C, an SSI recipient who waited three weeks to get his account unfrozen.”²⁵⁵ And when he finally was able to access his account, “he found he had lost 15% of his monthly income (\$100) in bank fees. Six months later, the OCSE computer matched and garnished Mr. Cirilo C's account a second time”, again causing the deduction in fees from his small SSI benefit.²⁵⁶

OSCE freezes of accounts containing only SSI are common. There are at least 100,000 elderly or disabled SSI recipients who owe past due child support.²⁵⁷ Each one is likely to have his bank account

custhelp.ssa.gov/app/answers/detail/a_id/93/kw/garnishing%20SSI%20income (last updated Jan. 24, 2012 3:33 PM).

253. See *Frozen Out*, *supra* note 110, at 2 (opening statement of Sen. Max Baucus, Chairman, Comm. on Fin.); see also Rowley, *supra* note 99.

254. SOCIAL SECURITY ADMIN, ANNUAL STATISTICAL SUPPLEMENT 2010: SUPPLEMENTAL SECURITY INCOME, PROGRAM OVERVIEW (Feb. 2011), available at <http://www.ssa.gov/policy/docs/statcomps/supplement/2010/ssi.pdf>.

255. Letter from Johnson Tyler, Legal Services N.Y.C., and Susan C. Santos the Empire Justice Ctr., to the U.S. Dep't of the Treasury et al., Comments regarding Interim Rule on Garnishment of Accounts Containing Federal Benefit Payments 13 (May 24, 2011), available at <http://www.sbls.org/index.php?id=533>.

256. *Id.*

257. Approximately 100,000 child support debtors were receiving SSI benefits in 2004. THE STORY BEHIND THE NUMBERS, *supra* note 219. The most recent statistics that we can find are from 2007, which show 12,318,042 total child support cases. Extrapolating the percentages indicates that in 2007 there were 141,000 child support obligors in that year who were recipients of SSI. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2007 ANNUAL REPORT TO CONGRESS, http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/fy2007_annual_report/table_55.html.

frozen for child support at least once a year, given mandatory bank match programs run by each state's child support office.²⁵⁸

E. Veterans Benefits

Under the Interim Rule, because garnishment orders from a state OCSE trigger a garnishment without the protections of the Interim Rule, electronically deposited veterans' benefits will also be seized for child support. This policy is misguided and is likely to push large numbers of disabled veterans who live in poverty to the edge. Given recent sensitivity to the high suicide and homeless rates among veterans with strife within their families,²⁵⁹ this rule is especially misguided.

Veterans, like all parents, have an obligation to support their children. The most equitable and efficient method of collecting child support payments is through income garnishment as it ensures a modicum of income left for the veteran. There are two different types of veterans' benefits. The first, and less common (about 310,000 recipients)²⁶⁰ is retirement benefits. These are issued to veterans who have worked twenty years or more in the military and are paid by the Department of Defense, not the Department of Veterans Affairs (the "VA"). Military retirement pay is not considered veterans' benefits. Because such benefits are paid as compensation for employment, they can be garnished for child support directly by an OCSE.²⁶¹

Second, 3.3 million Americans receive disability benefits from the VA.²⁶² This benefit cannot be legally garnished for child support by the OCSE.²⁶³ However, it can be "apportioned" by a petitioning

258. 42 U.S.C. § 666(a)(17) (2006); *see also* discussion, *supra* Part IV.A.

259. Erick Studenicka, *Suicide Seen as Major Threat to National Guard Soldiers*, NAT'L GUARD NEWS, Aug. 20, 2007, http://www.ng.mil/news/archives/2007/08/082007-suicide_ng.aspx (explaining that failed relationships are believed to be the cause of seventy to eighty percent of suicides among veterans, with financial and employment problems being the second and third cause); THE CAL. ENDOWMENT, RETURNING VETERANS AND CHILD SUPPORT ARREARS: THE CHANGING FACE OF CHILD SUPPORT 8-9 (2011), *available at* http://file.lacounty.gov/cssd/cms1_160234.pdf.

260. NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS, DEPARTMENT OF VETERANS AFFAIRS STATISTICS AT A GLANCE (Aug. 2011), <http://www.va.gov/vetdata/docs/quickfacts/Homepage-slideshow.pdf>.

261. 42 U.S.C. §§ 659, 662(f) (2006); Major Connor, *Using Garnishment to Collect Alimony and Child Support*, 1991-DEC ARMY LAW. 48 n. 120 (1991).

262. NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS, *supra* note 260.

263. While veteran disability pay is not garnishable, a state family court can count the income as available for support when determining how much support should be paid. *See*

spouse.²⁶⁴ Apportionment is a fairly easy procedure whereby the custodial spouse petitions the VA which then garnishes twenty to fifty percent of the veteran's disability payment.²⁶⁵ Similarly, a family court judge can order a veteran to pay child support from his disability benefits.²⁶⁶

Because veterans' benefits can be easily apportioned or garnished on a month to month basis, allowing a state OSCE to seize an entire bank account puts those veterans who have accumulated arrears – the truly poor – at great financial risk. This hole in the Interim Rule, allowing garnishment of bank accounts for child support, allows OCSE offices to capture one hundred percent of the benefits without regard for the obligor's financial needs.

F. How to Protect Some Electronic Social Security, SSI and Veterans Deposits from an OCSE Bank Garnishment

The authors remain hopeful that Treasury will amend its Interim Rule to protect two months (or some amount) of these federal exempt benefits from child support collection, as this was its original proposal.²⁶⁷ Even if that does not happen, there are strategies that advocates can employ to protect these benefits.

The Direct Express card is a MasterCard-branded prepaid (stored value) debit card that beneficiaries can use to receive federal payments, including Social Security, SSI, and VA benefits. The funds are loaded electronically and remotely, so beneficiaries need not go into a financial institution, government office, or check cashing outlet to access their benefits.

Benefits paid through the Direct Express Card cannot be frozen or garnished, except to the extent that the funds are not exempt under federal law, such as seizure of benefits to pay child support or

42 U.S.C. § 659(h)(1)(b)(iii) (2006); *Rose v. Rose*, 481 U.S. 619, 624 (1987).

264. 38 U.S.C. § 5307(a) (2006); 38 C.F.R. §§ 3.450(a)(ii), 3.452(a) (2012).

265. Ordinarily, apportionment of more than fifty percent of the veteran's benefits would constitute undue hardship on the veteran, while apportionment of less than twenty percent of his or her benefits would not provide a reasonable amount for the custodial parent. 38 C.F.R. §§ 3.451, 3.453.

266. "[Veteran] disability benefits are intended to provide compensation for disabled veterans and their families." *Rose*, 481 U.S. at 624.

267. Notice of Proposed Rulemaking re: Garnishment of Accounts Containing Federal Benefits, 75 Fed. Reg. 20299, 20302 (Apr. 19, 2010).

alimony.²⁶⁸ Because only exempt federal benefits are loaded onto the Direct Express Card, exempt funds are never commingled with non-exempt funds. As SSI funds are supposed to be completely safe from garnishments for child support, the Direct Express Card is an excellent vehicle to protect SSI funds from garnishment – even for child support.²⁶⁹ Other funds may be less safe.²⁷⁰

The Direct Express card can be used to withdraw cash from ATMs, make purchases at stores that accept MasterCard debit cards and get cash back when purchases are made, or make payments over the telephone or the Internet. It can be used to purchase money orders from the U.S. Post Office, but cannot be used to write personal checks. Unlike some bank accounts, there are no overdraft fees or bounce protection loans. The card carries some fees, but they are relatively modest, and recipients can avoid most of them.²⁷¹

Second, one can challenge an OCSE's use of bank garnishment when it knows the obligor lives in poverty. Such knowledge could occur, as in the case of Mr. W, when an income garnishment triggers a claim of poverty that protects the obligor from any reduction in the social security check. This would apply whether the recipients' benefits were SSI, veterans' benefits, or Social Security benefits.

Such a challenge would rest on the following theory. Under the applicable state law, a person owing child support has a property

268. See *Common Questions*, FINANCIAL MANAGEMENT SERVICE, <http://fms.treas.gov/directexpresscard/questions.html> (last updated Mar. 8, 2011) (providing questions and answers about the Direct Express card). The terms of the Direct Express card are not set out by regulation, but only by Treasury's contract with the bank that administers it. Since this contract is not public, this article is based on Treasury's statements on its website.

269. *Id.* at 6.4.

270. According to the terms of the contract governing the use of the card indicate that garnishment orders will be honored. "We may comply with any subpoena, levy or other legal process which we believe in good faith is valid. Unless the law prohibits us, we may notify you of such process by telephone, electronically or in writing. If we are not fully reimbursed for our record search, photocopying and handling costs by the party that served the process, we may charge those costs to your Card Account. We may honor legal process that is served in any manner at any of our offices, including locations other than where the funds or records sought are held, even if the law requires personal delivery at a different location." *Terms of Use for Your Direct Express Debit MasterCard Card, XIV(6) Legal & General Terms*, DIRECT EXPRESS, http://www.usdirectexpress.com/edcfdclient/docs/Terms_And_Conditions.pdf (last visited Aug. 14, 2010).

271. See *Common Questions*, *supra* note 268. The terms of the Direct Express card are not set out by regulation, but only by Treasury's contract with the bank that administers it. Since this contract is not public, this article is based on Treasury's statements on its website.

interest in receiving income commensurate with the local Self Support Rule. Colorado and Idaho, for example, ensure that only fifty dollars a month is deducted when the obligor's income is below \$850²⁷² and \$800,²⁷³ respectively. Once the obligor proves his income is below the self-support reserves (via a downward modification petition or other fact finding by OCSE regarding his or her income), due process requires the OCSE to safeguard that amount when garnishing the bank account. This could be done by issuing a modified garnishment notice that orders the bank to take only funds in excess of the self-support reserve when the account receives direct deposit, federal payments. In Colorado, this means a bank garnishment order would direct the bank to garnish only moneys above the \$800 threshold. In Idaho, the order would protect the first \$750 received by direct deposit.

Additionally, the deliberate garnishment of funds in a bank account *after* the OCSE has already taken the maximum sixty-five percent of a Social Security recipient's benefits through the administrative offset program, violates the Congressional limits on the amounts that can be seized for child support. Congress quite specifically limited the maximum amount that can be collected for child support to those amounts established by the Consumer Credit Protection Act.²⁷⁴ The maximum Social Security benefits that can be seized under the Consumer Credit Protection Act for child support that is over twelve weeks past due is sixty-five percent of income.²⁷⁵ This sixty-five percent is the maximum, even when arrearages as well as ongoing support are being collected.²⁷⁶ Thus there may be a cause of action against the OSCE for allowing the recipient to stay on the past due list

272. COLO. REV. STAT. § 14-10-115 (2011).

273. IDAHO CODE ANN. § 32-706 (2011).

274. 42 U.S.C. § 666(b) (2006) (discussing the withholding from income of amounts payable as support). The procedures referred to in subsection (a)(1)(A) of this section (relating to the withholding from income of amounts payable as support) must provide for the following: "(1) In the case of each noncustodial parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of such parent's income must be withheld, in accordance with the succeeding provisions of this subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 1673(b) of Title 15." *Id.*

275. 15 U.S.C. § 1673(b)(2)(B).

276. 42 U.S.C. § 666(b)(1) ("If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 1673(b) . . .").

for the automatic bank garnishment program²⁷⁷ even after collecting sixty-five percent of the Social Security benefits through administrative offset.

Another avenue is for advocates to work with their state OCSE to amend its garnishment notice to protect two months' worth of SSI benefits. The new notice would instruct banks not to restrain a set dollar amount equal to that state's maximum SSI payment for a single adult when an account received direct deposit SSI. The New York OCSE, for example, amended its notice to render it void when a bank determines the account contains only direct deposit SSI.²⁷⁸ As in New York, most states do not count SSI as available income with which to pay child support and thus should be open to such a change.²⁷⁹ Those seeking such a notice change should advocate not just the societal cost (homelessness, health, hunger) but also the resources the OSCE must expend in adjudicating SSI bank freeze claims and then undoing them. Similar measures should be employed for recipients of VA benefits and for Social Security recipients whose benefits have already been offset through up to the maximum sixty-five percent.

Also, advocates can file appeals on behalf of individual child support obligors whose federal benefit is taken for child support. Each state has different procedures for doing this. Some involve filing papers in family court. Others involve administrative appeals. Such appeals often reveal shortcomings in OCSE procedures in need of change. If one succeeds in such individual cases, the local OCSE should be requested to "delete" the case from automatic bank garnishment.²⁸⁰

277. See *supra* Part II.B.3 (discussing bank matching).

278. N.Y. STATE DIV. OF CHILD SUPPORT ENFORCEMENT, APPENDIX C: ASSET SEIZURE NOTICES, https://newyorkchildsupport.com/pdfs/Appendix_C_Asset_Seizure%20Notices_053102.pdf.

279. Some of the states that do not count SSI as available income for child support are as follows: *Marrocco v. Giardino*, 767 A.2d 720 (Conn. 2001); *Dep't of Public Aid v. Rivera*, 755 N.E.2d 548 (Ill. App. Ct. 2001); *Reyes v. Gonzales*, 22 S.W.3d 516 (Tex. Ct. App. 2000), *cert. denied* *Texas v. Reyes*, 121 S. Ct. 2550 (2001); *Davis v. Office of Child Support Enforcement*, 908 S.W.2d 649 (Ark. 2000); *Brooks v. Jeffcoat*, No. B-6731, 1995 WL 775058 (Del. Fam. Ct. Mar. 16, 1995); *Becker Co. Human Servs., re Becker Co. Foster Care v. Peppel*, 493 N.W.2d 573 (Minn. Ct. App. 1992); *Tenn. Dept. of Human Servs. ex rel Young v. Young*, 802 S.W.2d 594, 597 (Tenn. 1990); *Langlois v. Langlois*, 441 N.W.2d 286 (Wis. Ct. App. 1989). *But see* *Commonwealth ex rel Morris v. Morris*, 984 S.W. 840 (Ky. 1998).

280. U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE FOR CHILD SUPPORT ENFORCEMENT, FEDERAL OFFSET PROGRAM: USER GUIDE §§ 1-4, 2-6 (2011), *available at* <http://www.acf.hhs.gov/programs/cse/newhire/library/fop/userguide/fopug.pdf>.

Similarly, in a case where the obligor is permanently and totally disabled and lacks assets, OSCE should be then requested to “close” the child support case.²⁸¹

V. CONCLUSION

Treasury and the other federal agencies involved in the passage of the watershed Interim Rule have promulgated an important new consumer protection for the millions of recipients of federal benefits. The job is not finished, however. These agencies still need to make several essential changes before the Interim Final rule becomes the Final rule. First, SSI and most VA benefits need to be protected from seizure for child support. Without this change, the nation’s poorest recipients of federal benefits will continue to suffer exactly those dangerous and harmful effects from the illegal seizure of benefits that Treasury has already identified and moved to prevent by promulgating this rule. Additionally, low-income recipients of Social Security benefits need to be protected by ensuring that when there has been an administrative offset up to the full sixty-five percent of benefits, that these recipients do not have their bank accounts garnished as well. This is necessary to ensure that complete destitution does not result from garnishment for child support arrearages. Third, levies, attachments, and garnishments, whether or not issued by a court, should trigger the protections of the Interim Rule. Finally, Treasury should move expeditiously to extend the protections of the Interim Rule to other exempt federal payments, including military retirement.

281. 45 C.F.R. § 303.11(b)(5) (2012).

