

**Protecting Social Security Benefits
from
Predatory Lending
and
Other Harmful Financial Institution Practices**

Testimony before the

**Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives**

on behalf of the
Low Income Clients
of the

National Consumer Law Center

and

Consumer Federation of America

Consumers Union

National Association of Consumer Advocates

National Legal Aid & Defender Association

National Senior Citizens Law Center

U. S. Public Interest Group

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Chairman McNulty, Congressman Johnson, 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 on behalf of the following national organizations representing low income recipients of federal benefits –

- **Consumer Federation of America**²
- **Consumers Union**³

¹The **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 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.

²The **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 from 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.

- **National Association of Consumer Advocates**⁴
- **National Legal Aid and Defender Association**⁵
- **National Senior Citizens Law Center**⁶
- **U.S. Public Interest Research Group**.⁷

In addition, I have gathered extensive information and advice on necessary and appropriate resolutions to the problems affecting low income recipients of federal benefits from a number of local, multi-county, and statewide legal aid programs across the nation. Attorneys at the following legal aid programs, all of whom represent low income clients affected by these problems, have provided critical information as we have constructed our proposed recommendations to the federal agencies dealing with these issues, as well as in our discussions with members of Congress about these issues –

- Community Justice Project of Harrisburg, Pennsylvania
- Coordinated Advice & Referral Program for Legal Services of Cook County, Illinois
- Empire Justice Center of Albany, New York
- Jacksonville Area Legal Aid of Jacksonville, Florida
- 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 Assistance Foundation of Chicago
- Legal Services of New Jersey of Edison, New Jersey
- MFY Legal Services of New York, New York
- 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
- North Carolina Justice Center of Raleigh, North Carolina
- St. John's University School of Law Elder Law Clinic of Queens, New York
- Virginia Poverty Law Center of Richmond, Virginia
- Washoe Legal Services of Reno, Nevada

You have asked me to address how the freezing of beneficiaries' bank accounts in response to state

⁴The **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.

⁶The **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.

⁷The **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.

court garnishment orders on behalf of creditors implicates Section 207, the devastating impact account-freezing can have on Social Security beneficiaries, and what policy responses might be taken stop or mitigate the practice. We very much appreciate your concern about these issues. Indeed it is the most vulnerable of our society – and those with the least power – who suffer daily as the result of the problems highlighted in this hearing.

The Problem – Recipients Starve as Debt Collectors Claim Exempt Funds

We estimate that on a monthly basis tens of 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. We believe our estimate of over **1 million recipients of Social Security and other exempt federal benefits a year who have their funds illegally frozen by banks** is very conservative, and that the real number is likely much higher.⁸

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.*”),⁹ 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 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 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 Social Security Act specifically says:

The right of any person to any future payment under this subchapter shall

⁸If we assume that Social Security and SSI recipients carry and default on credit cards at the same rate as the general population (the current rate is 5.7% of all credit cards are in default) this means about 2.85 million of the country’s 50 million Social Security recipients would have judgments taken against them for credit card debts just in the last year. We can then reduce that number by 50% to make up for the fact that the assumption is based on an extrapolation, but this still means that well over 1 million recipients of Social Security and SSI have credit card judgments applied against them each year. This analysis is based on information from Moody’s Investors Service, a bond-rating agency, which has noted that more U.S. consumers are beginning to fall behind on credit-card payments. Moody’s reported the charge-off rate at 5.7% in May 2008, up from 4.5% the previous year. *Sector Snap: Credit card companies fall on outlook*. May 20, 2008 1:40 PM. ET. <http://news.moneycentral.msn.com/provider/providerarticle.aspx?feed=AP&date=20080520&id=8671348>

⁹Ellen 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

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.¹⁰ (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, debt collectors, and banks.

This nation's courts have consistently said that exemptions are to be liberally construed in favor of the debtor.¹¹ The United States Supreme Court has repeatedly reiterated that Social Security,¹² and

¹⁰Social Security Act, at 42 U.S.C. § 407(a). The protections are similar in the other federal statutes governing federal benefits:

- 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.

¹¹*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

Veterans Benefits¹³ 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,¹⁴ regardless of whether the creditor is a state or a private entity.¹⁵

In *Porter v. Aetna Casualty and Surety Co.*,¹⁶ the Supreme Court held that federally exempt disability benefits deposited in a bank account remained exempt so long as they are readily traceable and “retain the

(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 Gedgudas*, 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).

¹²*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).

¹³*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).

¹⁴ *Philpott v. Essex Cty. Welfare Bd.*, 409 U.S. 413, 93 S. Ct. 590, 34 L. Ed. 2d 608 (1973).

¹⁵*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).

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

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.”¹⁷ This rationale has been widely applied to other exempt benefits, to hold that exempt funds remain exempt in checking,¹⁸ savings,¹⁹ or CD²⁰ accounts so long as these are “usual means of safekeeping” money used for daily living expenses.²¹

The Policy – Exempt Benefits Must Be Protected.

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, the elderly, 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

¹⁷See *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).

¹⁸*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).

¹⁹*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).

²⁰*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).

²¹See *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).

his creditors.²²

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 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.²³ This requires the recipient to repeat the process of showing the funds are 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

²²See, 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).

²³See, e.g. *Mayers v. N.Y. Cmty. Bancorp Inc.*, No. CV 03 5837, 2005 WL 2105810. (E.D.N.Y. Aug. 31, 2005).(creditor hospital restrains disabled SSI recipients account three times); *Washington v. Gutman, Mintz*, 07 CIV. 4096 (EDNY 2008) (FDCPA claim against creditor who, over 22 months, restrained homeless woman's SSI account three times for the same debt.).

future federal benefits by paper check.²⁴

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 2008, these percentages have risen to 85% and 59% respectively.²⁵ 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.²⁶
- 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.²⁷

²⁴See, e.g. *Miceli v. Lincoln Financial*, 17 Misc.3d 1109(A), 2007 WL 2917242 (2007 N.Y. Dist. Ct.) (Court finds “unequivocal proof” that taken moneys were exempt based on exact evidence the debtor gave the creditor out of court.).

²⁵<http://www.ssa.gov/deposit/trendenv.shtml>.

²⁶31 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.

²⁷For 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.

- Electronically deposited federal benefits are easily identifiable. 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.*²⁸ 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 federally exempt funds was commonplace, and pursuant to the required balancing test dictated by the seminal Supreme Court case of *Mathews v. Eldridge*,²⁹ the courts had allowed the temporary freezing at issue here.³⁰ 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.³¹ 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 conflicting state law

²⁸The 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 resolve 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.

²⁹424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

³⁰ 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).

³¹ See, e.g. *Granger v. Harris*, 2007 WL 1213416 (E.D.N.Y., Apr 17, 2007) (recipient stated § 1983 claim against bank that disbursed funds to creditor, despite knowledge that funds were Social Security; state statute imposing sanctions on bank that failed to comply with restraining order was state compulsion sufficient to allege action under color of state law); *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).

dictates regarding the freezing of federally exempt funds.³²

Commingling of Funds Should Not Stop Protection of Exempt Funds

Most involved in this ongoing dialogue seem to agree that requiring the bank which receives the garnishment order to look at the account before freezing the funds is not too onerous. If the only deposits in the account are unambiguously exempt funds, the order should be returned unsatisfied. The complexity arises when the exempt funds are commingled with non-exempt funds.

Commingling appears to be the norm, rather than the exception – 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.³³

While commingling of exempt funds with non-exempt funds or funds of another raises the problem of traceability, in the context of garnishment or attachment proceedings, these issues are generally resolved in a court of law. 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,³⁴ generally applying a first-in first-out accounting method.³⁵ A small minority of courts have refused to require tracing, finding that the

³²However, the courts in both the Granger and the Mayer's cases appear to recognize the potential for this potential preemption.

³³An official from the FDIC has estimated that as many as 80% of bank accounts into which exempt Social Security and SSI funds are deposited are commingled with non-exempt funds. Meeting between federal banking regulators and consumer advocates, March 18, 2008, Washington, D.C.

³⁴ 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.); 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); 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).

³⁵E.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.³⁶

However, 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 seizure.³⁷ A simple system such as this provides certainty and ease of use for the banks, as well as basic protections for the recipients.

Exempt Funds Can Be Protected from Seizure

The issue here is the need for an *immediate determination* of the exempt funds, and which funds can be appropriately frozen and which funds should be protected from garnishment because of their exempt status. State laws on exemptions, garnishment and attachment may not include the procedures necessary to properly protect funds from freezing which are exempt under federal law, but that cannot mean that those federally exempt funds lose their status as exempt funds.

State law cannot take away the protected status of exempt funds provided by federal law. In many states, the exemptions allowed under state law must be affirmatively asserted to be preserved. Some states provide a method to identify exempt property prior to seizure, while others only provide that the consumer can go to court after the seizure to obtain the return or release of the property. There is a critical distinction between property which is exempt under state law and that which exempt under federal law. If federal law specifies that property is exempt, a state law cannot properly be interpreted to have the effect of denying the recipient that exemption because of the recipient's failure to follow the state law. Banks often argue that they perceive a risk of liability or sanctions if they disburse funds subject to a garnishment order to debtors. In actuality, it seems highly unlikely that a bank would be sanctioned for refusing to freeze funds that are unequivocally exempt under federal law.

In years past courts generally held that banks do not have a duty to make an independent evaluation of whether a bank account contains exempt funds, for the purpose of refusing a garnishment order. The courts generally found against the recipient, reasoning that the bank had no duty to determine whether a portion of the funds were exempt.³⁸ Now, as has been recognized by a number of courts, when the debt

³⁶*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.* cases noted in Note 34, *supra*.

³⁷*See, e.g.* West's Ann.Cal.C.C.P. § 704.080.

³⁸*See, e.g.*, Gorstein v. World Sav. Bank, 110 Fed. Appx. 9 (9th Cir. 2004); Parker v. Wetch & Abbot, P.L.C., 2006 WL 4846042 (S.D. Iowa July 11, 2006) (freeze of account containing exempt benefits did not violate anti-alienation clause of Social Security Act, nor state or Federal Fair Debt Collection Acts, nor state consumer protection law); Alexander v. Bank of Am., 2007 WL 3046637 (W.D. Mo. Oct. 17, 2007) (bank not liable for six weeks' freeze of SSDI benefits; only remedy for violation of anti-alienation clause is release of garnishment, no private right of action for damages; no intentional infliction of emotional distress where bank acted “promptly” to release garnishment; court assumes that bank could not know funds were

collector has reason to know that the funds are exempt, and processes a garnishment regardless, the collector risks violating a variety of state and federal laws.³⁹ There is likely to be similar liability for a bank's refusal to release clearly exempt funds to the recipient.

A few states have updated their garnishment statutes or court rules to address the need and the current ability to protect direct-deposited exempt benefits. Pennsylvania rules of civil procedure state explicitly that service of the writ will not attach funds in an account in which funds are direct/deposited on a recurring basis, and identified as exempt under state or federal law.⁴⁰ A debtor's failure to claim the exemption does not result in waiver.⁴¹ Connecticut and California provide that a modest amount of benefits are exempt without making a claim, and Connecticut specifically confers immunity on a bank that attempts in good faith to comply with the statute.⁴² In both states, however, the debtor must file a claim to prevent the freezing and turnover of any *additional* exempt amount.

In other states, it is necessary to construe the federal and state statutes and rules harmoniously. The state statutes may define exempt property under state law, prescribe the form for the garnishment summons and the bank's response, and establish a procedure for claiming exemptions. Many of these statutes were enacted long before direct-deposit, or even exempt benefits under federal law, existed. Even in these states, state laws cannot abrogate a federal right, especially when the federal law establishing the exempt status of the funds is clear. It seems highly unlikely that a state statute could be interpreted to mean that funds which are exempt under federal law can lose that protected status just because a recipient fails to follow a state required procedure. Also, the principle of liberal construction, as well as the public policy served by the benefit programs, both support a construction that allows banks to disburse to debtors funds

exempt until debtor formally claimed exemption).

³⁹*Mayers v. New York Cmty. Bancorp, Inc.* 2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005) (recent changes in technology, i.e., electronic direct deposit of Social Security benefits and ease of identifying deposits as exempt funds, require a re-evaluation of New York procedure allowing pre-judgment freeze of bank accounts), *later decision*, 2006 WL 2013734 (E.D.N.Y. July 18, 2006) (defendants' motion for interlocutory appeal denied). *See also* *Hogue v. Palisades Collection, Inc.*, 494 F. Supp. 2d 1043 (S.D. Ohio 2007) (debtor stated claims under federal and Iowa fair debt collection acts, Iowa Uniform Consumer Credit Code, tort claim for abuse of process against creditor and its attorney; garnishment continued after being shown affidavit and bank statements showing that account contained only exempt Social Security); *Jordan v. Thomas & Thomas*, 2007 WL 2838474 (S.D. Ohio Sept. 26, 2007) (FDCPA claim stated; frozen account contained only exempt Social Security; genuine issue of fact whether collector's attorneys conducted investigation or had reasonable cause to believe account contained non-exempt funds); *Lee v. Javitch, Block, & Rathbone*, 2007 WL 3332706 (S.D. Ohio Nov. 7, 2007) (Ohio statute cited in *Todd* has been amended to require only "reasonable cause to believe"; genuine issue of fact as to reasonable cause where large-volume collection firm did crude screening, i.e., eliminated debtors aged over 65 with no employer or trade lines listed on credit report; summary judgment denied on FDCPA and UDAP claims). *But see* *Parker v. Wetch & Abbot, P.L.C.*, 2006 WL 4846042 (S.D. Iowa July 11, 2006) (freeze of account containing exempt benefits did not violate anti-alienation clause of Social Security Act, nor state or federal fair debt collection acts, nor state consumer protection law); *Smith v. Levine*, 2006 WL 3704622 (Cal. Ct. App. Dec. 18, 2006) (litigation privilege barred abuse of process claim arising from levy on non-debtor's account, and conversion claim arising from refusal to return improperly seized funds).

⁴⁰Pa. R. Civ. P. 3111.1.

⁴¹Cal. Civ. Proc. Code § 704.080 (West); Conn. Gen. Stat. § 52-367b.

⁴²*Id.*

that are clearly exempt. A few New York courts have ordered creditors to include in their restraining notices, which are served on banks to initiate a garnishment, a check box to indicate that the bank holds directly deposited exempt funds, and instructions that such funds should not be restrained.⁴³

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 an 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.⁴⁴

Fees Charged Social Security Recipients and Others Should Be 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.

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 mostly from 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.

Treasury is Poised to Propose a Good Compromise

We understand that as the result of extensive discussions and negotiations between Treasury and the Social Security Administration, the other federal payment agencies, and the federal banking agencies,

⁴³Lincoln Fin. Services, Inc. v. Miceli, 17 Misc. 3d 1109(A) (Dist. Ct. 2007) (table) (text available at 2007 WL 2917242) (ordering creditor to include instructions about exempt funds in any future restraining notices against this debtor); Contact Res. Services, Inc. v. Gregory, 806 N.Y.S.2d 407 (City Ct. 2005) (protective order as to specific debtor).

⁴⁴ See 142 Cong. Rec. H48721 (1996).

that a compromise regulation will be proposed in the near future. Our understanding of this compromise is that it will incorporate *at least* the following features:

Upon receiving an order to freeze a bank account pursuant to a garnishment or attachment, a bank will –

1. Review the electronic deposits made into the account in the previous 30 to 45 days (called the “*look-back period*”), to determine whether any are accompanied with the electronic designation for federally exempt funds.
2. If there are any exempt funds deposited into the account, then the total amount of exempt funds deposited within the look-back period will be multiplied by a factor (either 2 or 2.5, or some other number to be determined – this is called the “*multiplier*”).
3. The multiplied sum of exempt funds will be considered the *protected amount* – this amount of money will always be kept safe from freezing or attachment or garnishment, regardless of the flow of money into and out of the account.
4. Funds in the account which are in excess of the multiplied sum will be frozen and held pursuant to state law for disposition.
5. The recipient will be free to seek to protect all exempt funds *over* the *protected amount* using the standard state court procedure.
6. No garnishment fees assessed by the bank can be taken from the *protected amount*.

We think this proposal is a potentially wonderful resolution to this difficult situation. There are, however, a number of important issues still to be resolved. These include –

- *The amount of the multiplier is critical.* Although recipients will be able to go to court to protect exempt funds which are over the *protected amount*, in reality very few recipients will have the means to do this. As a result the *protected amount* will become the *de facto* exempt funds kept safe from the claims of creditors. As it is so imperative that these funds remain available for recipients to use for intended life-sustaining purposes, the multiplier should be at least 2, if not more. If the multiplier is not sufficiently high, savings will be discouraged, and a bank account will remain an unsafe way for recipients to manage their financial affairs.
- *No bank fees should be permitted to be withdrawn from protected funds.* If some funds are frozen, then checks and debits made by the recipient based on the expectation of the availability those funds may bounce. When subsequent deposits are made into the account – replenishing the *protected amount* – no fees resulting from the freezing or the garnishment or attachment order should ever be withdrawn from the *protected amount*. This prohibition must include NSF fees, as well as all other fees which are the natural consequence of the garnishment order.
- *Notice of the freezing must be immediately provided to the recipient.* The bank should be required to provide notice immediately to the recipient of –
 - the pendency of the garnishment or attachment order, the date it was entered, and the amount;
 - the effect of the order as applied to the funds in the recipient’s bank account – showing which funds are frozen pursuant to the order, and which funds will remain free from the order;

- assurance to the recipient that all funds within the *protected amount remain available for the recipient's use*;
 - subsequent funds deposited into the account will also be protected up to the *protected amount*;
 - state court information regarding how the recipient can claim state exemptions and protect funds over the *protected amount*.
-
- *More protective state rules apply.*

Conclusion

The Appendices to this testimony include dozens of case histories of real people whose lives have been terribly effected by the illegal freezing of their protected funds. People go hungry, rent goes unpaid, there is no money for medicine, transportation. The consequences are devastating. As all of these recipients can explain, having a bank account frozen when you have no other money is a terrible experience. Unfortunately, these case histories are 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).

The real-life stories recited in the Appendices includes names, dates and the names of the banks involved. 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, Georgia, Illinois, Michigan, Mississippi, Montana, Nevada, New Jersey, New York, Pennsylvania, Virginia**. Unfortunately, for every specific story included in this testimony, there are tens of thousands more.

I would be happy to answer any questions.

Appendices

National Consumer Law Center

Appendices includes case histories of recipients of Social Security, SSI and other federal benefits who have suffered after banks have frozen their bank accounts containing electronically deposited funds.

Case histories are provided from the following states:

Alabama
Georgia
Illinois
Michigan
Mississippi
Montana
Nevada
New Jersey
New York
Pennsylvania
Virginia

Alabama

Ethel Silmon is a 59 year old, widow. Her only income is Social Security Disability of \$889 per month. She has been on disability for several years due to severe anxiety, depression, COPD, and a heart condition. She had a credit card for years and paid regularly until she became disabled and could no longer work. After she became disabled, her income dropped dramatically and she could no longer pay the credit card debt. She defaulted on the debt. The credit card company charged off the debt. The debt was bought by Unifund CCR Partners, who sued her and got a judgment against her for \$13,474. They started harassing her to collect the judgment.

Her Legal Aid attorney told her that she was judgment proof and that her income was protected. Her attorney also helped her submit a letter to her bank (Wachovia) about her exempt status. They also sent a letter to the debt collector explaining that Mrs. Silmon's only income was exempt from judgments.

Despite the letters, after obtaining a judgment, the debt collector filed a Writ of Seizure against Mrs. Silmon's bank account held by Wachovia. The bank promptly froze her bank account. The writ was for \$15,895.44 and the bank informed Mrs. Silmon and her attorney that they would not release the funds in the client's bank account until the full amount was collected or they received a court order dismissing the writ. At the time, Mrs. Silmon had less than \$1,000 in the bank and she had written checks for her mortgage, electricity, medical expenses, and groceries that the bank refused to honor. The bank also charged Mrs. Silmon overdraft fees on each of the checks she had written.

The Legal Aid attorney called the bank several times, as well as the creditor, and the creditor's attorney. All calls were ignored. The attorney filed several motions with the court to dismiss the writ. Almost a month after the funds were frozen in her Wachovia account, the writ was dismissed, the funds were released, and the overdraft fees were refunded.

During the month without access to her money, Mrs. Silmon suffered several severe anxiety attacks, she had to go to the food bank for food, and had to rely on her doctors for samples of medicine. She is still fearful that they will try it again and states that she can not handle it if they do.

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Georgia

Ms. F is a 43-year-old resident of Wilkes County, Georgia. In 1999, Ms. F was in a car accident that left her unable to walk for over a year. She has had approximately ten surgeries on her legs and feet since the accident. After her accident, she used her credit card to meet her expenses because she did not have any income. After the credit card company raised the minimum monthly payment amount, she was no longer able to make the payments and the credit card company subsequently received a default judgment on the debt. In 2001, Ms. F began receiving Social Security disability income.

On March 29, 2006, the credit card company filed a garnishment against a bank account held by Ms. F at Regions Bank. The garnishment summons instructed Regions Bank to immediately hold all property belonging to Ms. F “except what is exempt.” On April 3, 2007, the Social Security Administration electronically deposited \$1,012 in disability income into her bank account. That same day, Regions Bank froze her account, withdrew \$807.57 pursuant to the garnishment, and then withdrew an additional \$75 for a garnishment fee. After the checks Ms. F had previously written all bounced due to the freeze on her account, Regions Bank charged Ms. F an additional \$217 in NSF fees.

Ms. F learned about the garnishment on April 7, when she attempted to make a withdrawal at her local branch. She told the branch employees that she had Social Security in her account and they could not freeze it. An employee told her to get a lawyer to write a letter to the bank stating that Social Security is exempt and the bank might be able to release the funds. Ms. F asked a local attorney to write such a letter pro-bono and then took the letter to the bank branch. Ms. F did not know that Georgia Legal Services Program could assist her with a garnishment and she could not afford to hire a private attorney.

On May 11, 2006, the bank filed an answer in the superior court asserting that \$807.57 in the account is subject to garnishment. It subsequently sent the money to the registry of the clerk, who then forwarded the money to the creditor. The garnishment answer form has a space for the bank to list the amount of exempt funds in the bank account. The bank did not describe any of the money in the account as exempt.

Ms. F had to borrow money from her family to pay the NSF fees and other charges charged by merchants after her checks bounced. She had to postpone a surgical operation on her knee because she could not afford to travel to the doctor’s office during this ordeal. Although a settlement was eventually reached, the garnishment caused Ms. F significant stress and she could not afford to fill her prescriptions Nexium and Celebrex. Her inability to take these medicines, combined with the stress caused by the garnishment, caused her to eat significantly less during the month of April. She lost approximately fifteen pounds that month.

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Illinois

Juanita Johnson is 74 years old and relies on Social Security and a VA pension as her only source of income. In March 2005, a judgment was entered against her from an old credit card account. Believing that she had paid the debt in full after disposing of the credit card seven years prior to the judgment, but unable to find legal representation, Ms. Johnson appeared in court without a lawyer and unsuccessfully contested the claim. A lawyer from the collection agency gave the court an affidavit from his company and a judgment was entered against Ms. Johnson over her objections.

A few months later, Ms. Johnson was commanded to come back to court to disclose her collectible assets. She was sworn under oath and interviewed outside the courtroom where she told the collection lawyer that her only income was her VA pension and Social Security. After the collection attorney demanded that she make arrangements to pay, Ms. Johnson agreed to pay \$20 a month towards the judgment. Ms. Johnson was not informed that her Social Security and VA pension were exempt from garnishment.

After temporarily entering a nursing home in late 2005, Ms. Johnson missed two payments and subsequently received notice that her rent check had bounced. Ms. Johnson then contacted her bank where she was informed that her account had been frozen. Ms. Johnson was unable to pay bills from her account for three weeks. She bounced six checks and was forced to ask her doctor to write her electric company to ask that they not disconnect her power.

Ms. Johnson was eventually informed that she should contact a legal aid lawyer and was advised that her income was exempt from garnishment. Her lawyer was able to get the freeze lifted, but only after collection agency said they had no record of her many conversations with them where Ms. Johnson informed them that her only income was through pension disbursements.

Attorneys for the collection agency failed to appear when Ms. Johnson's lawyer went to court and successfully petitioned the judge to lift the freeze. However, despite the court order, the bank waited an additional four days before allowing Ms. Johnson to access her account.

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Michigan

A 59 year-old, disabled man from Muskegon contacted CALL after SSD and VA benefits were wrongfully garnished from his bank account, resulting bounced checks and the accrual of overdraft fees. CALL's attorney intervened with the creditor and the bank, obtaining both the return of \$586 in garnished funds and a credit for \$66 in overdraft fees.

A disabled woman in Van Buren County contacted CALL following the garnishment of her bank account, which was comprised entirely of SSD and SSI benefits. The Social Security benefits were the woman's sole source of income, and this fact was known to the judgment creditor due to evidence produced at a debtor's exam several months prior to the garnishment. The hotline attorney was successful in convincing the opposing attorney to lift the garnishment without forcing the woman to resubmit proof of receipt of Social Security benefits (which would have caused a hardship to the woman, who suffers from mental illness), and also in convincing the opposing attorney to persuade his client cease all further collection activity against the woman, since the attempt to knowingly garnish exempt funds arguably constituted a violation of the Fair Debt Collection Practices Act.

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Michigan

Betty Reignbow (age 62) of East Lansing, Michigan, had her bank account garnished sometime around August 7, 2007, even though virtually all the funds in her account came from Social Security and SSI disability payments. Betty is in her mid-60s, has numerous disabilities, and cares for her adult disabled son who is in his twenties. The funds that go into Ms. Reignbow's account at Fifth Third Bank each month are \$511 for her own social security (plus another \$69.70 in SSI funds), and \$530 from her son's disability. During the month prior to the garnishment, her church gave her \$200 to fix a broken pipe in her home, and this sum was also deposited in the account. She learned on August 7, 2007 that her bank account had been frozen, when she tried to buy gas with her ATM card. Despite repeated pleas to the bank her money was not released until a month later when her cousin, who is a law professor, contacted the bank's lawyer. In the meantime her September income from SSA was frozen as well.

Mrs. Reignbow survived during the month without access to her funds because of the kindness of her relatives.

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Mississippi

Client is 59, on social security disability for severe arthritis & anemia. She was sued on a credit card on 11/19/2004 and timely answered 12/15/2004, stating among other things in her answer that she was disabled and unable to make payment, and the answer was filed of record. So, at all times creditor was on notice of disability. Despite having answered, a default was taken against her without notice on May 31st, 2005, in the amount of \$9768.18, plus interest, attorney's fees and costs, and on March 13th, 2007, again without notice, a garnishment was entered in the amount of \$16, 380.16. No notice was given her of the garnishment.

At the time of the garnishment she had \$3,421.13 representing a current month's social security check for 688.00 clearly apparent on her account transaction record and exempt pursuant to 42 U.S.C. Section 407 and a FEMA award for her Katrina losses also exempt by law.

No notice was sent her by her major national bank of the garnishment until her checks began to bounce at which point on April 16th, she was mailed an insufficient funds notice by her bank which did not reference the garnishment, her exemption rights, or how to assert her exemptions.

Client had life insurance, and Medicare prescription Part D payment automatically deducted. She told the bank her funds were all Social Security and FEMA funds and she was told there was nothing they could do. They did direct her to the creditor's attorney, who - most unusually - released the garnishment but the Court did not send a copy to the bank. It was not until August 27th that we were able to convince the bank to release the funds, this took me over 4 hours on the phone and fax machine. To date they still have not refunded the bounced check charges.

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Montana

1. Mr. Murray, of Livingston, Mt., contacted MLSA when his bank account at Wells Fargo was attached because of a judgment from an old credit card debt. Wells Fargo allowed approximately \$80 to be taken from his account. Mr. Murray lives entirely on SSDI and VA Compensation benefits of approximately \$860 per month. He is 56 years old. He became disabled when he broke his neck and back. His back injury healed poorly and is inoperable. He has not been able to return to work as a truck driver. Mr. Murray contacted MLSA through our statewide Helpline and with the information provided, he was able to file his own request for a hearing on exempt funds and had his \$80 returned to his account, but he too lost his "Non-Refundable Levy Fee" of \$65 from Wells Fargo. He has since closed his bank account so that he does not have to fear further sweepings of his account. Mr. Murray is contemplating bankruptcy at this point because he continues to get calls from collection agencies and fears being sued again and having his benefits taken out of his bank account.

2. Ms. O'Brien is a 60 year old woman on SSDI. She was sued by Collection Bureau Services of Missoula Montana for unpaid medical debts. Although she is on SSDI she had not yet been awarded Medicare and she had substantial medical bills. Her bank account at US Bank was swept and she contacted MLSA. MLSA was able to contact the attorney for Collection Bureau Services who agreed to lift the levy upon seeing proof of her SSDI and returned the \$207.00 to O'Brien. Unfortunately, US Bank would not return their \$75 Non-Refundable levy fee. Ms. O'Brien closed her account with US Bank and has moved to Rapid City, South Dakota.

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Nevada

We have had a number of clients recently who are having bank accounts garnished and the banks have done a couple of things that we don't believe are right - one action is to charge the client's bank credit card if the amount in the checking account is not sufficient to pay the garnishment levy (e.g. Wells Fargo checking account does not contain \$400, but the issued Wells Fargo Visa credit card has \$400 of credit on it, bank simply pays the \$400 and charges the credit card, the garnishment notice from the creditor was for "bank accounts"); the second action is paying off the entire amount of the garnishment levy when the client does not have the amount in the checking account, but the client has overdraft protection, and the bank then charges the client the fees for the overdraft (e.g. garnishment levy is for \$400, client has \$100 in checking account, bank pays \$400 creating \$300 overdraft and charges client \$45 fee under the overdraft protection).

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New Jersey

Ms. H found out about a levy on her bank account when she went to buy needed medication. Of course, she was unable to purchase her meds because the creditor levied both her savings and checking accounts. This lady's sole source of income was exempt funds, and therefore the entire balance of each account was completely exempt. Moreover, each levy was for an amount less than the New Jersey statutory \$1,000 exemption, and even collectively did not exceed \$1,000.

Ms. H's legal aid lawyer contacted the creditor's counsel and provided documents to show that the funds were entirely from Social Security and therefore exempt from attachment. The creditor's attorney wrote to the Levy Officer at the bank to have the bank funds released. However, the bank did not respond for more than a week, and the court clerk insisted that there was nothing that could be done to free up Ms. H's funds in the absence of cooperation from the bank. The state court procedure permitted an appeal to the court for an order releasing the levies, but the judge assigned to hear these appeals was away on vacation. At this point, our client had been without her medication for more than a week.

The legal aid attorney contacted the attorney for the bank and requested assistance. With the cooperation of the creditor and plaintiff's counsels, the bank finally agreed to release Ms. H's funds. The process took over two weeks, during which time Ms. H was without her life supporting medication, as a result her health deteriorated.

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New York

1. Ms. Cassandra Suggs lives with her eleven year old daughter in public housing in New York City. She banks with Apple Bank, a New York State bank. Ms. Suggs has a number of outstanding credit card debts that she has been unable to pay since she became disabled about four years ago. She is currently homebound and in a wheelchair due to osteoarthritis and various other medical problems. Her only income is Supplemental Security Income (SSI). Her daughter is also disabled and also receives SSI.

Recently, Ms. Suggs was sued by a debt buyer on one of her old credit card accounts. She was not served with a summons, and her first notice of the lawsuit occurred when her bank account containing her SSI was frozen in September 2007. She notified the plaintiff's attorney of her exempt SSI income. Because she had deposited some of her daughter's SSI as cash into her own account to pay some bills, the attorney accused her of having commingled funds and refused to release the account. Our office eventually assisted Ms. Suggs to obtain a court order vacating the judgment and releasing the funds. But during the one month period that she had no access to her money, she could not pay rent and she received a notice of pending eviction from the public housing authority. Ms. Suggs is now one month behind in her rent and is also behind in her utility bills. Her bank charged her a legal process fee of \$150, which they have not reversed.

2. Mr. L is 62 years old and disabled due to a heart condition. He is largely homebound, and lives on less than \$700 a month in Social Security and pension benefits. When Mr. L began receiving letters from debt collectors about two years ago, he worried that his creditors would seize his exempt income, leaving him unable to pay his rent and medical expenses. Mr. L asked his bank – Chase Bank – whether it could protect his exempt income from creditors. A Chase employee stated that if the bank received a restraining order, it would have no choice but to freeze Mr. L's exempt funds, and that it would most likely take him three to six months to obtain their release. After this conversation, Mr. L cancelled his direct deposit and closed his bank account. For several years, he spent \$57 each month to cash his check -- \$27 on check cashing fees and \$30 on a car service (he was unable to walk the three blocks to the closest check casher).

Recently, Mr. L decided to open a bank account again after he was diagnosed with terminal cancer and a friend of his was robbed at knifepoint after cashing her Social Security check at a local check casher. Two months later, his checking account at Commerce Bank was frozen by a debt collector even though it contained nothing but directly deposited exempt benefits. Although Mr. L eventually negotiated release of his account, he was without access to his funds for over a week.

3. In April 2007, Ms. Henrietta Sue Green's bank account at Chase Bank was frozen by a creditor who had obtained a default judgment against her. Ms. Green is a senior and disabled; she survives on Social Security, Workman's Compensation, and a small pension. Upon learning of the restraint, Ms. Green immediately notified the creditor and her bank that her account contained only exempt funds, but the creditor maintained the restraint for 13 days. During this time, Ms. Green was unable to buy food or medicine and had no money for transportation. She suffered unbearable anxiety and lives in fear that her account will be restrained again.

In October 2006, a debt collector restrained Ms. Beth Spine's bank account even though it contained nothing but directly deposited Supplemental Security Income. Ms. Spine had no access to her account for five weeks, and she lost two months of benefits. She had to apply to a local charity for funds to pay her rent, and she had to borrow money for food from her roommate. Eventually, she agreed to make \$50

payments in return for the release of her exempt funds, which never should have been restrained. In addition, her bank charged her \$100 for processing the restraint. Approximately 7 months later, after paying off the first account, Ms. Spine was sued by a different debt collector. Although she disputed the debt, Ms. Spine agreed to make \$25 monthly payments because she felt that if she did not agree to make payments, her account would be frozen again. Ms. Spine feels that her SSI benefits are not safe in the bank, and that the federal protections are meaningless. Ms. Spine cannot afford these payments and has been skipping meals and undergoing other privations in order to pay the debt collectors.

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New York

1. Anne D., 45, a Pilates instructor who suffers from mental illness and lives in Manhattan, discovered that her bank account, which contained only exempt funds, was frozen when she attempted to withdraw cash from an ATM last October. The victim of identity theft, Ms. D. was never served with a summons and complaint or a restraining notice, and did not know a default judgment had been entered against her in another county. While her account was frozen, Ms. D. could not pay her rent, buy food, or purchase medicine. In addition, her bank charged her fees for returned checks. Although a bank manager helped Ms. D. contact the plaintiff's attorney and even informed the attorney that Ms. D.'s account contained only exempt funds, the bank said it could not violate the restraining order by lifting the restraint on its own. The account remained frozen until Ms. D. successfully vacated the default judgment several weeks later.

The funds in Ms. D.'s accounts at that time consisted of Supplemental Security Income (SSI), which is exempt from collection pursuant to 42 U.S.C. § 407, and earned income, which is exempt from collection, pursuant to N.Y. Social Services Law § 137-a.

2. George M., 57, of Manhattan, worked for the U.S. Postal Service for 22 years, and for the New York State Department of Motor Vehicles for five years, before he became disabled and unable to work approximately four years ago. Now homebound because he is unable to walk without great difficulty, he relies on his Social Security Disability checks, which are directly deposited into his bank account. Despite the fact that all of his income is exempt from collection, his bank account was frozen last June. "I thought that because my money comes from the federal government, they knew they couldn't touch it, but they did anyway," he said of the creditor. Because Mr. M. is homebound, he pays all his bills -- including his rent -- online, through his bank account. Once his bank account was restrained, he had no way of paying his bills, and considered closing his bank account to prevent it being restrained again.

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New York

Ms. B, is a 72 year old resident of Washington Heights. Her only income is her monthly Social Security check. She deposits her check into a Chase checking account each month, and writes checks against it to pay her rent, her utility bills, and various other monthly bills, including several credit card accounts. Since her income is not sufficient to pay all of her monthly bills, she receives loans of money from time to time from family members, which she deposits into her Chase account.

Shortly, after September 27, 2005, Ms. B received a notice from Chase informing her that the bank had been served with a restraining order by a judgment creditor. The amount of the judgment, which resulted from unpaid dental bills, was \$920.15. At the time, Ms. B's account balance was \$929.54.

On September 29, 2005, a \$53.83 check that Ms. B had written to Time Warner Cable Company on September 25, 2005 was presented to Chase for payment. Since there were no unrestrained funds in the account to pay the check, Chase refused payment, charged Ms. B a \$30 NSF fee, and debited her account \$30, reducing the balance from \$929.54 to \$899.54

This process repeated itself throughout October and November. On September 30, 2005, the bank refused payment on a \$30 check to Household Finance and debited Ms. B's account for another \$30. On October 3, 2005, the bank refused payment on three more checks and debited Ms. B's account for \$90 - - \$30 for each check. On October 4, 2005, the bank charged \$60 in NSF fees for two additional checks, including a second charge for the \$53.83 check to Time Warner Cable which had been presented to Chase for the second time. On October 5, 2005, Chase debited the account for another \$60 because two "pre-authorized debits" - - one for \$4.15 and one for \$0.95 - - could not be completed. Ms. B had at some point authorized the bank to withdraw small amounts from her account every month to cover some card issued by the bank.

By November 22, 2005, the funds in Ms. B's checking account were completely exhausted. The bank continued to charge NSF fees, however. The account balance had reached -\$637.79 by the time Chase zeroed out the amount on April 12, 2006. (This was \$1,567.33 less than the starting point on September 27, 2005).

The net result of this series of events is that Ms. B's lost the entire \$929.54 which had been in the account on September 27, 2005. Meanwhile, the judgment creditor who had executed on her bank account received exactly nothing: Because Chase's NSF fees consumed the entire account balance, there was nothing left over for the dentist. In effect, the serving of the execution by the judgment creditor caused the entire balance of Ms. B's account to be transferred, not to be judgment creditor, but to Chase.

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Pennsylvania

J and his wife, now deceased, purchased a Ford Focus automobile and entered into a retail installment contract for the purchase. After defaulting on this contract, the car was repossessed and sold, and a default judgment was entered against them for the deficiency, costs, and attorney fees totaling \$12,370.64.

J has been disabled and unable to work since 1996 and is now sixty-seven years old. His sole source of income is Social Security disability payments of \$963.00 per month.

J is a customer of CSB Bank, where he has a checking account into which the monthly Social Security payments are electronically deposited each month. On each such electronic deposit, a notation is prominently displayed identifying the source of such deposits: "SSA US TREASURY 303 SOC SEC."

J's creditor on the judgment against him and his wife obtained a writ of execution from the court clerk, which was served on CSB Bank, instructing it to attach all J's bank accounts that are subject to attachment. Although CSB Bank had actual knowledge that the funds in J's account were Social Security payments (and therefore exempt from both execution and attachment), the bank nevertheless froze J's account for more than a month.

J's account was eventually unfrozen, but CSB Bank charged J \$340.00 in legal fees on the basis that it incurred fees to clear up the matter. These charges were simply taken by CSB Bank from J's account at the bank which contained only Social Security benefits.

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Virginia

Mrs. Ruby Fauntleroy is 74 year old resident of Arlington, Virginia. She is a grandmother living in low-income housing. She tried for years to pay off the Capitol One debt (about \$4,000, incurred mostly due to medical needs). She would pay \$50 per month, but they demanded more, telling her that she might as well send nothing, if she's only going to send \$50/month. So, she said ok. Now, due to interest and late fees, that same debt is up to about \$7,000.

After Capitol One obtained a judgment against her in Richmond, Virginia, a garnishment order was also in Richmond. Her bank account in Arlington was frozen pursuant to the garnishment order before her legal aid attorneys had sufficient time to have the case removed to Arlington or for her to submit any response. However, both the Mrs. Fauntleroy's own Arlington bank and Capitol One, the garnishor, were notified in person and in writing about the exempt status of the fund in her bank account.

When her bank account was frozen, she borrowed money to pay her rent; she stopped the direct deposit of her SSA check to her bank; she stopped buying medicines; she started buying money orders to pay her bills. Money orders are difficult because she has physical difficulty getting around, and no means to travel other than public transportation. She is now too frightened of the banking system to trust them again and has left a few dollars in her account to keep it open, but is too afraid to use it.

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