Frozen Out: A Review of Bank Treatment of Social Security Benefits

Testimony before the

Committee on Finance
U.S. Senate

on behalf of the
Low Income Clients
of the
National Consumer Law Center
and
Consumers Union
Consumer Federation of America
National Association of Consumer Advocates
National Legal Aid & Defender Association
National Senior Citizens Law Center
National Veterans Legal Services Program
U. S. Public Interest Group

Community Justice Project of Pennsylvania
Jacksonville Area Legal Aid
Legal Advocacy Center of Central Florida
Legal Aid Society of Roanoke Valley
Legal Services of New Jersey
MFY Legal Services of New York City
Mississippi Center for Justice
Mountain State Justice
Neighborhood Economic Development Advocacy Project
North Carolina Justice Center
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Chairman Baucus, Senator Grassley, Members of the Committee, thank you very much for inviting me to testify about the escalating problems caused by bank freezing of exempt funds. In the past few years this issue has become one of the most alarming and frequent reasons for emergency requests for assistance to legal services lawyers all over the nation. I am here today, testifying on behalf of not only the low income clients of the **National Consumer Law Center**,[1] but also the **Consumer Federation of America,**[2] **Consumers Union**,[3] **National Association of Consumer Advocates,**[4] **National Legal Aid and Defender Association,**[5] **National Senior Citizens Law Center,**[6] **National Veterans Legal Services Program,**[7] and the **U.S. Public Interest Research Group.**[8] In addition, the following local and state legal aid programs would like this testimony to speak for their low income clients: **Community Justice Project of Pennsylvania, Jacksonville Area Legal Aid, Legal Advocacy Center of Central Florida, Legal Aid Society of Roanoke Valley, Legal Services of New Jersey, MFY Legal Services of New York City, Mississippi Center for Justice, Mountain State Justice of West Virginia, Neighborhood Economic Development Advocacy Project, North Carolina Justice Center, and the Virginia Poverty Law Center.**[9]

Members of the Committee, as you know, in recent years the number of recipients of Social Security and other federal benefits who receive their payments electronically has risen dramatically.[10] 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 payment (except income tax refunds) be electronically deposited.[11] 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.[12] Nevertheless, *many millions of low income recipients of federal benefits now have their payments directly deposited into bank accounts, where they had previously received paper checks.*

The federal government saves substantial money through direct deposit,[13] and direct deposit of federal benefits into a bank account is often advantageous to low-income recipients. The money is safe and accessible at the bank and through its network of ATMs. Payments are simplified because checks or electronic debits are available. High fees from check cashing stores and the need to purchase money orders are avoided.

However, there are two major and increasingly significant drawbacks to direct deposit: (1) the increase in bank accounts held by low income federal payment recipients has increased recipients' vulnerability to illegal and improper seizure of their exempt benefits, and (2) fees charged to customers with low-balance accounts are growing at exponential rates.

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*."),[14] 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.

The banks say it is not their duty to determine which accounts contain exempt funds. They say it is not their job to refuse attachment orders issued by state courts just because the accounts contain exempt funds. The banks – and the OCC and the Federal Reserve Board – say that it is the business of the courts to sort out which funds are exempt from attachment and which funds are available.

We disagree with this assessment as a legal matter and as a policy matter. Legally, the cases have not yet caught up with the technological situation that exempt funds directly deposited in bank accounts presents, but the case law presents no bar to such a requirement. As a policy matter, how can there be any dispute that the funds provided by American taxpayers to keep this nation's elderly and disabled from starvation and destitution should be kept available rather than frozen for the convenience of creditors who have no right to the monies?

This dispute brings us to this hearing today. You have asked me to answer two questions:

1. When Social Security, SSI, Railroad retirement, and Veterans' benefits are electronically deposited in a beneficiary's bank account, and the bank receives a garnishment or attachment order from a state court on behalf of a creditor who is seeking to recover debts allegedly owed to the creditor by the beneficiary, should the bank be allowed to freeze the funds and/or garnish or attach them? Stated differently, should the bank first determine if the funds are from one of these Federal benefits, and refrain from freezing and/or attaching or garnishing the funds if the funds are from such benefits?

2. Should banks be able to charge fees against Social Security, SSI, Railroad Retirement, or Veterans' benefits funds electronically deposited in a bank account that have been frozen, attached or garnished as in item #1 above? Such fees include, but are not limited to, fees for implementing the freeze, attachment or garnishment, for restoring frozen funds, or for returning checks or debits because there are insufficient funds in the account resulting from the freeze, attachment or garnishment.

We have also provided our opinion on the question that you asked the agencies – whether they have authority to regulate in this area.

I. Financial institutions should be required to identify electronically deposited exempt funds and freeze only non-exempt funds when they receive attachment or garnishment orders.

Social Security benefits, SSI benefits, Veterans' benefits, Railroad Retirement benefits, were all intended by Congress to be used exclusively for the benefit of recipients to ensure a minimum subsistence income to workers and the disabled.[15] 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 articulated the underlying reasons for these protections. The courts have enumerated the following purposes to exemption 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.[16]

This nation's courts have consistently said that exemptions are to be liberally construed in favor of the debtor.[17] The United States Supreme Court has repeatedly reiterated that the Social Security,[18] and Veterans Benefits[19] 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 before and after payment to the beneficiary,[20] regardless whether the creditor is a state or a private entity.[21]

In *Porter v. Aetna Casualty and Surety Co.*,[22] 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."[23] This rationale has been widely applied to other exempt benefits, to hold that exempt funds remain exempt in checking,[24] savings,[25] or CD[26] accounts so long as these are "usual means of safekeeping" money used for daily living expenses.[27]

These rationales have also been routinely applied to Social Security benefits,[28] holding that those benefits are generally exempt from attachment by creditors when those benefits are deposited into a bank account as long as the funds are available on demand or for the support of the beneficiary and *even when they are commingled with other funds.*[29]

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 recipient must find an attorney 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.

However, 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 often 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. *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.*

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,[30] generally applying a first-in first-out accounting method.[31] A small minority of courts have refused to require tracing, finding that the exemption was lost when the funds were commingled.[32]

<u>The Banks' Response</u>

Although some banks do examine accounts to determine whether they are comprised exclusively of exempt funds[33]– in which case, the bank declines the attachment order– the majority of banks do not. Upon receipt of a judgment creditor's request for attachment, most banks ignore even clear evidence of exempt funds – such as electronic deposit from the Social Security Administration – and simply freeze the recipient's bank account.

Because of two significant changes in recent years – 1) the huge influx of low income recipients who receive the federal payments through direct deposit and 2) the ease with which banks can now identify these exempt amounts in the accounts because of this electronic record – it is appropriate for the banks to respond differently in the future.

As was recognized by the federal district court in the recent case of *Mayers v. New York Cmty. Bancorp, Inc.,*[34] the traditional constitutional balancing between the competing interests of the players now dictates a different response by the banks. Some banks routinely look to see if the account is comprised of solely exempt funds. 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.

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 that we do not create the incentive for Social Security and other beneficiaries to have second class bank accounts – as we would 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 seem to be a backwards 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.[35]

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 [are] 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, we recommend it be the "First In Last Out" system. Under this system, exempt funds are considered to be the first deposited and the last withdrawn on any given day. 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]

An alternative system that would be simpler mathematically 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.

<u>Liability to the banks exists only for *not* providing these protections to exempt funds</u>

The banks, as well as several of the banking agencies, 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.[40] 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.[41]

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 under federal law. It appears to us that in every state except three[42] the recipient is required to attach only *non-exempt* funds.[43] In those three 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.

In fact, such a result seems potentially a violation of 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 applied so as to protect debtors.[44]

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 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.[45]

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.[46]

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.

II. Fees charged Social Security recipients and others should be very limited.

The banks assess expensive fees against these frozen accounts. Although the account is frozen and inaccessible to the depositor, the bank still deducts its fees from the balance. The act of freezing the account itself generates an "attachment fee" deducted from the account – generally between $100 and $150. All checks, ATM withdrawals, and preauthorized electronic transfers for rent and other purposes are returned for insufficient funds. Every time a debit request is returned unsatisfied, the bank NSF fee – generally in the amount of $25 to $35 – is deducted.[47]

These fees can eat up the precious money in an account all too quickly, and should be strictly limited, if not prohibited. Certainly they should not be a profit center for the bank.

In the appendix to this testimony there is a story of a low income recipient of Social Security from New York whose *entire account* – consisting of a bit over $800 in Social Security funds, plus about $100 in money given to her by relatives to help her through the month – was soaked up by bank fees in less than two months time. The bank charged an attachment fee ($125), plus numerous overdraft fees on checks written prior to the attachment and preauthorized electronic debits that the recipient could not stop without paying the bank stop payment fees. These fees were all collected by the bank from mostly Social Security funds, after an attachment order was applied. Neither the recipient, nor the creditor received any of the funds, just the bank that held them.

If overdraft fees and other fees are permitted to be charged against federally exempt funds in bank accounts, at the least they should be limited to the actual cost of the expense that generated the fee. It makes no sense as a policy matter for the American taxpayer to be expending millions of dollars on a yearly basis to help recipients avoid destitution, only for substantial portions of these funds to be siphoned off by the banks that are distributing their funds.

III. The Federal banking agencies have the authority under current law to regulate on this issue.

The federal banking agencies have provided 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.

The question is whether a 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."[48] State or local laws may not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[49]

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."[50] That is, "[f]ederal regulations have no less preemptive effect than federal statutes."[51] Federal agency orders similarly may preempt state or local action.[52] *Even mere letters from a federal agency interpreting an ambiguous statute may preempt state law.*[53]

Federal agency action may preempt state law even if the federal statute itself does not conflict with state law or expressly give the federal agency authority to preempt.[54] 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."[55] Federal agencies have considerable authority to preempt as long as their actions are not arbitrary and capricious under the deferential *Chevron* standard.[56]

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.

Conclusion

As Mr. Taliaferro will describe in his testimony, having a bank account frozen when you have no other money is a terrible experience. Unfortunately, Mr. Taliaferro's story is all too typical. We hear from legal services and private attorneys that this is tremendous problem throughout the U.S. that has been escalating in recent years, largely due to the increased number of recipients whose benefits are electronically deposited into bank accounts (due to EFT 99). In the Appendices attached to this testimony are more stories, with as many names, dates and the names of the banks involved as we could put together in this short time frame. All of the banks involved knew of the exempt status of the federal funds they were freezing. All of the banks could have avoided this terrible harm to these recipients of Social Security, SSI and VA funds. There are case histories from Alabama, Florida, Georgia, Illinois, Michigan, Montana, New York, Virginia, and other states. Unfortunately, for every specific story included in this testimony, there are thousands more. I also include three letters for your attention, one from the Director of a program in western Virginia, one from a lawyer in Florida, and one from a lawyer in New York City. Each of these letters strives to illustrate for you both the depth of this problem to the low income individuals it affects, as well as the huge number of people who are suffering from these continued garnishments and attachments.

I would be happy to answer any questions.

Endnotes

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. Margot Saunders is co-author of the NCLC's Consumer Banking and Payments Law manual, as well as a co-author and contributor to several other NCLC publications.

2.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.

3.**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.

4.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.

5. 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.

6. The **National Senior Citizens Law Center** advocates before the courts, Congress and federal agencies to promote the independence and well-being of low-income elderly and disabled Americans.

7.The **National Veterans Legal Services Programs** is an independent, nonprofit, veterans service organization dedicated to ensuring that the U.S. government honors its commitment to our veterans by providing them the federal benefits they have earned through their service to our country. NVLSP accomplishes its mission by: Providing veterans organizations, service officers and attorneys with training and educational publications to enable them to help veterans and their dependents obtain all of the benefits that they deserve; and Representing veterans and their dependents who are seeking benefits before the U.S. Department of Veterans Affairs and in court.

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.All of these programs are either multi-county or statewide organizations that advocate on behalf of low income people:
Community Justice Project of Harrisburg and Pittsburgh, Pennsylvania, **Jacksonville Area Legal Aid** of Jacksonville, Florida; **Legal Advocacy Center of Central Florida** in Sanford, Florida; **Legal Aid Society of Roanoke Valley** of Roanoke Virginia; **Legal Services of New Jersey** in Edison, New Jersey; **MFY Legal Services** of New York, New York; **Mississippi Center for Justice** in Jackson, Mississippi; **Mountain State Justice** of Charleston, West Virginia; **Neighborhood Economic Development Advocacy Project (NEDAP)** of New York, New York; **North Carolina Justice Center** of Raleigh, North Carolina, **Virginia Poverty Law Center** of Richmond, Virginia.

10.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. http://www.ssa.gov/deposit/trendenv.shtml.

11.31 U.S.C. § 3332. *See also* 31 C.F.R. § 208.1.

12. *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.

13.A recent private study commissioned by the U.S. Treasury Department estimated that $100 million was saved by converting from paper checks to electronic payments. Financial Mgmt. Servs., U.S. Department of Treasury, Understanding the Dependence on Paper Checks: A Study of Federal Benefit Check Recipients and the Barriers to Boosting Direct Deposit (2004), available at http://fms.treas.gov/eft/reports/EFTResearch7.27.04FINAL.pdf (study conducted by Federal Reserve Bank of St. Louis).

14.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.

15. Social Security benefits: "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." 42 U.S.C. § 407(a).

Veterans benefits: "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).

Railroad Retirement benefits: "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.

Federal Retirement program benefits: "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.

16.*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).

17.*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. 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).

18. *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).

19.*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).

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

21.*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).

22.370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962).

23.*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).

24.*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).

25.*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).

26.*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).

27.*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).

28.*Philpott v. Essex Cty. Welfare Bd.,* 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973); *S&S Diversified Servs. L.L.C. v. Taylor,* 897 F. Supp. 549 (D. Wyo. 1995) (Social Security old age benefits remained exempt when commingled with other funds in joint account, so long as they are "reasonably traceable"; court warned creditors it may impose sanctions for attempt to garnish exempt funds);

29.*Porter v. Aetna Cas. & Surety Co.,* 370 U.S. 159, 82 S. Ct. 1231, 8 L. Ed. 2d 407 (1962). *See also Beardsley v. Admiral Ins. Co.*, 647 So. 2d 327 (Fla. Dist. Ct. App. 1994) (commingling exempt federal retirement funds and non-exempt funds did not destroy exemption; funds should be allocated or traced, if possible); *Dean v. Fred's Towing,* 801 P.2d 579 (Mont. 1990) (Social Security benefits of non-debtor wife remained exempt when commingled in joint account with debtor husband; first-in first-out accounting rule); *NCNB Fin. Servs. v. Shumate,* 829 F. Supp. 178 (W.D. Va. 1993) (first-in first-out accounting rule applied to exempt old age Social Security benefits), aff'd, 45 F.3d 427 (4th Cir. 1994) (table); *In re Radford,* 265 B.R. 827 (Bankr. W.D. Mo. 2000) (lump-sum Social Security Disability payment, received by debtor and deposited in bank account, exempted by "paid or payable" language; no need to determine whether funds necessary for support); *Anderson Boneless Beef v. Sunshine Ctr.,* 852 P.2d 1340 (Colo. Ct. App. 1993) (creditor not entitled to garnish Social Security and supplemental security income checks deposited by debtor for care and maintenance of beneficiaries); *Hatfield v. Christopher,* 841 S.W.2d 761 (Mo. Ct. App. 1992) (where recipient cashed his Social Security check, spent part of it and deposited balance in account commingled with other funds, benefits remained exempt); *Collins, Webster & Rouse v. Coleman,* 776 S.W.2d 930 (Mo. Ct. App. 1989) (Social Security benefits exempt); *Dean v. Fred's Towing,* 801 P.2d 579 (Mont. 1990) (Social Security benefits of non-debtor wife remained exempt when commingled in joint account with debtor husband; first-in first-out accounting rule).

30.*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).

31.*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).

32.*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).

33. New York Community Bank, Astoria Federal Savings and Loan Association, Roslyn Savings Bank, and JP Morgan Chase, for example, as well as other banks in the New York area, have stated in depositions and letters that they examine bank accounts to determine whether they contain only

electronically deposited federally exempt funds, and they "will not honor a restraining order as long as it can be determined that the accounts contain only exempt funds, such as SSI."

34.2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005) (exemption for Social Security benefits in bank account is property right protected by due process clause), later decision, 2006 WL 2013734 (E.D.N.Y. July 18, 2006) (denying defendants' motion for interlocutory appeal).

35. *See* 142 *Cong. Rec.* H48721 (1996).

36.245 Mont. 366, 801 P.2d 579 (1990).

37. 245 Mont. at 371, 582.

38.The accounting system we recommend would be "First In, Last Out" (aka "FILO") to be applied to all exempt funds. Under this system, all exempt funds would be considered to be deposited first on a given day, and withdrawn last – ie. first in and last out. Consider the following example of how this would work:

Day 1 – Deposit of $700 exempt funds.	Balance $700	$700 exempt	$0 non-exempt
Day 3 – Deposit of $200 non-exempt funds.	Balance 900	700 exempt	200 non-exempt
Withdrawal of $50.	Balance 850	700 exempt	150 non-exempt
Day 4 – Withdrawal of $300	Balance 550	550 exempt	0 non-exempt.
Day 5 – Deposit of $200 non-exempt funds.	Balance 750	550 exempt	200 non-exempt

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

40.We have done a review of all state laws and it appears that in every state 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.

41.Advocates for low-income consumers in some states have succeeded in changing 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. See, e.g., Pa. R. of Civ. Proc. Rule 3111.1. The new rules 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.

42. Colorado, Minnesota, and Virginia.

43.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))

44.*See* cases cited in note 17.

45.*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).

46. *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).

47.This practice is separate from the problems caused when banks promote overdraft "protection loans" to Social Security recipients and bleed the accounts through high overdraft fees. Although this practice was declared legal in *Lopez v. Washington Mut.,* 302 F.3d 900 (9th Cir. 2002), it is still very bad public policy. NCLC describes these transactions as "bounce loans" because any benefits from the program are far outweighed by the costs. However, the financial services industry generally refers to them as "bounce protection" or "courtesy overdrafts." *See* Consumer Federation of America and National Consumer Law Center, *How Banks Turn Rubber Into Gold by Enticing Consumers to Write Bad Checks* (Jan. 27, 2003), available at http://www.consumerlaw.org/action_agenda/bounce_loans/appendix.shtml.

48.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).

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

50.Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 370 (1986); *see generally* Lauren Saunders, Preemption as an Alternative to Section 1983, Clearinghouse Review Journal of Poverty Law and Policy 705, 109-10 (March–April 2005).

51.*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).

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

53.*See Estate of F.K. v. Division of Medical Assistance and Health Service,* 2005 WL 13252 (N.J. Super. Ct. App. Div. Jan. 4, 2005) (finding that federal Medicaid Act as interpreted in U.S. Department of Health and Human Services' letter preempted conflicting state regulation counting spouse's annuity as an asset of plaintiff); Blackwell, 61 F.3d 170 (3d Cir. 1995) (finding that Hyde Amendment as interpreted by federal Medicaid bureau director's letter preempted state regulation restricting Medicaid funding for certain abortions).

54.*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).

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

56.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. at 63.