Comments of the
National Consumer Law Center
on behalf of its low-income clients
and
National Association of Consumer Advocates
Consumer Federation of America
Consumer Action
Consumers Union
National Legal Aid and Defender Association
National Senior Citizens Law Center
U.S. Public Interest Research Group

Coordinated Advice & Referral Program for Legal Services of Cook County, Illinois
Empire Justice Center of Albany, New York
Indiana Legal Services, Inc. of Bloomington, Indiana
Legal Aid Society of Minneapolis, Minnesota
Legal Aid Society of Roanoke Valley of Roanoke, Virginia
Legal Advocacy Center of Central Florida, Inc of Sanford, Florida
Legal Services of Northern Virginia of Falls Church, Virginia
Jacksonville Area Legal Aid, Inc. of Jacksonville, Florida
MFY Legal Services, Inc. Of New York, New York
Michigan Poverty Law Program of Ann Arbor, Michigan
MidPenn Legal Services of Harrisburg, Pennsylvania
Mid Minnesota Legal Assistance of Minneapolis, Minnesota
Mississippi Center for Justice of Jackson, Mississippi
Mountain State Justice of Charleston, West Virginia
Neighborhood Economic Development Advocacy Project (NEDAP) of New York, New York
New York Legal Assistance Group (NYLAG) of New York, New York
South Brooklyn Legal Services of Brooklyn, New York
Virginia Poverty Law Center of Richmond, Virginia

regarding

Proposed Interagency Guidance on
Garnishment of Exempt Federal Benefit Funds

Office of the Comptroller of the Currency
[Docket ID OCC–2007–0015]

Federal Reserve System
[Docket No. OP–1294]

Federal Deposit Insurance Corporation

Office of Thrift Supervision
[ID–OTS–2007–0018]

National Credit Union Administration

November 27, 2007

These comments regarding the Proposed Guidance on Garnishment of Exempt Benefit Funds are submitted by **National Consumer Law Center** (NCLC),[1] on behalf of its low-income clients, as well as the **National Association of Consumer Advocates,[2] Consumer Federation of America,[3] Consumer Action,[4] Consumers Union,[5] National Legal Aid and Defender Association,[6] National Senior**

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[1]The **National Consumer Law Center**, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of sixteen practice treatises and annual supplements on consumer laws, including *Consumer Banking and Payments Law* (3d ed. 2005), which has several chapters devoted to electronic commerce, electronic deposits, access to funds in bank accounts, and electronic benefit transfers. NCLC also publishes bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted trainings for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal the electronic delivery of government benefits, predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and were specifically very involved in the development of rules implementing EFT-99 after its enactment in 1996. NCLC's attorneys regularly provide comprehensive comments to the federal agencies on the regulations under these laws. These comments are written by Margot Saunders, co-author of the NCLC's *Consumer Banking and Payments* Law manual, and co-author and contributor to several other NCLC publications.

[2]The **National Association of Consumer Advocates (NACA)** is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[3]The **Consumer Federation of America** is a nonprofit association of about 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through research, advocacy and education.

[4]**Consumer Action,** founded in 1971, is a national non-profit education and advocacy organization offering many free services to consumers.

[5]**Consumers Union** is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived form the sale of Consumer Reports, its other publications and services, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[6]The **National Legal Aid and Defender Association (NLADA),** established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender systems. Among NLADA's more than 2000 members are civil legal aid programs funded by the Legal Services Corporation and a variety of other funding sources.

Citizens Law Center,[7] **U.S. Public Interest Research Group,**[8] as well as the following multi-county or statewide legal services organizations that advocate on behalf of low income people:

- Coordinated Advice & Referral Program for Legal Services of Cook County, Illinois
- Empire Justice Center of Albany, New York
- Indiana Legal Services, Inc. of Bloomington, Indiana
- Legal Aid Society of Minneapolis, Minnesota
- Legal Aid Society of Roanoke Valley of Roanoke, Virginia
- Legal Advocacy Center of Central Florida, Inc of Sanford, Florida
- Legal Services of Northern Virginia, of Falls Church, Virginia
- Jacksonville Area Legal Aid, Inc. of Jacksonville, Florida
- MFY Legal Services of New York, New York
- Michigan Poverty Law Program of Ann Arbor, Michigan
- MidPenn Legal Services of Harrisburg, Pennsylvania
- Mid Minnesota Legal Assistance of Minneapolis, Minnesota
- Mississippi Center for Justice of Jackson, Mississippi
- Mountain State Justice of Charleston, West Virginia
- Neighborhood Economic Development Advocacy Project (NEDAP) of New York, New York
- New York Legal Assistance Group (NYLAG) of New York, New York
- South Brooklyn Legal Services of Brooklyn, New York
- Virginia Poverty Law Center of Richmond, Virginia

We appreciate the fact that the regulators have commenced the process of addressing the problems caused by the seizure of exempt benefits from bank accounts. However, the Proposed Guidance does not and will not address the real problems. We are seeking a clear, comprehensive and unequivocal rule – to be issued by these federal banking regulators that does the following:

> *Banks should be prohibited from seizing or freezing federal exempt funds electronically deposited in a bank account pursuant to a) a state order for execution, garnishment or attachment, or b) the bank's own common law or contractual claim for set-off.*
>
> *The sole exception to this rule should be when the state order specifically indicates that it is pursuant to a judgment for alimony or child support and the exempt funds are Social Security benefits.*[9]

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[7]**The National Senior Citizens Law Center (NSCLC)** advocates for economic and health security for America's low-income older persons and individuals with disabilities, with an emphasis on problems affecting people of color and women. For 35 years NSCLC has engaged in Social Security and Supplemental Security Income (SSI) advocacy including the protection of Social Security and SSI funds from creditors.

[8]The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

[9]Note that only Social Security benefits paid under Title II of the Social Security Act are not exempt for purposes of alimony or child support. 42 U.S.C. 659(a). Supplemental Security Income (SSI) benefits paid pursuant to Title XVI of the Act are protected under 42 USC 407 & 42 U.S.C. §1383(d)(1) are protected from all executions, garnishments or attachments, including those involving alimony or child support.

When exempt funds have been commingled with non-exempt funds, the bank should conduct a simple accounting analysis (as further described by either the bank or the regulators) to determine the available non-exempt funds that can be seized to satisfy the order.

In these Comments we will provide a comprehensive basis upon which the agencies can rest a Guidance along these lines. At the end, we provide a specific response to each of the Best Practices outlined in the Proposed Guidance.

***Something must be done*.**

We estimate that on a monthly basis thousands of low-income recipients of Social Security, SSI and other federal payments whose benefits are entirely exempt from claims of judgment creditors are left temporarily destitute when banks allow attachments and garnishments to freeze their only assets. As was illustrated in a recent Wall Street Journal article ("*The Debt Collector vs. The Widow – Viola Sue Kell thought her Social Security benefits were safe in the bank. She was wrong*."),[10] when a bank applies an attachment or garnishment order to the exempt funds in a low-income recipient's bank account, the consequences are generally devastating. There is no money for food or medicine. Checks written for rent or the mortgage are bounced. People go hungry. They get sick or sicker. They suffer anxiety. They are forced to pay steep bank fees and fees to merchants because the checks they wrote when they had money in the bank now bounce.

In these Comments we intend to provide both legal and policy reasons to support our request for a clear and comprehensive Joint Guidance from these five federal banking regulators which will address the problems suffered by recipients of federal benefits when their exempt funds are seized or frozen by the banks. We believe – as do others, including numerous members of Congress – that the law is clear, the correct policy is obvious, the right steps for the five federal banking regulators is manifest.

But – the issue really is not what is *required* either legally or is *appropriate* as a policy matter. The issue is whether these five federal banking regulators *will* tell the banks what they must do when most of them do not want to do it. We know from our experience trying to resolve these problems in the states (Alabama, New York, Maryland, Pennsylvania, Virginia, to name just a few) <u>that the banks do not want to change their responses to garnishment orders.</u> We do not know exactly why the banks are resisting a rule which would clearly protect both the account holders and the banks. The banks charge fees from the seizures; they make money from the overdraft fees precipitated by the seizure which stop previously written checks and debits; and they make money from their business relationships with the debt buyers and debt collectors for credit card and other debts who are largely responsible for generating these executions against judgment proof recipients of federal benefits. But it should not be the wishes of the banks that control what the federal banking regulators do.

The Law – Exempt Benefits Must Be Protected.

The law could not be clearer. To preserve federal benefits for their intended recipients, Congress provided that the benefits cannot be seized to pay pre-existing debts, as such seizures would result in the

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[10] Ellen E. Schultz, "*The Debt Collector vs. The Widow – Viola Sue Kell thought her Social Security benefits were safe in the bank. She was Wrong*." Wall Street Journal, April 28, 2007. Page A1.

loss of subsistence funds. Each of the statutes governing the distribution of these funds specifically articulates that these funds are to be free from "attachment or garnishment or other legal process." The Social Security Act specifically says:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and <u>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</u>.[11] (Emphasis added.)

What words could be used to make these protections any clearer? The *words in these statutes* apply as against all parties – creditors, judgment creditors and banks.

This nation's courts have consistently said that exemptions are to be liberally construed in favor of the debtor.[12] The United States Supreme Court has repeatedly reiterated that the Social Security,[13] and

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[11]Social Security Act, at 42 U.S.C. § 407(a). The protections are similar in the other federal statutes governing federal benefits:

- <u>Veterans benefits:</u> "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1).
- <u>Railroad Retirement benefits:</u> "Except as provided in subsection (b) of this section and the Internal Revenue Code of 1986 [26 U.S.C.A. § 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 45 U.S.C. § 231m.
- <u>Federal Retirement program benefits:</u> "An amount payable under subchapter II, IV, or V of this chapter is not assignable, either in law or equity, except under the provisions of section 8465 or 8467, or subject to execution, levy, attachment, garnishment or other legal process, except as otherwise may be provided by Federal laws. 5 U.S.C. § 8470.

[12]Wilder v. Inter-Island Stream Navigation Co., 211 U.S. 239 (1908); In re Perry, 345 F.3d 303 (5th Cir. 2003) (Texas homestead law); In re Cobbins, 227 F.3d 302 (5th Cir. 2000) (Miss. law) (liberal construction required, but mobile home not exempt unless debtor also owns land); In re Colwell, 196 F.3d 1225 (11th Cir. 1999) (Florida law); In re Crockett, 158 F.3d 332 (5th Cir. 1998) (Texas law); In re McDaniel, 70 F.3d 841 (5th Cir. 1995) (Texas law); In re Johnson, 880 F.2d 78, 83 (8th Cir. 1989) (Minn. law); Tignor v. Parkinson, 729 F.2d 977, 981 (4th Cir. 1984) (Va. law); In re Carlson, 303 B.R. 478 (B.A.P. 10th Cir. 2004) (Utah law); In re Casserino, 290 B.R. 735 (B.A.P. 9th Cir. 2003) (Oregon law); In re Vigil, 2003 WL 22024830 (10th Cir. Aug. 26, 2003) (unpublished) (Wyo. law); In re Winters, 2000 Bankr. LEXIS 648 (10th Cir. B.A.P. June 26, 2000) (unpublished); In re Kwiecinski, 245 B.R. 672 (10th Cir. B.A.P. 2000); In re Bechtoldt, 210 B.R. 599 (B.A.P. 10th Cir. 1997) (Wyo. law); In re Webb, 214 B.R. 553 (E.D. Va. 1997); Levin v. Dare, 203 B.R. 137 (S.D. Ind. 1996) (where statute unclear, court follows liberal construction rule and holds property exempt); Marine Midland Bank v. Surfbelt, Inc., 532 F. Supp. 728 (W.D. Pa. 1982); In re Morse, 237 F. Supp. 579 (S.D. Cal. 1964); In re Bailey, 172 F. Supp. 925 (D. Neb. 1959); In re Wilson, 2004 WL 161343 (N.D. Iowa Jan. 27, 2004); In re Moore, 269 B.R. 864 (Bankr. D. Idaho 2001); In re Marples, 266 B.R. 202 (Bankr. D. Idaho 2001); In re Atkinson, 258 B.R. 769 (Bankr. D. Idaho 2001); In re Stratton, 269 B.R. 716 (Bankr. D. Or. 2001); In re Siegle, 2000 Bankr. LEXIS 1627 (Bankr. D. Mont. Dec. 6, 2000), amended, supplemented by 257 B.R. 591 (Bankr. D. Mont. 2001); In re Moore, 251 B.R. 380 (Bankr.

Veterans Benefits[14] are protected from attachment and garnishment. The protections in these federal statutes explicitly apply to benefits that are "paid and payable," thus making the benefits exempt both

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W.D. Mo. 2000) (principle of liberal construction required that recreational all-terrain vehicles be included in exemption for motor vehicles where statute did not specifically exclude them); In re Longstreet, 246 B.R. 611 (Bankr. S.D. Iowa 2000); In re Hasse, 246 B.R. 247 (Bankr. E.D. Va. 2000) (construing Virginia's exemption for IRAs); In re Bogue, 240 B.R. 742 (Bankr. E.D. Wis. 1999) (compilation of Wisconsin cases requiring liberal construction of exemptions); In re Simpson, 238 B.R. 776 (Bankr. S.D. Ill. 1999); In re Shaffer, 228 B.R. 892 (Bankr. N.D. Ohio 1998); In re Rhines, 227 B.R. 308 (Bankr. D. Mont. 1998); In re Black, 225 B.R. 610 (Bankr. M.D. La. 1998); In re Clifford, 222 B.R. 8 (Bankr. D. Conn. 1998) (under Connecticut law, the exemption statute and in particular the tools of trade exemption are to be interpreted liberally); In re Gallegos, 226 B.R. 111 (Bankr. D. Idaho 1998); In re Robertson, 227 B.R. 844 (Bankr. S.D. Ind. 1998) (Indiana courts have a longstanding practice of construing exemption statutes liberally in favor of the debtors for whose benefit they were enacted); In re Brockhouse, 220 B.R. 623 (Bankr. C.D. Ill. 1998); In re Cain, 235 B.R. 812 (Bankr. M.D.N.C. 1998) (North Carolina exemptions should receive a liberal construction); In re Lazin, 217 B.R. 332 (Bankr. M.D. Fla. 1998) (Florida exemption for annuity contracts construed liberally in favor of debtor); In re Hankel, 223 B.R. 728 (Bankr. D.N.D. 1998) (homestead statutes, like all exemption statutes, are to be accorded a liberal interpretation); In re Shaffer, 228 B.R. 892 (Bankr. N.D. Ohio 1998); In re Ward, 210 B.R. 531 (Bankr. E.D. Va. 1997); In re Evans, 190 B.R. 1015 (Bankr. E.D. Ark. 1995), aff'd without op., 108 F.3d 1381 (8th Cir. 1997); In re Powell, 173 B.R. 338 (Bankr. E.D. Ky. 1994); In re Galvin, 158 B.R. 806 (Bankr. W.D. Mo. 1993); In re Miller, 103 B.R. 65 (Bankr. N.D.N.Y. 1989); In re Thexton, 39 B.R. 367 (Bankr. D. Kan. 1984); In re Maylin, 155 B.R. 605 (Bankr. D. Me. 1993); In re Lind, 10 B.R. 611 (Bankr. D.S.D. 1981); In re Avery, 514 So. 2d 1380 (Ala. 1987); Fleet v. Zwick, 994 P.2d 480 (Colo. Ct. App. 1999); In re Marriage of Gedgaudas, 978 P.2d 677 (Colo. Ct. App. 1999); Wilmington Trust Co. v. Barry, 338 A.2d 575 (Del. Super. Ct. 1975), aff'd mem., 359 A.2d 664 (Del. 1976); Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001) (constitutional homestead exemption is liberally construed); Goldenberg. v. Sawczak, 791 So. 2d 1078 (Fla. 2001); Broward v. Jacksonville Med. Ctr., 690 So. 2d 589 (Fla. 1997); Broward v. Jacksonville Med. Ctr., 690 So. 2d 589 (Fla. 1997); Schuler v. Wallace, 61 Haw. 590, 607 P.2d 411 (1980); LPP Mortg., Ltd. v. Meurer, 2004 WL 57585 (Iowa Ct. App. Jan. 14, 2004) (homestead exemption statutes are broadly construed); Bohl v. Bohl, 234 Kan. 227, 670 P.2d 1344 (Kan. 1983); Celco, Inc. v. Davis Van Lines, 226 Kan. 366, 598 P.2d 188 (1979); Dwyer v. Cempellin, 673 N.E.2d 863 (Mass. 1996) (discussion of public policy of homestead exemptions and liberal construction in favor of debtor); Carrel v. Carrel, 791 S.W.2d 831 (Mo. Ct. App. 1990) (exceptions to maximum garnishment restrictions must be narrowly construed); Household Fin. Corp. v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), aff'd per curiam, 429 S.E.2d 716 (N.C. 1993); Morgan Keegan Mortgage Co. v. Candelaria, 951 P.2d 1066 (N.M. Ct. App. 1997); Meadow Wind Healthcare Ctr. v. McInnes, 2000 Ohio App. LEXIS 3415 (Ohio Ct. App. July 24, 2000); In re Anderson, 932 P.2d 1110 (Okla. 1996); P.I.E. Employees Fed. Credit Union v. Bass, 759 P.2d 1144 (Utah 1988); Homeside Lending, Inc. v. Miller, 31 P.3d 607 (Utah Ct. App. 2001); Mercier v. Partlow, 149 Vt. 523, 546 A.2d 787 (1988); Macumber v. Shafer, 637 P.2d 645 (Wash. 1981); In re Elliott, 74 Wash. 2d 600, 446 P.2d 347 (Wash. 1968); Cowart v. Pan Am. Bank, 2000 Wash. App. LEXIS 2132 (Wash. Ct. App. Nov. 3, 2000) (unpublished); Schwanz v. Teper, 66 Wis. 2d 157, 223 N.W.2d 896 (Wis. 1974). But see In re McWilliams, 296 B.R. 424 (Bankr. E.D. Va. 2002) (strictly construing recording requirements of Va. homestead exemption statute); In re Jackson, 2001 Bankr. LEXIS 525 (Bankr. E.D. Va. Mar. 30, 2001) (homestead exemption statute is liberally construed, but its procedural requirements are construed strictly, so homestead deed untimely). But cf. In re Oakley, 344 F.3d 709, 712 (7th Cir. 2003) (Indiana law) (dismissing rule of liberal construction even though state courts use it).

[13]Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988); Philpott v. Essex Cty. Welfare Bd., 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

[14]Porter v. Aetna Cas. & Surety Co., 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962) (deposited VA benefits retain exempt characteristic so long as they remain subject to demand and use for needs of recipient for maintenance and support, and not converted to permanent investment).

before and after payment to the beneficiary,[15] regardless of whether the creditor is a state or a private entity.[16]

In *Porter v. Aetna Casualty and Surety Co.*,[17] the Supreme Court held that veterans' disability benefits deposited in a bank account remained exempt so long as they are readily traceable and "retain the quality as moneys," that is, they are readily available for the day-to-day needs of the recipient and have not been converted into a "permanent investment."[18] This rationale has been widely applied to other exempt benefits, to hold that exempt funds remain exempt in checking,[19] savings,[20] or CD[21] accounts so long as these are "usual means of safekeeping" money used for daily living expenses.[22]

The Policy – Exempt Benefits Must Be Protected.

Social Security benefits, SSI benefits, Veterans' benefits, Railroad Retirement benefits, were all

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[15] Philpott v. Essex Cty. Welfare Bd., 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

[16] Bennett v. Arkansas, 485 U.S. 395, 108 S. Ct. 1204, 99 L. Ed. 2d 455 (1988); Philpott v. Essex Cty. Welfare Bd., 409 U.S. 41, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

[17] 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962).

[18] *See* Porter v. Aetna Cas. & Surety Co., 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962). *See also* Jones v. Goodson, 772 S.W.2d 609 (Ark. 1989) (certificates of deposit purchased with veterans benefits remained exempt; funds were "immediately accessible" even though depositor would forfeit some interest in case of early withdrawal); Younger v. Mitchell, 777 P.2d 789 (Kan. 1989) (veterans benefits deposited into an interest bearing savings account exempt); United Home Foods Dist., Inc. v. Villegas, 724 P.2d 265 (Okla. Ct. App. 1986).

[19] Porter v. Aetna Cas. & Surety Co., 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962); S&S Diversified Servs. L.L.C. v. Taylor, 897 F. Supp. 549 (D. Wyo. 1995); United Home Foods Dist., Inc. v. Villegas, 724 P.2d 265 (Okla. Ct. App. 1986).

[20] Porter v. Aetna Cas. & Surety Co., 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962); Younger v. Mitchell, 777 P.2d 789 (Kan. 1989).

[21] *In re Smith, 242 B.R. 427* (Bankr. E.D. Tenn. 1999) (proceeds of veteran's life insurance policy remained exempt when widow used them to purchase CD, and funds were not commingled with other funds); Jones v. Goodson, 772 S.W.2d 609 (Ark. 1989) (key issue was accessibility; depositor could obtain funds at will, although he would be penalized by loss of some interest); Decker & Mattison Co. v. Wilson, 44 P.3d 341 (Kan. 2002) (proceeds of workers' compensation settlement, deposited in couple's joint account, then used to purchase CD remained exempt, where funds were traceable and CD a usual means of safekeeping); E.W. v. Hall, 917 P.2d 854 (Kan. 1996). *But see* Feliciano v. McClung, 556 S.E.2d 807 (W.Va. 2001) (lump sum workers' compensation award would remain exempt in ordinary bank account, but purchase of CD turns it into non-exempt investment).

[22] *See* Porter v. Aetna Cas. & Surety Co., 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962). See also Jones v. Goodson, 772 S.W.2d 609 (Ark. 1989) (certificates of deposit purchased with veterans benefits remained exempt; funds were "immediately accessible" even though depositor would forfeit some interest in case of early withdrawal); Younger v. Mitchell, 777 P.2d 789 (Kan. 1989) (veterans benefits deposited into an interest bearing savings account exempt); United Home Foods Dist., Inc. v. Villegas, 724 P.2d 265 (Okla. Ct. App. 1986) (veterans benefits direct deposited into a bank account and used to pay household expenses "clearly" exempt).

intended by Congress to be used exclusively for the benefit of recipients to ensure a minimum subsistence income to workers, the eldery, and the disabled. To preserve these benefits for recipients, Congress provided that the benefits cannot be seized to pay pre-existing debts, as such seizures would result in the loss of subsistence funds. Each of the statutes governing the distribution of these funds specifically articulates that these funds are to be free from "attachment or garnishment or other legal process."

The courts processing the competing interests of the creditors, debtors and banks have repeatedly articulated the underlying reasons for these protections: (1) to provide the debtor with enough money to survive; (2) to protect the debtor's dignity; (3) to afford a means of financial rehabilitation; (4) to protect the family unit from impoverishment; and (5) to spread the burden of a debtor's support from society to his creditors.[23]

Seizures of Exempt Funds Violate Both the Law and the Policy.

Despite the explicitness of the federal law and the purpose of these benefits, banks (after receiving garnishment or attachment orders) routinely freeze accounts holding these benefits. When the account is frozen, no money is available to cover any expenses for food, rent, or medical care. Checks and debits previously drawn on the account (before the recipient learned that the account was frozen) are returned unpaid. Subsequent monthly deposits into the account will also be subject to the freeze and inaccessible to the recipient.

The funds will remain frozen for a time period determined by state law before being turned over to the creditor. In order to unfreeze the account, generally the recipients must find attorneys or go to the local court house on their own, fill out a form stating that the funds in the account are exempt, and then present the form and accompanying proof in the form of letters from Social Security and bank statements to the creditor. If the creditor voluntarily agrees to release the funds, the creditor will send a release of the attachment to the bank. At this point, it may still take several days or even weeks before the funds are actually released. In at least some jurisdictions, forms for this purpose are not available at local courthouses, and there is no established procedure for presenting this information to the creditor. Thus even in the best and rare case scenario, where the debtor is able to unfreeze the account in a week or two, significant harm generally occurs.

Even when proof that the funds are exempt is presented to the creditor, if the creditor does not voluntarily agree to release the funds, the only way to have the bank account unfrozen is for the recipient to request a hearing. In most cases a lawyer is necessary to help a recipient through this arcane judicial process. Yet lawyers are hard to find in many areas of the nation. Legal aid programs are generally overwhelmed with other work. Transportation to lawyers, the courthouse and the bank is often difficult and expensive for recipients, who are by definition, elderly or disabled and often impoverished.

Moreover, quite often, if after the recipient successfully proves that an attachment or garnishment order was wrongly applied against exempt funds, the judgment creditor sends another order, based on the same judgment. This requires the recipient to repeat the process of showing the funds are

[23]*See, e.g.*, *In re* Johnson, 880 F.2d 78, 83 (8th Cir. 1989) (Minn. law); North Side Bank v. Gentile, 129 Wis. 2d 208, 385 N.W.2d. 133 (1986); Vukowich, *Debtors Exemption Rights*, 62 Georgetown L.J. 779 (1974).

exempt. Because of the sheer number of difficulties involved (finding an attorney, going to the courthouse, filing papers, going through a hearing, waiting for the bank to released the funds), the recipient either gives up and allows the funds to be paid to satisfy the judgment, or drops out of the banking system – receiving future federal benefits by paper check.

The effect of a freezing of exempt funds is thus – generally – a full taking of these funds, because rarely does the recipient have the wherewithal to pursue the process of claiming the exemptions.

The New Realities Require Clearer Prohibitions.

Three critical elements dictate a change in the legal response to attachment and garnishment orders applied against exempt funds in bank accounts:

- Tens of millions of low-income recipients of federal benefits now have their payments directly deposited into bank accounts, where they had previously received paper checks. For example, in 1985, 41.5% of Social Security recipients and 12.4% of SSI recipients received their payments electronically. By 2007, these percentages had risen to 84.1% and 58% respectively.[24] This is undoubtedly the result of the huge government effort to promote direct deposit fostered by the passage of EFT 99 in 1996, which requires that all federal payments (except income tax refunds) be electronically deposited.[25]

- The number of judgments *against* these impoverished recipients of federal benefits has escalated dramatically in recent years. As the credit industry continues to provide high priced credit to low-income recipients, and piles on astronomical late fees, over the limit fees, and exorbitant interest rates, the unpaid debts of these low-income recipients continue to mount. This higher and higher level of unpaid debt, in turn, creates a greater demand for access to these funds which are intended to be sacrosanct and kept for the sole purpose of protecting the recipients from impoverishment.[26]

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[24] http://www.ssa.gov/deposit/trendenv.shtml.

[25] 31 U.S.C. § 3332. *See also* 31 C.F.R. § 208.1. Both the law and Treasury's regulations implementing it recognize that electronic deposit may not be for everyone, and there are broad waivers allowing individual recipients to continue receiving paper checks. *See* 31 C.F.R. § 208.4. It is entirely within the discretion of the recipient to determine whether he or she qualifies for a hardship waiver. The paying agency has no part in deciding whether a recipient is eligible for the hardship exception. The individual recipient determines "in his or her sole discretion" whether electronic fund transfer would impose a hardship. 31 C.F.R. § 208.4(a). "Hardship waivers are solely self-determining, that is, the recipient decides whether receiving payment by EFT would cause a hardship for the recipient. Paying agencies may request that individuals who elect to rely on a hardship waiver notify the paying agency of their intent to rely on a hardship." 31 C.F.R. Pt. 208, App. B. *However, we have been told by Treasury officials that they are intending changing the current regulations to* require *direct deposit for all federal recipients who have bank accounts.* Needless to say, this would considerably exacerbate the disastrous dangers facing recipients subject to the freezing of exempt funds.

[26] For an explicit explanation of the degree to which predatory lending, especially credit card lending, is the cause for these explosions of unpaid debt among this nation's seniors, see, "Debt Weight, The Consumer Credit Crisis in New York City," Community Development Project, Urban Justice Center, October, 2007. http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf.

- <u>Electronically deposited federal benefits are easily identifiable.</u> In the past, the claim that it was burdensome for the banks to look first before applying an attachment made some sense. The funds were generally all deposited in a paper format and more intricate inquiry was required to determine the genesis of each deposit. Now, the situation is quite different. *Banks can easily identify the electronically deposited, federal benefits, we are asking the agencies to order them to protect.*

The banks have claimed that it is difficult or impossible for them to determine whether there are exempt funds in an account before implementing a garnishment order. This claim is belied by the fact that *some banks currently identify electronically deposited exempt funds, and refuse attachment orders against those funds*.[27] Clearly, it is neither difficult, illegal, nor expensive to perform this analysis first. The issue is whether the banks *should* look, not whether they can – because they clearly can. The technology is simple – every electronic deposit is denominated by the source and type of funds.

Before electronic deposit of federal exempt funds was commonplace, and pursuant to the required balancing test dictated by the seminal Supreme Court case of *Mathews v. Eldridge,*[28]the courts had allowed the temporary freezing at issue here.[29] But the courts are now recognizing that technological changes that make it so easy to identify the funds as exempt, when weighed against the terrible harm caused to recipients by the attachment of exempt funds, may necessitate a different constitutional response.[30] The courts in these cases have reached this preliminary conclusion based only on the constitutional balancing tests between the interests of the parties. The cases have not yet dealt with the issue of whether the Supremacy Clause of U.S. Constitution would dictate that the protections of Section 407 of the Social Security Act (and the similar provisions of the other federal benefit statutes) trump

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[27]The fact that many banks currently identify electronically deposit exempt funds and refuse attachment and garnishment orders against these funds was discovered by Johnson Tyler, attorney for low-income recipients of federal benefits from South Brooklyn Legal Services, in his efforts to resolves these problems for his clients. The banks which have indicated to him that they already identify electronically deposited, exempt funds include: New York Community Bank, Rosslyn Savings Bank, JP Morgan Chase and Household Bank. All of these banks except Household then return the attachment or garnishment order unsatisfied if they find that the accounts contain only electronically deposited, exempt federal payments. Apparently Household allows the attachment order, even against exempt funds, when the creditor demands it.

[28]424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[29] *See, e.g.* Huggins v. Pataki, No. 01 CV 3016, 2002 WL 1732804 (E.D.N.Y. Jul. 11, 2002) in which the district court refused to reapply the constitutional balancing test in light of the technological changes of direct deposit because of the Second Circuit decision in McCahey v. L.P. Investors, 774 F.2d 543 (2d Cir.1985).

[30]*See, e.g.* Granger v. Harris, 2007 WL 1213416 (E.D.N.Y., Apr 17, 2007) (federal recipient's claim that exempt social security funds were frozen by bank pursuant to an attachment order is sufficient to state a claim); Mayers v. New York Cmty. Bancorp, Inc.,2005 WL 2105810 (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), later decision, 2006 WL 2013734 (E.D.N.Y. July 18, 2006) (denying defendants' motion for interlocutory appeal).

conflicting state law dictates regarding the freezing of federally exempt funds.[31]

So the state of the *current case law* cannot be used by the federal banking agencies as an excuse for not acting – because the case law is up in the air on the critical issue here: whether the banks should be required to look before attaching and then only attach non-exempt funds.

***Commingling of Exempt Funds Does Not – and Should Not – End the Protection of Exempt Funds*.**

The more complex issue is what should happen if the funds are commingled – either with non-exempt funds owned by the recipient, or with funds of another person who is not a debtor on the attachment or garnishment. Here it is very important not to create the incentive for Social Security and other beneficiaries to have second class bank accounts – as would happen if by depositing one dollar of non-exempt funds the recipient would lose any protections applied to accounts comprised purely of exempt funds. It would be a odd national policy to punish the normal use of bank accounts by recipients when they deposit other funds in their accounts, when one of the stated reasons for EFT 99 was to encourage the use of mainstream banking by low-income federal recipients.[32]

Commingling of exempt funds with non-exempt funds or funds of another does raise the problem of traceability. However, the majority rule across the United States is that exempt funds will continue to be protected even when deposited into accounts with non-exempt funds,[33] generally applying a first-in first-out accounting method.[34] A small minority of courts have refused to require tracing, finding that the

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[31]However, the courts in both the Granger and the Mayers cases appear to recognize the potential for this potential preemption.

[32] *See* 142 *Cong. Rec.* H48721 (1996).

[33]In re Sanderson, 283 B.R. 595 (Bankr. M.D. Fla. 2002) (recently amended Fla. Stat. § 222.25 exempts tax refunds attributable to earned income credit, even after deposit and commingling). E.g., Tom v. First Am. Credit Union, 151 F.3d 1289 (10th Cir. 1998); In re Nye, 210 B.R. 857 (D. Colo. 1997); In re Williams, 171 B.R. 451 (D.N.H. 1994); NCNB Fin. Servs. v. Shumate, 829 F. Supp. 178 (W.D. Va. 1993), aff'd without op., 45 F.3d 427 (4th Cir. 1994); In re Mix, 244 B.R. 877 (Bankr. S.D. Fla. 2000) (workers' compensation settlement remains exempt when deposited in checking account, even if commingled with non-exempt funds, so long as traceable); In re Lazin, 217 B.R. 332 (Bankr. M.D. Fla. 1998); In re Ryzner, 208 B.R. 568 (Bankr. M.D. Fla. 1997); In re Norris, 203 B.R. 463 (Bankr. D. Nev. 1996); Waggoner v. Game Sales Co., 702 S.W.2d 808 (Ark. 1986); Broward v. Jacksonville Med. Ctr., 690 So. 2d 589 (Fla. 1997); Parl v. Parl, 699 So. 2d 765 (Fla. Dist. Ct. App. 1997); Beardsley v. Admiral Ins. Co., 647 So. 2d 327 (Fla. Dist. Ct. App. 1994); Decker & Mattison Co. v. Wilson, 44 P.3d 341 (Kan. 2002) (proceeds of workers' compensation settlement, deposited in couple's joint account, then used to purchase CD remained exempt, where funds were traceable and CD a usual means of safekeeping); Hatfield v. Christopher, 841 S.W.2d 761 (Mo. Ct. App. 1992); Collins, Webster & Rouse v. Coleman, 776 S.W.2d 930 (Mo. Ct. App. 1989); Dean v. Fred's Towing, 801 P.2d 579 (Mont. 1990).

[34]*E.g.,* S&S Diversified Servs. L.L.C. v. Taylor, 897 F. Supp. 549 (D. Wyo. 1995); NCNB Fin. Servs. v. Shumate, 829 F. Supp. 178 (W.D. Va. 1993), aff'd without op., 45 F.3d 427 (4th Cir. 1994); Dean v. Fred's Towing, 801 P.2d 579 (Mont. 1990).

exemption was lost when the funds were commingled.[35]

But the federal banking regulators should adopt regulations designed to promote important federal policies. The twin policies at issue here are 1) the preservation of federal benefits for their designed purpose – to protect recipients from impoverishment, and 2) the increase in the use of the mainstream banking system by previously unbanked recipients.

The use of a simple accounting system – as has been required by the courts as a matter of routine when there is commingling – could be easily adapted for the automatic use by banks for accounts with electronic deposit of exempt benefits. As is explained in the Montana Supreme Court case of *Dean v. Fred's Towing:* [36]

> We see no reason why the "tracing" of funds as used here to determine what amount in an account is attributable to exempt funds should not apply with equal force to exempt Social Security funds in an account ... if sums [are] exempt at their source they remain exempt even though commingled with non-exempt funds, as long as the exempt source of the funds [is] reasonably traceable.[37]

In the age of sophisticated computer technology, it would be so simple for this elementary accounting principle to be applied upon the press of a button to bank accounts containing exempt funds.

If the recipient is able to object to the attachment of the bank account containing exempt funds, this accounting analysis will have to be performed in any event – because that is the traditional way to determine which funds are exempt when they have been commingled. So the proposal here would be to have the nations' banks all use a simple accounting program, required by their regulators, which would simply be performed *before* the attachment, rather than after it.

If a simple accounting system is applied, one that is often used is "First In - First Out" – FIFO. Under this system, the funds are withdrawn in exactly the same order as they were deposited. Of course, exempt funds are deposited electronically only once or twice a month, so the system is simple to administer, especially with modern computers.[38]

One way to envision the way the money flows in a FIFO accounting system, is to imagine a faucet or pipe which forces the flow of the money out of the account to stay in the same order as it came

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[35]*E.g.,* Bernardini v. Central Bank, 290 S.E.2d 863 (Va. 1982). *See also* Idaho Code § 11-604 (exemptions for insurance, disability and family support are "lost immediately upon the commingling of any of the funds . . . with any other funds"). *But cf.* In re Meyer, 211 B.R. 203 (Bankr. E.D. Va. 1997) (noting statutory protection for unemployment benefits and workers' compensation benefits even if deposited and commingled) and Granger v. Harris, 2007 WL 1213416, E.D.N.Y.,2007, Apr 17, 2007 (noting that exempt benefits do not lose their exempt status even when commingled.).

[36]245 Mont. 366, 801 P.2d 579 (1990).

[37] 245 Mont. at 371, 582.

[38]NCNB Financial Services, Inc. v. Shumate, 829 F.Supp. 178 (W.D.Va. 1993).

in to the account.

Consider the following example of how a FIFO accounting system would work:

Day	Deposit	Withdrawal	Total Balance	*Withdrawn* from Exempt Funds	Balance Exempt funds	*Withdrawn* from Non-Exempt Funds	Balance *Non*-Exempt Funds
Day 1	$200 non-exempt	--	**$200**		$0		$200
Day 3	$700 exempt		**$900**		$700		$200
		$50	**$850**		$700	$50	$150
Day 4		$300	**$550**	$150	$550	$150	$0
Day 5	$200 non-exempt		**$750**		$550		$200
Day 9		$150	**$600**	$150	$400		$200

An alternative, mathematically simpler system would be to adopt – on a uniform, national basis – the method that several states use to determine which funds are exempt when there has been commingling in an account. For example, in California, a set amount is considered to be exempt from all attachments, and only the funds in the account which exceed that amount are available for attachment.[39] A simple system such as this provides certainty and ease of use for the banks, as well as basic protections for the recipients.

The Supremacy Clause Alone Provides the Power to* Tell *Banks to Protect Exempt Federal Funds.

There can be no serious question that the banking agencies have the authority to require banks to protect exempt funds. First, the banking agencies authority to make regulations to protect banks' safety and soundness and to avoid reputational risk provide ample authority for the rules we seek. The decision in *Mayer v. New York Cmty Bancorp, Inc.*[40] demonstrates the litigation and reputational risks that banks face if they freeze a bank account without first determining whether it contains exempt funds. There, a federal court refused to dismiss a due process claim against the banks for this very practice. Moreover, as outlined below, banks continue to be successfully sued in various jurisdictions around the country for a variety of tortious actions relating to this continued refusal to identify and protect electronically deposited exempt federal benefits.

[39]*See, e.g.* West's Ann.Cal.C.C.P. § 704.080.

[40]2005 WL 2105810 (E.D.N.Y. August 31, 2005).

In addition, the banking agencies have adopted numerous regulations and guidance preempting and interpreting state laws for the benefit of their regulated institutions. State laws protecting consumers in the areas of predatory mortgage lending, electronic deposits, even foreclosure protections, have all been preempted by the OCC and the OTS. Recently the five agencies together issued guidances on issues relating to predatory mortgage lending which were not specifically grounded in any particular federal law – just the real need to protect consumers from some of the more outrageous abuses occurring in the mortgage market.

It is highly unlikely that any bank, acting under the authority of its regulatory agency's guidance, could face any legal jeopardy for failing to attach property which is exempt under federal law. Federal law preempts conflicting state law. Any state law that purports to hold a bank responsible for failing to follow a state law that conflicts with the federal law would be preempted under the Supremacy Clause and traditional preemption analysis.

The Supremacy Clause gives the U.S. Constitution and federal statutes preemptive force. The courts have consistently held that if the provisions of a state law are "inconsistent with an act of Congress, they are void, as far as that inconsistency extends."[41] State or local laws may not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[42]

Moreover, "[p]reemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." That is, "[f]ederal regulations have no less preemptive effect than federal statutes."[43] In this context, federal agency orders similarly may preempt state or local action.[44]

Federal agency action may by used here to preempt state law even if the federal statute itself does not specifically conflict with state law or expressly give the federal agency authority to preempt.[45] In analyzing the preemptive effect of federal agency action, a "narrow focus on Congress' intent … is misdirected" because an agency's ability to preempt "does not depend on express congressional authorization to displace state law."[46] Federal agencies have considerable authority to preempt as long as

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[41]Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 31 (1824); *accord* Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 541 (2001); Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000).

[42] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); accord Crosby v. National Foreign Trade Council, 530 U.S. 363, 372-73 (2000).

[43]Fidelity Federal Savings and Loan Association v. De la Cuesta, 458 U.S. 141, 153–54 (1982); *accord* Capital Cities Cable v. Crisp, 467 U.S. 691, 699 (1984); *see* Watters v. Wachovia Bank*, N.A.*, 127 S.Ct. 1559 (2007) (finding state law preempted by federal regulation).

[44]*See, e.g.,* Entergy Louisiana Incorporated v. Louisiana Public Service Commission, 539 U.S. 39, 47 (2003).

[45]*See* City of New York v. Federal Communications Commission, 486 U.S. 57, 63 (1988); *see also* Watters v. Wachovia Bank, 127 S.Ct. at 1582 & n.24 (Stevens, J., dissenting) (complaining that the majority found a regulation preemptive even though Congress did not authorize the federal banking agencies to preempt state law).

[46]Fidelity Federal, 458 U.S. at 154; accord City of New York, 486 U.S. at 63.

their actions are not arbitrary and capricious under the deferential *Chevron* standard.[47]

The federal statutes protecting exempt funds from garnishment or other legal process already preempt any state laws that permit those funds to be frozen. To the extent there is any ambiguity, it is certainly consistent with congressional intent for the banking agencies to issue guidance to their institutions prohibiting the freezing of funds that Congress explicitly protected to meet basic needs. On the other hand, any state law that permits such funds to be frozen – or that imposes liability on banks that comply with federal law -- would conflict both with Congress's intent and with a permissible agency directive and would be preempted.

Liability to the Banks Exists Only for* Freezing *Exempt Funds.

The banking regulators insist that this is a complicated question involving the intersection of state and federal law, and that banks run a legal risk for *not* freezing an account in response to a court ordered attachment or garnishment. We disagree with this assessment.

Every state law requires that attachment and garnishment orders apply only to non-exempt funds.[48] We believe it highly unlikely, if not impossible, that banks would be exposed to any legal jeopardy for refusing an attachment when the only funds the bank is refusing to attach are exempt under federal law.[49]

We have closely reviewed the exemption law in every state for the answer to the question of whether a bank might be under any legal jeopardy for refusing to attach funds that are clearly exempt

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[47]New York v. Federal Energy Regulatory Commission, 535 U.S. 1, 16, 18 (2002) (citing Chevron U.S.A. Incorporated v. Natural Resources Defense Council., 467 U.S. 837, 842–43 (1984)); City of New York, 486 U.S. 57, 63 (1988).

[48]We have done a review of all state laws and it appears that in most states an attachment or garnishment order clearly only applies to non-exempt funds. In a minority of states, there is some ambiguity surrounding the issue of whether the "exempt status" of the funds only applies upon the debtor's taking some action. However, that would conflict with the specific protection of the federal statutes at issue here – where the Supreme Court and others have already said that Social Security, SSI and Veterans Benefits retain their exempt status from before the time they are paid to the recipient until after they are paid to the recipient. A state procedure that purports to say that these funds are not exempt unless the recipient comes forward to claim them directly conflicts with this protection and would be clearly preempted.

[49]Advocates for low-income consumers in some states have succeeded in persuading the courts to change the forms provided to banks with attachment or garnishment orders, prohibiting banks from applying the orders to accounts that hold only funds electronically deposited by the Social Security Administration. For example, Pennsylvania recently adopted new rules that protect funds that are "on deposit in a bank or other financial institution in an account in which funds are deposited electronically on a recurring basis and are identified as funds which upon deposit are exempt from attachment . . . ." Pa. R. of Civ. Proc. Rule 3111, Note, reprinted at http://www.aopc.org/OpPosting/Supreme/out/471civ.5attach.pdf. "Under the amended rules, the judgment creditor rather than the defendant has the burden of raising an issue with respect to exempt payments within the scope of new Rule 3111.1. The defendant need not file a claim for exemption as exempt funds are not attached." Pa. R. of Civ. Proc. Rule, Civil Procedural Rules Committee Explanatory Note, reprinted at http://www.aopc.org/OpPosting/Supreme/out/471civ.5attach.pdf.

under federal law. It appears to us that in the majority of states the recipient is required to attach only *non-exempt* funds.[50] In a few states, there may be some ambiguity because the *status* of the exemption appears to apply only after the debtor has asserted the exemption. However, it seems highly unlikely that upon review, any court would agree that the failure to follow a specific *state* procedure would mean that *federal* exemptions are lost. This would mean that funds exempt under federal law could be determined to not be exempt because of the application – or the lack of application – of a state law *process*. Social Security payments and VA payments are exempt under federal law, they cannot become un-exempt because a state law requires the recipient to do something to claim the exemption.

In fact, such a result would violate the Supremacy Clause. State laws are preempted if they conflict with the purposes of a federal law or regulation. Moreover, as was explained previously, the courts throughout the nation have already articulated that exemption procedures are to be liberally construed and applied so as to protect debtors.

Indeed, we have never heard of any case in which a bank suffered even the burden of legal inquiry after it refused to honor an attachment or garnishment order because the only funds on deposit were exempt. In fact, this scenario seems highly unlikely, given the fact that creditors and their attorneys would pretty clearly face legal jeopardy of their own for pursuing funds that they have reason to know are exempt. In recent years, creditors and creditors' attorneys who wrongfully frozen or seized exempt funds in bank accounts have been found subject to common law claims such as conversion, negligence, or intentional infliction of emotional distress and to statutory claims for violations of the Fair Debt Collection Practices Act and state unfair and deceptive practices statutes.[51]

On the other hand, our advocates report numerous cases in which the banks were required to pay the recipients money because the bank *failed to look* or ignored clear evidence of the exempt status and applied attachment or garnishment orders to exempt funds, or refused to release funds when the bank customer brought proof of that exempt status.[52]

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[50]Indeed in some states, the treatises on civil procedure make it explicit that a bank will suffer no legal jeopardy for refusing to attach exempt funds. *See, e.g.* 1 New York Civil Practice: CPLR P 5251.14. ("There are two exceptions to the general principle that a willful transfer or interference with property or debts covered by a valid restraining notice is punishable as a contempt. *First, there is no contempt if the property is exempt* under CPLR 5205 or CPLR 5206 , or under any other provision of law." (footnotes omitted))

[51]*See* Todd v. Weltman, 434 F.3d 432 (6th Cir. 2006); Rahaman v. Weber, 2005 WL 89413 (Minn. Ct. App. 2005) (procedure for claiming exemption, including damages if creditor seized exempt property, did not preclude common law causes of action for conversion against creditor and its attorneys).

[52]Chung v. Bank of Am., 2004 WL 1938272 (Cal. Ct. App. 2004) (unpublished) (stating that bank garnishee had duty to verify whether funds were exempt, not creditor); Lukaksik v. BankNorth, N.A., 2005 WL 1219755 (Conn. Super. Ct. Apr. 26, 2005) (plaintiff pleaded exceptional circumstances sufficient to maintain action for breach of fiduciary duty); Branch Banking Trust Co. v. Bartley, 2006 WL 1113632 (Ky. Ct. App. Apr. 28, 2006) (father sued bank that allowed creditor to garnish non-custodial account containing minor son's funds; bank raised genuine issue of fact on counterclaim that father breached fiduciary duty by setting up ordinary joint account and failing to respond to creditor's garnishment notice). *But see,* Gorstein v. World Sav. Bank, 110 Fed. Appx. 9 (9th Cir. 2004) (bank has no duty to determine whether portion of funds in account were exempt); McCahey v. L.P. Investors, 774 F.2d 543 (2d Cir.1985) (debtor's interest in preserving non-exempt property for his or her own use is ... subservient to the creditor's judgment, meaning that bank has no duty to determine exempt funds).

Finally, if banks and other financial institutions followed guidance issued by their federal regulators regarding how to treat federally exempt funds, it seems highly improbable that any state court would hold the bank liable for not applying an attachment order to federally exempt funds.

Comments on Proposed Best Practices.

We appreciate the attention the five federal banking regulators have given to this important issue, and the fact that a proposed Guidance on the subject has been raised. However, the proposed best practices in this Guidance do not address the problems currently suffered by recipients of federal benefits who are having their only or primary source of income frozen and then eaten into by bank fees.

First of all, the Guidance does *not* require the critical mandate – that the banks be required to look before allowing an attachment or garnishment order, and then only to allow the order against funds which are not electronically deposited exempt federal funds. Unfortunately several of the proposals are unclear and ambiguous as to what is actually recommended.

Secondly, to the extent that the individual proposals might be somewhat helpful, these best practices would not even be required of banks, and are completely unenforceable, even by the regulators, much less than by individuals harmed by a bank's failure to follow the best practices. The federal banking agencies have the statutory authority to *require* the banks to look and then only attach non-exempt funds. The agencies have the authority to make these requirements mandatory and enforceable.

The banking regulators clearly recognize the problems caused by banks' freezing exempt funds, and it is the duty and the responsibility of the regulators to mandate appropriate, enforceable, behavior by the banks.

Below we provide our responses to each proposal:

1) *Promptly notify a consumer when a financial institution receives a garnishment order and places a freeze on the consumer's account.*

> This would be helpful. But it does not address the real harm here – which is the freezing of the account, not just knowledge of the freezing. Under the traditional garnishment and attachment processes, the order applies to non-exempt funds, generally by its terms. But when the bank freezes exempt funds, the state procedure requires the recipient to go through a court hearing in which the recipient is required to prove to the creditor that the funds are exempt. While some individual creditors will agree to a release of the attachment order when the recipient shows their exempt status, and some banks will release the freeze for the same reason, there is no state court process that recognizes this informal settlement of the seizure. The standard process requires a hearing, which takes time, repeated access to the courthouse, and quite often an attorney. In the meantime, the recipient is without access to sustenance funds.
>
> Creditors often reassert attachment or garnishment orders repeatedly against the same account, hoping and expecting that elderly or disabled recipients will not have the resources to continue re-proving that their funds are exempt and protected, and eventually – just because the creditors have the resources and the recipients do not – the exempt, protected funds will be used to satisfy the judgment. *Simple notification of the garnishment order does not address the real problem*

here.

2) *Provide the consumer with information about what types of federal benefit funds are exempt, including SSA and VA benefits, in order to aid the consumer in asserting federal protections.*

This is also a good requirement, but again, it just does not address the real problem – the freezing of exempt funds.

3) *Promptly determine, as feasible, if an account contains only exempt federal benefit funds such as SSA or VA benefits.*

If the regulators require this determination, it should be *before* the bank allows the attachment or garnishment order, not after. Otherwise, we are not clear exactly what this best practice is designed to require. If it requires the bank to *look* and make its own determination of whether the funds on deposit are exempt, that is exactly what we are requesting. But does this best practice mean that the bank should make this determination *before* seizing the funds, and then only apply an order against non-exempt funds? Or does this proposal mean that the bank should freeze the funds and *then* determine if the frozen funds are exempt? In this case, does this proposal then mean that a bank should – on its own, without a court order – then *release* the exempt funds? This is in fact what some banks are doing in response to proof offered by the recipients, or threats of legal action by attorneys representing recipients. But if the agencies can recommend that the banks a) look to see if the funds are exempt, and b) release exempt funds upon making this determination *after* the freezing, why not simply require the banks to make this determination *before* freezing the funds?

4) *Notify the creditor, collection agent, or relevant state court that the account contains exempt funds in cases in which the financial institution is aware that the account contains exempt funds.*

It would be good for the bank to notify the creditor and the court that the account contains exempt funds. But this is not sufficient to protect the recipients.

Again, there needs to be the requirement that the bank make the determination of whether the account contains exempt funds (which is a simple to do as looking at one computer screen). That determination should be the basis for the bank's refusal to attach exempt funds, not simply informing the creditor or the court.

5) *If state law or the court order will permit a freeze not to be imposed if the account is determined to contain only exempt federal benefit funds, act accordingly if that determination is made.*

First of all, most state laws only require the banks to freeze *non-exempt* funds. However, in some – fairly few states – because of the method in which exemptions *under state law* are claimed, some institutions might believe in those states that the *federal exemptions* are also inapplicable until the recipient claims them. However, this purported conflict between state law and federal law – whether a *federal exemption* is applicable without being claimed under a state process – is exactly what the federal banking regulators need to resolve.

In a minority of states, the state law does not recognize any property as exempt until the debtor comes forward and claims the exemption. So theoretically in these states, one might say that all funds on deposit in a bank account are available to satisfy a judgment *until* the debtor has claimed their exempt status. However, that rule cannot apply to funds that are exempt from judgment as a matter of federal law, because the exempt funds are exempt all along – federal law does not require the debtor to come forward and claim the exempt status.

As a result, regardless of the state law, the bank only needs to recognize the *federal law* exempt status of the funds and refuse to apply the attachment order to these *federally exempt* funds.

This is the penultimate issue on which the federal banking agencies can use their authority under federal law to clarify the situation for the banks. Regardless of the procedure established under state law to claim exempt funds, the federally exempt funds are *already* exempt and free from claims by judgment creditors. Thus, when a state order directs a bank to freeze funds, the appropriate response is to only freeze funds which are not exempt under federal law. Clarifying this route through state and federal law which appear to conflict – but which do not actually conflict – is exactly the most appropriate task for the five regulators of this nation's financial institutions.

6) *Minimize the cost to a consumer when the consumer's account containing exempt federal benefit funds is frozen, such as by refraining from imposing overdraft, NSF, or similar fees while the account is frozen or refunding such fees when the freeze has been lifted.*

Exempt funds should not be frozen in the first place. However, to the extent they are frozen, this is an excellent proposal. Banks should be required to refund the fees *immediately*. However, this should be a required practice, rather than just a recommended one.

7) *Allow the consumer access to a portion of the account equivalent to the documented amount of exempt federal benefit funds as soon as the financial institution determines that none of the exceptions to the federal protections against garnishment of exempt federal benefit funds are triggered by the garnishment order.*

What does this mean? When would the bank allow this access?

If this proposal means that the bank should a) identify which funds are exempt, and then b) only allow the attachment against the non-exempt funds, this is *exactly what we are asking for.* However, is that what is proposed here? Moreover, if the agencies are making this recommendation as a best practice, why not require it?

8) *Offer consumers segregated accounts that contain only federal benefit funds without commingling of other funds.*

The problem with this proposal is that it consigns federal benefit recipients to a second class banking system, in which they would have to either have two accounts – one for exempt funds and one for other funds, or they would not be able to use banks for their non-exempt funds. The better method of dealing wiht this issue is to prohibit freezing of exempt funds in bank accounts.

Not a bad proposal, but why not just offer ETAs, which are the Treasury created and subsidized accounts just for this purpose? And this proposal still does not clearly state that even these accounts would be free from attachment or garnishment.

9) *Lift the freeze on an account as soon as permissible under state law.*

We do not understand this proposal. Is this not already the state law, as is required to be followed by all banks?

Conclusion

The banking regulators have the authority under the Supremacy Clause, as well as under their authorizing statutes to tell the financial institutions they regulate that they must follow the federal law, as articulated in the Social Security Act and the other statutes governing federal benefits. The regulators have the ability to *require* the banks to look before they freeze, and then only to freeze non-exempt funds. The regulators can also propose a simple, standard method for the banks to determine which funds are exempt when they have commingled with non-exempt funds.

If the regulators act proactively and protectively for the benefit of the tens of millions of impoverished recipients of federal benefits, the regulators will prevent the future suffering of many.