

# Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment<sup>†</sup>

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### I. Introduction

"I'm sorry, your card has been declined." These words may trigger a range of emotions from mild embarrassment to frightened panic. They may also inform veterans' widows, disability benefits recipients, and retirees that their bank accounts—accounts often holding their only means of subsistence—are frozen.<sup>1</sup> Encouraged by the government to have their benefits checks directly deposited into bank accounts,<sup>2</sup> and under the (legally valid) impression that private creditors do not have the right to seize their benefit money,<sup>3</sup> these vulnerable citizens nonetheless cannot access their funds. How did this happen?

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1. See *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing Before the S. Fin. Comm.*, 110th Cong. (Sept. 2007) [hereinafter Taliaferro, *Frozen Out*], available at <http://www.senate.gov/~finance/hearings/testimony/2007test/092007testwt.pdf> (statement of Waverly Taliaferro, Social Security beneficiary, New York, New York, 3) (describing two freezes of his bank accounts containing Social Security retirement benefits); Rob Johnson & Ray Reed, *Observers Debate Banks' Obligations in Garnishments*, ROANOKE TIMES, Nov. 6, 2006 at A1 (describing freezing of a disability beneficiary's account); Ellen E. Schultz, *The Debt Collector vs. The Widow*, WALL ST. J., Apr. 28, 2007, at A1 (telling the story of a veteran's widow who had her benefits frozen).

2. See Soc. Sec. Admin., Social Security Online: Direct Deposit, <http://www.ssa.gov/deposit> (last visited Oct. 14, 2008) (extolling the virtues of direct deposit: "No more waiting in line. It's safe, quick and convenient.") (on file with the Washington and Lee Law Review); Press Release, Dep't of Veterans Affairs, VA Begins Direct Deposit Program for Insurance Payments (Aug. 6, 1998), available at <http://www1.va.gov/opa/pressrel/pressrelease.cfm?id=97> ("Veterans and beneficiaries won't have to worry if their check is lost in the mail or stolen," said VA Under Secretary for Benefits Joe Thompson. "Electronic fund transfer will give them the peace of mind of knowing their payments are guaranteed to be on time, every time."); Electronic Transfer Account (ETA)—Direct Deposit/EFT [Electronic Funds Transfer] Facts, <http://www.eta-find.gov/DirectDepositFacts.cfm> (last visited Oct. 14, 2008) (listing convenience, reliability, security, and flexibility as positive attributes of direct deposit) (on file with the Washington and Lee Law Review).

3. See 42 U.S.C. § 407(a) (2000) (protecting Social Security Benefits); 42 U.S.C. § 1383(d)(1) (2000) (protecting Supplemental Security Income Benefits); 38 U.S.C. § 5301(a)(1) (Supp. V 2005) (protecting Veterans' Benefits); 5 U.S.C. § 8346 (2006) (protecting Federal Civil Service Retirement Benefits); 45 U.S.C. § 231m (2000 & LEXIS 2009 current through Pub. L. No. 110-460) (protecting Federal Railroad Retirement Benefits). *But see infra* note 44 (discussing exceptions that allow garnishment of funds otherwise exempted under 42 U.S.C. § 407 to collect certain domestic support and governmental obligations).

When the accountholder contacts the bank, she will discover that a creditor has filed a garnishment order against her account, which the bank has frozen. To remedy the situation, she must go to court for a hearing. Weeks will pass before she can access her funds, and even after the law has exonerated her—by determining that the creditor never had a right to the funds in the first place—the bank will charge her a substantial fee for the "service" of garnishing her account, as well as fees for any checks written and returned during the freeze.<sup>4</sup> She will likely request to receive all future benefits checks through the mail, subjecting her to check-cashing fees, the danger of carrying cash, and delays in payment receipt—the problems that direct deposit was designed to avoid.

To be sure, in most cases the benefit recipient voluntarily incurred the debt that ultimately led to the garnishment order and subsequent account freeze. Be that as it may, federal law prioritizes beneficiaries' claims to their funds over the judgments of standard creditors.<sup>5</sup> Thus, the scenario described above defies congressional intent. Freezing accounts based on garnishment orders directed toward exempt funds finds no support in policy considerations. Bank fees made pursuant to the freeze also run contrary to the public interest. As a consumer advocacy group recently noted: "It makes no sense . . . 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."<sup>6</sup>

Congressional intent to preserve beneficiaries' rights and access to subsistence funds currently lies tangled in a web of widely diverging state laws and bank policies. This Note calls for disentanglement—ideally through detailed, comprehensive legislation. This legislation should facilitate automation

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4. See *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing before the S. Fin. Comm.*, 110th Cong. (2007) [hereinafter Saunders, *Frozen Out*], available at <http://www.senate.gov/~finance/hearings/testimony/2007test/092007testms.pdf> (statement of Margot Saunders, Counsel, National Consumer Law Center, 4, 9) (describing the process for a beneficiary to prove exemption; listing standard bank fees). According to a recent Social Security Administration (SSA) Report, America's twelve largest financial institutions collected \$994,143 in fees for garnishing accounts containing electronically deposited Social Security benefits. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., PUBL'N NO. A-15-08-28031, CONGRESSIONAL RESPONSE REPORT: FINANCIAL INSTITUTIONS DEDUCTING FEES AND GARNISHMENTS FROM SOCIAL SECURITY BENEFITS 10 (2008) [hereinafter SSA REPORT], available at <http://www.ssa.gov/oig/ADOBEPDF/A-15-08-28031.pdf>. This figure excludes (because of the institution's lack of data) four of the twelve largest financial institutions, and also excludes all smaller institutions. *Id.* app. C at C-3. Thus, the total dollar amount of garnishments by all financial institutions is likely much higher.

5. See *supra* note 3 and accompanying text (discussing federal exemption statutes).

6. Saunders, *Frozen Out*, *supra* note 4, at 7.

of exempt fund identification, ensure recognition of priority creditors,<sup>7</sup> require banks to assert exemptions on behalf of debtors, prescribe a uniform accounting method, and provide an enforcement mechanism. While legislation effectuating these elements would have placed an onerous burden before the information age, banking technology makes compliance significantly easier today.<sup>8</sup> Practical problems are surmountable; Congress needs only the political will to act.

Structurally, this Note first illustrates, in Part II, the process through which "exempt funds"<sup>9</sup> in bank accounts are frozen by the banks and potentially paid to the creditor if the beneficiary<sup>10</sup> fails to act in time or effectively. Part III then describes and evaluates federal and state statutes bearing upon exempt fund garnishment, surveying the laws of all states and focusing on the specific procedures in Virginia. Part IV examines Due Process and Supremacy Clause challenges to state garnishment statutes that provide inadequate beneficiary protection, contending that all state laws violate both clauses to varying degrees. Moving from the process and law as they currently exist to the process and law as they should be, Part V identifies public and private action that would remedy or alleviate the problems of freezing and garnishing exempt funds. Part VI assesses the approaches suggested in Part V, finding private action inadequate, finding promise in federal regulatory and state legislative action, and recommending congressional legislation as the optimal method of beneficiary protection. Ultimately this Note concludes that a federal flat exemption, of the type currently required under California and Connecticut law,<sup>11</sup> would provide an effective interim solution.<sup>12</sup> The best long-term solution would require banks to assert actual exemption amounts on behalf of beneficiaries.

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7. See *infra* note 44 and accompanying text (allowing garnishment of otherwise exempt funds to pay certain domestic relations and governmental obligations).

8. See Saunders, *Frozen Out*, *supra* note 4, at 5 ("The [banking information] technology is simple—every electronic deposit is denominated by the source and type of funds.").

9. This phrase appears throughout the document in reference to the list of statutes *supra* note 3, subject to the qualifications listed *infra* note 44 and exceptions to those qualifications described *infra* notes 62–66 and accompanying text.

10. This Note uses the words "beneficiary," "debtor," and "depositor" interchangeably. Although these words have obviously distinct meanings, the legal issues in this Note refer only to beneficiaries who are both debtors and depositors, so all three terms above will apply to a person described as any of them.

11. See *infra* notes 37, 87 (describing California and Connecticut requirements that banks make a certain portion of any account containing electronically deposited exempt funds available to the depositor).

12. See *infra* Part V.A.1 (proposing this interim solution as part of a broader legislative package).

## II. Overview of The Exempt Funds Garnishment Process

The path from benefits receipt to attempted recovery of funds and fees takes many twists and turns. While most of the legal issues addressed in this Note arise towards the end of the process, an understanding of the steps leading to the garnishment order and account freeze clarifies the problems facing creditors, debtors, and banks. Thus, this Part examines the process from soup to nuts, illustrating each step of the typical exempt fund garnishment scenario—beginning with benefits determination and ending with post-garnishment claims in court.<sup>13</sup>

Upon award of a federal benefit, such as Social Security or Veterans' benefits, the determining agency instructs the recipient to designate a bank account for receipt of funds by direct deposit or, if necessary, to open an account.<sup>14</sup> Although the recipient may choose to opt out and receive benefits

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13. This Note addresses only situations in which the bank and creditor are separate entities. For a discussion of whether banks may deduct fees for loans they make to customers from these customers' bank accounts containing exempt funds, see Loren Prizant, Note, *Offsets Or Upsets? An Examination of the Role of 42 U.S.C. § 407 in Relation to a Bank's Setoff of Social Security Benefits*, 42 BRANDEIS L.J. 169, 171 (2003) (contending that bank setoff of funds does not constitute the "legal process" required under 42 U.S.C. § 407).

14. See 31 C.F.R. § 208.3 (2008) (providing that all federal disbursements must be electronically deposited unless recipient obtains a waiver under 31 C.F.R. 208.4); *id.* § 208.7(b) (directing benefit-granting agencies to develop procedures facilitating direct deposit). The Department of the Treasury reportedly intends to alter existing regulations to require electronic deposit for *all* beneficiaries with bank accounts. Letter from Margot Saunders, Counsel, National Consumer Law Center, at 9 n.25 (Nov. 27, 2007), *in response to* Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) [hereinafter Saunders, Response to Proposed Guidance], available at [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_7\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_7_1.pdf). Many banks offer programs, called Electronic Transfer Accounts (ETAs), specifically for federal benefits depositors. See 31 C.F.R. § 208.5 (2008) ("Any Federally-insured financial institution shall be eligible, but not required, to offer ETAs as Treasury's Financial Agent."); see also ETA Homepage, <http://www.eta-find.gov> (last visited Oct. 14, 2008) (allowing beneficiaries to search for the closest available participating financial institution) (on file with the Washington and Lee Law Review). Banks have reported, however, that benefits-only accounts are not popular with customers. See Letter from Andrea Beggs, Senior Vice President, JPMorgan Chase & Co., at 8 (Nov. 27, 2007), *in response to* Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) [hereinafter Beggs, Response to Proposed Guidance], available at [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_14\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_14_1.pdf) ("Consumers clearly prefer the convenience and flexibility of an account that allows all types of deposits."); Letter from Kathleen Kloiber Koch, Assoc. Gen. Counsel, Bank of America, at 8 (Nov. 27, 2007), *in response to* Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) [hereinafter Koch, Response to Proposed Guidance], available at [http://www.federalreserve.gov/SECRS/2007/December/20071204/OP-1294/OP-1294\\_21\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/December/20071204/OP-1294/OP-1294_21_1.pdf) ("The ETA account could not accept non-benefit deposits and was not widely accepted by consumers.").

checks by mail, most recipients do not.<sup>15</sup> After this initial deposit, the agency electronically deposits benefits monthly unless the recipient opts out of direct deposit.

The next event in the sequence involves an extension of credit to the benefits recipient. This credit extension arises in a number of ways. For example, the beneficiary may accept an unsolicited credit card offer through the mail, take out a line of store credit, or receive hospital services effectively rendered on credit.<sup>16</sup> The beneficiary then defaults on the debt. When late payments add up, the creditor undertakes debt collection efforts. Such efforts may include late payment notifications, warnings, and referral to a collection agency.<sup>17</sup>

When hope of collection without legal action has failed, the creditor sues and obtains judgment against the debtor in state court, often by default judgment.<sup>18</sup> The creditor gives the debtor notice of the suit, usually through a template form.<sup>19</sup> If payment from the debtor is not immediately forthcoming, the creditor may seek a garnishment order.<sup>20</sup>

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15. See Schultz, *supra* note 1 (showing a steady increase in the percentage—currently over 80%—of Social Security checks deposited directly into bank accounts).

16. See *Belser v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 472 (7th Cir. 2007) ("Ella Belser bought products from JCPenney using a house-label credit card."); Schultz, *supra* note 1 (noting that an unpaid hospital bill led to a court judgment and subsequent garnishment of exempt funds); Henry L. Woodward, Commentary, *Now Where, Exactly, was that Safety Net for a Vet's Widow?*, ROANOKE TIMES, June 23, 2002, at Horizon 3 (telling the story of a benefits recipient who had her bank account garnished based on debt from an unsolicited credit card offer received through the mail). This Note does not examine mortgage and automobile financing, as the creditor's security interest in the house or automobile typically precludes the need to garnish a bank account to recover the debt.

17. See ACA International, Collections Information, <http://www.acainternational.org/KnowledgeBase/default.aspx?cid=5431> (last visited Oct. 14, 2008) (collecting statistics on collection agencies, which currently number 6,500 in the United States) (on file with the Washington and Lee University Law Review).

18. No data are available regarding the frequency of default judgments, which are very difficult to reverse. See, e.g., VA. CODE ANN. § 8.01-428(A) (2007) (requiring a plaintiff wishing to set aside a default judgment to prove: (1) fraud; (2) a void judgment; (3) proof of settlement; or (4) that defendant was in active military service at the time of the judgment); *Charles v. Precision Tune, Inc.*, 414 S.E.2d 831, 833 (Va. 1992) (holding that a court may not set aside a default judgment unless defendant meets the proof required by § 8.01-428). As these debtors usually have no grounds to contest a creditor's claim, default judgments likely constitute a high percentage of judgments in the consumer credit context.

19. Debtors sometimes complain that these forms provide inadequate notice. See, e.g., *Belser*, 480 F.3d at 473 (discussing plaintiff's assertion that, due to unclear language in letters from the creditor, she could not identify which creditor had initially sued and obtained default judgment against her). The paucity of published case law in this area probably derives from the high prevalence of default judgments; the debtor often has few or no grounds for contestation. See *supra* note 18 (discussing default judgments).

20. For an example of state-specific garnishment procedures, see *infra* Part III.B.2

With judgment in hand, the creditor locates funds to garnish. Once funds are found, the creditor serves a copy of the garnishment summons on the bank holding the funds and notifies the judgment debtor.<sup>21</sup> The creditor has no legal responsibility to verify whether an account may contain exempt funds before proceeding with a garnishment order.<sup>22</sup> The garnishment order commands the bank to file an answer, hand over the funds immediately, or withhold funds until a court establishes the validity of the garnishment.<sup>23</sup> As it happens, creditors "often blanket all banks within a given area in an attempt to locate assets of a debtor;" thus, there is a good chance that the bank will not have any of the debtor's accounts.<sup>24</sup>

When the bank receives the garnishment order, it freezes the beneficiary's account.<sup>25</sup> The freeze takes effect immediately upon request, and the beneficiary may not withdraw any funds until the bank lifts the freeze, possibly even if the garnishment order requests less than the amount of funds remaining in the account.<sup>26</sup> The bank typically charges fees to the beneficiary both for the

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(detailing Virginia's garnishment procedures).

21. See, e.g., Garnishment Summons, Va. Form DC-451 (2007), available at <http://www.courts.state.va.us/forms/district/dc451.pdf> (providing detailed instructions to the bank receiving the garnishment order); Request for Hearing—Garnishment Exemption Claim, Va. Form DC-454 (2007), available at <http://www.courts.state.va.us/forms/district/dc454.pdf> (notifying judgment debtor of exemptions from garnishment, including Social Security and Veterans' benefits). This form is not, of course, designed to provide the debtor with advance notice of the garnishment; this would cause shrewd debtors to withdraw all funds immediately.

22. While most state laws do not include an affirmative requirement that the creditor determine such funds are not exempt, some state laws do impose this duty on the creditor. See, e.g., OHIO REV. CODE ANN. § 2716.11 (West 2006) (requiring a creditor to sign an affidavit asserting a "reasonable basis to believe" that the garnishee has nonexempt property); *Lee v. Javitch, Block & Rathbone, LLP*, 484 F. Supp. 2d 816, 820 (S.D. Ohio 2007) (finding a creditor's "subjective belief" that a garnishee might have nonexempt property insufficient to comport with Ohio law). Alaska and Arizona have similar code provisions. See ALASKA STAT. § 09.38.080(b) (2006) (requiring the creditor to affirm a "reason to believe" that the garnishee has nonexempt property); ARIZ. REV. STAT. ANN. § 12-1572(2) (2003) (requiring "good reason to believe" that a garnishee has nonexempt property). Still, the success of such a measure depends on a debtor's willingness and ability to assert her rights following the garnishment.

23. See, e.g., Garnishment Summons, Va. Form DC-451 (2007), available at <http://www.courts.state.va.us/forms/district/dc451.pdf> ("You are hereby commanded to (1) file a written answer with this court, or (2) deliver payment to this court, or (3) appear before this court on the hearing date and time shown on this summons . . .").

24. SSA REPORT, *supra* note 4, app. F at F-2. Although beyond the scope of this Note, this creditor practice appears to be a further waste of banks' time and resources.

25. See Saunders, *Frozen Out*, *supra* note 4, at 3–4 (describing a standard bank response to garnishment orders, which is to freeze the account as instructed on the garnishment order).

26. See Schultz, *supra* note 1 (noting that a garnishment order for \$125 resulted in freezing the beneficiary debtor's account containing \$679).

freeze (\$100–\$150) and for each automated or check transaction (\$25–\$35) she makes while her funds are unavailable due to the account freeze.<sup>27</sup>

When the beneficiary realizes that the funds in her account have disappeared, her first likely reaction is to contact the bank. The bank then informs the beneficiary that a creditor has claimed the funds via garnishment order and that the funds will not be available until a court determines the exempt status of the funds.<sup>28</sup> A few banks will immediately recognize the exempt status of the funds and release the freeze on the account.<sup>29</sup>

After the bank freezes the account, the beneficiary receives the garnishment notice from the creditor.<sup>30</sup> This notice includes a form to request a hearing for claiming exemptions.<sup>31</sup> The beneficiary attends the hearing, bringing benefits documentation—as instructed by the notice—to demonstrate the exemption.<sup>32</sup> The court then issues the garnishment disposition, notifying the creditor that funds cannot be garnished and prompting the bank to lift the account freeze.<sup>33</sup> This entire process may take weeks, even months.<sup>34</sup> Even when the sequence is complete, the creditor may later issue another

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27. See Saunders, *Frozen Out*, *supra* note 4, at 7 (describing typical bank fees).

28. Although in many states creditors are required to provide notice of the garnishment to the debtor, *see, e.g., supra* note 21 and accompanying text, this notice often does not reach the debtor before the funds are frozen, and even if it does, few consumer debtors are likely to understand its practical implications, *see* Saunders, *Frozen Out*, *supra* note 4, at 4 ("[M]ost 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.").

29. Many such banks, if exempt funds are identifiable, would not have frozen the account in the first place. See Henry Woodward, Editorial, *Keeping Protected Income Safe*, ROANOKE TIMES, Oct. 27, 2007, at B9 (noting that benefits recipients "may be able to switch to a credit union or locally owned bank that will do the 'right thing,'" asserting in the garnishment answer that the account contains no garnishable funds); *see also* Saunders, *Frozen Out*, *supra* note 4, at 15 n.33 (providing a list of banks with stated policies not to honor garnishment orders if an account contains only exempt funds).

30. See VA. CODE ANN. § 8.01-511 (2007) (requiring the judgment creditor to mail a copy of the garnishment order to the debtor *after* service on the bank).

31. See *id.* § 8.01-512.4 (requiring the judgment creditor to provide the judgment debtor with notice of possible exemptions, including a list of "major exemptions under federal and state law").

32. See *id.* (requiring notice that instructs judgment debtors to bring documentation proving exemptions to the hearing).

33. See, e.g., Garnishment Disposition, Va. Form DC-453 (2006) (allowing the creditor to release the garnishment for reasons specified on a list that does not include exempt status of the garnished funds) (on file with the Washington and Lee Law Review).

34. See Taliaferro, *Frozen Out*, *supra* note 1, at 2 (describing twenty-three days without access to funds); Schultz, *supra* note 1 (describing a three-month delay for a beneficiary in Minnesota).



garnishment order on the same account, freezing the funds again and forcing the beneficiary to assert her exemption once more.<sup>35</sup>

Accounts that commingle exempt funds with nonexempt funds present a challenge for depositors and banks alike in determining exemption.<sup>36</sup> Under current law in most states, the burden falls on the debtor to demonstrate that funds in the account are exempt.<sup>37</sup> One deposit containing a small sum of nonexempt funds can "contaminate" the beneficiary's account, throwing into question the exempt status of all funds.<sup>38</sup>

To this point, this sequence description presumes that the beneficiary knows her benefits are exempt and asserts that exemption. Some beneficiaries, however, may not know that their benefits are exempt, and thus may never challenge the garnishment order.<sup>39</sup> Because most beneficiaries depend on their benefits for subsistence, beneficiaries will likely take every action within their power to gain access to the funds. Given the vulnerability of the beneficiary population, however, some are powerless to take action, and creditors receive the benefit money despite the federal protections. A recent Social Security Administration report estimates that in fiscal year 2007, \$177.7 million was transferred to creditors through garnishment procedures from bank accounts

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35. See *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing Before the S. Finance Comm.*, 110th Cong. (2007) [hereinafter Williams, *Frozen Out*], available at <http://www.senate.gov/~finance/hearings/testimony/2007test/092007testjw.pdf> (statement of Julie L. Williams, Chief Counsel, Office of the Comptroller of the Currency, 5) (describing recurring garnishment orders that repeatedly freeze exempt funds).

36. Compare Brief of Amicus Curiae New York Bankers Association in Support of Defendant-Appellee HSBC Bank USA at 21, *Huggins v. Pataki*, No. 02-7950 (2d Cir. 2003), available at 2003 WL 23475663 ("There is no single method by which presumptively-exempt funds could be segregated and, in any event, it would be unreasonably complex for banks to implement such a procedure on a broad scale."), with Saunders, *Frozen Out*, *supra* note 4, at 5 ("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 automatic use by banks . . .").

37. See, e.g., ALASKA STAT. § 09.38.080(f) (2006). For an exception to prevailing state laws, see CAL. CIV. PROC. CODE § 704.080(b) (West Supp. 2008) (exempting statutorily defined amounts—ranging from \$1,225 to \$3,650 depending upon the number of depositors and type of benefits—from garnishment without a debtor claim).

38. See Taliaferro, *Frozen Out*, *supra* note 1, at 2–3 (describing how a bank's promotional gift for opening an account rendered the funds commingled, making the account freezable and undermining the bank's promise not to freeze accounts containing only Social Security funds).

39. This problem is particularly likely to arise in states that do not require that the court or creditor provide notice to the debtor of the garnishment. See *infra* Part III.B, notes 97–98 and accompanying text (describing states that do not provide for notice to the debtor); see also *Deary v. Guardian Loan Co.*, 534 F. Supp. 1178, 1184 (S.D.N.Y. 1982) (considering argument that debtors may "presume that once a judgment has been entered, there is nothing they can do to prevent collection of the debt from whatever funds they may possess").

containing directly deposited Social Security benefits.<sup>40</sup> No data are available on the amount or incidence of account freezes, which present a more common problem.

If the beneficiary's challenge to the garnishment does not succeed, or if the beneficiary wishes to recover bank fees, she may file suit on statutory or constitutional claims.<sup>41</sup> At this point, however, the beneficiary has already suffered considerable harm; she has been cut off from her benefits, often resorting to desperate and humiliating measures simply to subsist.<sup>42</sup>

### III. Statutory Law

In the model federalist arrangement, state and federal statutory law dovetail neatly, each with its own well-defined sphere of sovereignty. In practice, however, the two spheres of legislation often overlap—forcing courts to choose which law to apply—or under-lap—leaving gaps that courts and private actors must fill. The relationship of federal beneficiary protection law to state garnishment law provides a scenario that can be viewed either way—that neither state nor federal law covers the situation, or that the two sets of laws conflict directly. Subpart A identifies the relevant federal laws and their often complex interplay. Subpart B assesses pertinent state statutes, noting the gaps left between these statutory schemes and the commands of federal law that allow account freezes and garnishment of exempt funds to occur.

#### A. Federal Law

Several federal statutes bear upon exempt fund garnishment; this subpart discusses them in rough order of importance to the issue. The exemption statutes themselves provide the analytical foundation.<sup>43</sup> Other statutes qualify these exemptions, allowing garnishment for certain limited purposes.<sup>44</sup> Still

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40. SSA REPORT, *supra* note 4, at 9.

41. *See infra* note 74 and accompanying text (describing claims brought under the Fair Debt Collection Practices Act (FDCPA)); *infra* Part IV (describing constitutional challenges to state garnishment procedures).

42. *See, e.g.*, Taliaferro, *Frozen Out*, *supra* note 1, at 2 (describing his twenty-three days without access to his benefits: "We ate all our staples, spent the silver dollars I'd saved as keep-sakes, and then survived off a ten pound bag of brown rice.").

43. *See supra* note 3 and accompanying text (listing the exemption statutes).

44. *See* 42 U.S.C. § 659(a) (2000) (allowing garnishment of funds otherwise exempted under 42 U.S.C. § 407 to collect child support and alimony payments); 26 U.S.C. § 6334(c) (2000) (allowing garnishment of benefits to collect unpaid federal taxes); 26 U.S.C. § 6331(h)

other statutes and regulations interact with these qualifications, limiting the amount of exempt funds that may be garnished to a specified percentage of the benefit.<sup>45</sup> The Federal Financial Management Act of 1994 (FFMA)<sup>46</sup> and the Debt Collection Improvement Act of 1996 (DCIA)<sup>47</sup> require electronic deposit of federal benefits and enable federal agencies to deduct certain debts from exempt federal benefits.<sup>48</sup> Finally, the Fair Debt Collection Practices Act (FDCPA),<sup>49</sup> although it does not affect exemptions directly, may serve as a basis for challenging garnishment tactics by debt collectors. Although this collection of statutes does not provide an exhaustive list of federal laws affecting exempt fund garnishment,<sup>50</sup> it does define the primary framework for considering the pertinent legal issues.

Title II, Section 208 of the Social Security Act of 1935<sup>51</sup> provides the most broadly applicable exemption. It exempts Social Security benefits from all legal process, including garnishment. Subsection (a), the operative provision, reads as follows:

The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution,

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(2000) (authorizing the Internal Revenue Service to collect overdue federal tax debts of beneficiaries by levying up to 15% of each monthly payment until the debt is paid); 26 U.S.C. § 3402(p) (2000 & Supp. V 2005) (allowing beneficiaries to elect to have a percentage of benefits withheld and paid to the Internal Revenue Service to satisfy federal income tax liability); 31 U.S.C. § 3716(c)(3)(A) (2000) (rendering benefits subject to administrative offset to another federal agency for nontax debts).

45. *See, e.g.*, 15 U.S.C. § 1673 (2006) (limiting garnishment to 25% of disposable earnings unless an exception applies); 20 C.F.R. § 350.4(a) (2008) (limiting garnishment of Railroad Retirement benefits for support obligations to 65%).

46. Federal Financial Management Act of 1994, Pub. L. No. 103-356, § 401, 110 Stat. 3410, 3412 (codified as amended in scattered sections of 31 U.S.C.) (establishing various rules regarding agency finances, including a requirement to electronically deposit federal benefits).

47. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321, 1321-358 (codified as amended in scattered sections of 31 U.S.C.) (addressing collection of debts owed to the federal government).

48. *See infra* notes 68–73 and accompanying text (discussing the impact of these two Acts).

49. Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692–1692o (2006)) (restricting collection mechanisms available to creditors).

50. For an example of a federal statute tangentially affecting exempt fund garnishment, see 12 U.S.C. § 91 (2006) (prohibiting pre-judgment or mesne attachment of funds held by a national bank).

51. Act of Aug. 14, 1935, ch. 531, Pub. L. 74-271 § 208, 49 Stat. 620, 625 (enacting exemption language now codified at 42 U.S.C. § 407(a) (2000)).

levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.<sup>52</sup>

The statute provides broad protection from any practice rendering benefits "subject" to "legal process."<sup>53</sup> Its purpose, plainly enough, is protection of beneficiaries and their dependents from claims of creditors.<sup>54</sup> Other statutes exempt other federal benefits (including Veterans', Federal Civil Service Retirement, and Federal Railroad Retirement Benefits) from most claims of garnishment.<sup>55</sup>

Several statutes qualify 42 U.S.C. § 407.<sup>56</sup> One major qualification, enacted in 1975, allows garnishment of benefits to pay child support and alimony.<sup>57</sup> As one court stated, "The purpose of exemptions is to relieve the person exempted from the pressure of claims hostile not only to his own essential needs *but also to those of his dependents*."<sup>58</sup> Public policy does not view family support as an interest hostile to the beneficiary, nor does it view the need for familial support payments as any less important than the beneficiary's need. In some instances, such support payment might represent the family member's only source of income. Thus, Congress allows garnishment of benefits for familial support.

Other qualifications enable the federal government to collect its debts. One code section enables the Internal Revenue Service to garnish exempt funds to collect back taxes,<sup>59</sup> and another allows beneficiaries to voluntarily withhold

52. *Id.*

53. While the U.S. Code does not define "legal process," the U.S. Supreme Court recently defined legal process as process "requir[ing] utilization of some judicial or quasi-judicial mechanism . . . by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003). For an argument that freezing a bank account pursuant to a garnishment order constitutes an action subjecting benefits to legal process, see *infra* Part IV.B.

54. See, e.g., French v. Dir., Mich. Dep't of Soc. Servs., 285 N.W.2d 427, 431 n.4 (Mich. Ct. App. 1979) ("[T]he purpose of § 407 of the Social Security Act is to protect the benefits recipient and those dependent on him from claims of creditors." (citing Brown v. Brown, 288 N.E.2d 852, 853 (Ohio App. 1972))).

55. *Supra* note 3. In this Note, for purposes of simplicity and clarity, 42 U.S.C. § 407 serves as the primary reference point for discussions of exempt federal benefits.

56. See *supra* note 44 (defining debts, such as child support and alimony, for which Social Security Disability benefits lose their exempt status).

57. See Social Services Amendments of 1974, Pub. L. No. § 459, 93-647, 88 Stat. 2337, 2357-58 (1975) (amending 42 U.S.C. § 659 to allow legal process upon federal benefits to recover child support and alimony payments).

58. Thiel v. Thiel, 197 A.2d 354, 357 (N.J. 1964) (emphasis added).

59. 26 U.S.C. §§ 6331(h), 6334(c) (2000).

a portion of benefits to cover future tax liability.<sup>60</sup> A third provision allows administrative offset of nontax debts owed to other federal agencies.<sup>61</sup>

These qualifications, however, may themselves be qualified. Supplemental Security Income (SSI) benefits, for instance, are not subject to garnishment for *any* reason, including child support and alimony.<sup>62</sup> This variance presents challenges to familial support creditors, government agencies, garnishees, and debtors alike. Administrative offsets are also subject to limitations—\$9,000 per year in benefits remain exempt from administrative offset.<sup>63</sup> Because this offset typically occurs pre-deposit, this qualification does not present a major issue. Potential domestic relations and government garnishment of post-deposit benefits funds could, however, be subject to this qualification.<sup>64</sup> Another qualification comes from the Consumer Credit Protection Act (CCPA),<sup>65</sup> which limits the amount of income that a creditor may garnish to between fifty and sixty-five percent depending on the obligation.<sup>66</sup>

In assessing the interrelation of the various exemption statutes, statutes excepting certain preferred creditors from the exemption, and statutes limiting the extent of the preferred creditors' exceptions, potential practical problems abound. For example, consider the scenario of a domestic support creditor seeking to garnish exempt funds. Several steps must occur in identifying the proper amount of exemption. First, the general exemption from legal process

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60. 26 U.S.C. § 3402(p) (2000 & Supp. V 2005).

61. 31 U.S.C. § 3716(c)(3)(A) (2000).

62. Although no statute explicitly codifies this ban on garnishing SSI funds, courts and agencies recognize it. *See, e.g.,* Davis v. Office of Child Support Enforcement, 20 S.W.3d 273, 276 (Ark. 2000) (noting that 42 U.S.C. § 659 qualifications apply only to money paid in remuneration for past employment, making these qualifications inapplicable to SSI benefits); Metz v. Metz, 101 P.3d 779, 782–83 (Nev. 2004) (contrasting SSI, a "federal social welfare program" contingent upon means testing and not prior work-related income, with Social Security Disability (SSD) benefits, available contingent upon prior work income regardless of the beneficiary's means); *see also* E-mail from Soc. Sec. Admin. to Allen Myers (Dec. 17, 2007, 08:38 EST) ("Supplemental Security Income (SSI) payments are not the same as Social Security benefits. SSI payments are not subject to levy or garnishment.") (on file with the Washington and Lee Law Review).

63. 31 U.S.C. § 3716(c)(3)(A)(ii) (2000).

64. *See* SSA REPORT, *supra* note 4, app. C at C-3 (showing that the nation's twelve largest financial institutions processed over \$9 million in garnishments for preferred creditors).

65. Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601 (2006)) (establishing safeguards for consumer debtors).

66. *See* 15 U.S.C. § 1673(b)(2) (2006) (limiting the percentage of earnings that may be garnished); *see also* 20 C.F.R. § 350.4(a) (2008) (limiting child support and alimony garnishment to 65% of a Railroad Retirement recipient's benefit). The word "earnings" is defined to include pension and retirement program income. 15 U.S.C. § 1672 (2000).

must be identified. Second, the creditor must assert the domestic support qualification. Third, the debtor must assert the CCPA garnishment limitation. While the math does not present overwhelming challenges, the process of manually identifying and asserting these exemptions requires knowledge and vigilance.<sup>67</sup> In practice, few garnishment orders may present this sort of complexity. Banks, beneficiaries, and creditors, however, must deal with these exemption issues when they arise.

Two acts of Congress set the problem of exempt fund garnishment into full swing. The FFMA initiated the move towards electronic funds transfer, stating that all federal benefit payments would henceforth be made by direct deposit.<sup>68</sup> The DCIA required that "all federal payments made after January 1, 1999, shall be made by electronic funds transfer."<sup>69</sup> As a result, more federal benefits money sits in banking accounts, far more vulnerable to garnishment than its exempt legal status would suggest.

Legislative intent behind the DCIA is somewhat opaque. First, Congress passed the Act as part of an omnibus appropriations bill, hardly an ideal subject for divination.<sup>70</sup> Second, the Act's stated purposes included both "maximiz[ing] collections of delinquent debts owed the government"<sup>71</sup> and "ensur[ing] that debtors have all appropriate due process rights."<sup>72</sup> The Act also provided for the administrative offset of federal funds referenced above.<sup>73</sup> While these statutes demonstrated no specific intent to weaken the exempt status of federal benefits in relation to private creditors, that has been the statutes' effect.

Finally, the FDCPA may come into play in garnishment litigation. Some beneficiaries have succeeded with claims that a debt collector's failure to

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67. The potential complexity of this manual process makes garnishment exemption assessment a prime candidate for automation, as discussed *infra* Parts V.A.2 and V.B.

68. Federal Financial Management Act of 1994, Pub. L. No. 103-356, § 402, 108 Stat. 3410, 3412 (codified as amended at 31 U.S.C. § 3332 (2000)) (requiring electronic payment of federal benefits).

69. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134 § 31001(x)(1)(A), 110 Stat. 1321, 1321-376 (1996) (codified as amended at 31 U.S.C. § 3332(f)(1) (2000)); *see also* 31 C.F.R. §§ 208.1-208.11 (2008) (setting forth regulations effectuating electronic benefits disbursement).

70. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-358 (introducing the DCIA on the 358th page of the appropriations bill).

71. *Id.* § 31001(b), 110 Stat. at 1321-358 (listing the maximization of collection of debts owed to the government as the legislation's first stated purpose). Nothing in the statutory language suggests any intent to facilitate debt collection for private creditors.

72. *Id.* § 31001(b), 110 Stat. at 1321-359 (listing debtor due process protection as the fifth stated purpose).

73. *See supra* note 44 and accompanying text (describing various offsets).

investigate whether or not funds in a bank account were exempt before seeking garnishment violates the FDCPA.<sup>74</sup> This remedy, however, requires a state law placing the burden on debt collectors to check bank accounts before garnishing them.<sup>75</sup>

What emerges from the federal statutory picture is a web of laws working, to some extent, at cross-purposes with one another. While the exemption statutes assert the strongest influence and serve as the basis for all of the other laws, statutes that qualify these exemptions make clear that the exemptions are not absolute. While the FDCPA seeks to protect consumers from unscrupulous predatory collection, the DCIA specifically seeks to facilitate debt collection.<sup>76</sup> Although none of these laws directly conflict with one another, some of these statutes have inadvertently eroded the foundational federal benefits protection laws. The laws that have most severely eroded benefits protection, however, come from state legislatures.

### B. State Law

State law controls the procedural mechanics of garnishment, including protection of benefits therefrom. Because garnishment is a creature of statute, "in derogation of the common law,"<sup>77</sup> and because federal law does little to circumscribe garnishment processes, state statutory schemes serve a vitally important role in protecting benefits from garnishment. Nonetheless, the vast majority of state garnishment regimes leave beneficiary debtors subject to account freezes, and some statutory structures do not even require notice to the debtor.

Section 1 of this subpart surveys the law in all fifty states. Rather than addressing each state's laws individually in cumbersome detail, this subpart groups states into three classes according to the level of protection the state provides to beneficiaries: (1) states providing extraordinary protection;

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74. See *Hogue v. Palisades Collection, LLC*, 494 F. Supp. 2d 1043, 1051 (S.D. Iowa 2007) (holding that plaintiff stated an FDCPA claim based on creditor's failure to investigate); *Jordan v. Thomas & Thomas*, No. C-1-04-296, 2007 WL 2838474, at \*1 (S.D. Ohio Sept. 26, 2007) (denying defendant's motion for summary judgment on plaintiff's FDCPA claim).

75. See *Hogue*, 494 F. Supp. 2d at 1048 (noting that Iowa law does not disallow judgment creditors from discovering details about a debtor's assets); *Jordan*, 2007 WL 2838474 at \*4 (stating the Ohio requirement that a judgment creditor have a reasonable basis to believe that the funds sought to be garnished are not exempt).

76. See *supra* note 71 and accompanying text (noting collections-oriented purpose).

77. *Fed. Sav. & Loan Ins. Corp. v. S. & W. Constr. Co. of Tenn.*, 475 So. 2d 145, 147 (Miss. 1985); see also *Freeport Motor Cas. Co. v. Madden*, 188 N.E. 415, 417 (Ill. 1933) ("Garnishment is a statutory proceeding unknown to the common law.").

(2) states providing notice; and (3) states providing nothing.<sup>78</sup> This subpart then notes other garnishee rights and obligations under state law that affect exempt fund garnishment and identifies state law trends over the past thirty years. Following this overview of all states, section 2 of this subpart focuses on the post-judgment garnishment process in Virginia. The Virginia discussion includes a substantial shift in state law stemming from a 1983 case, and an example of a minor change to the state's standard garnishment form that produces a major impact on banks and beneficiary debtors.

### *1. Overview of the Fifty States (and the District of Columbia)*

All states have laws providing for garnishment of bank accounts—whether referred to as trustee process,<sup>79</sup> restraining notice,<sup>80</sup> or garnishment<sup>81</sup>—to execute judgments against debtors. The methods (or lack thereof) by which the states protect exempt funds from garnishment, however, vary widely. Congress noted "great disparities among the laws of the several States relating to garnishment" in 1968,<sup>82</sup> and the laws appear just as disparate today.<sup>83</sup> Nevertheless, one can identify common characteristics in garnishment law among certain groupings of states. Using a survey of state garnishment law conducted in 1980,<sup>84</sup> and comparing state law then to state law today, this Note identifies three main classes of state statutory schemes.

The first class, which numbers only four states, provides extraordinary protection to accounts containing exempt funds. The second and largest class, which includes forty states, requires notice to the debtor of the garnishment, and often of the right to exemptions and a hearing. The third class, containing

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78. See *infra* Appendix: State Law Survey for an overview of each state's garnishment procedure; the appendix groups states by class.

79. See, e.g., ME. REV. STAT. ANN. tit. 14, §§ 2601–3105 (2003 & Supp. 2007) (setting forth Maine's trustee process); MASS. GEN. LAWS ANN. ch. 246 §§ 1–83 (West 2004) (describing trustee process in Massachusetts).

80. See N.Y. C.P.L.R. 5222 (McKinney 1997 & Supp. 2008) (referring to garnishment notice to the garnishee and debtor as "restraining notice").

81. See, e.g., Va. Code Ann. §§ 8.01-511 to -525 (2007) (describing Virginia's garnishment process).

82. Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, § 301(a)(3), 82 Stat. 146, 163 (codified at 15 U.S.C. § 1671(a)(3) (2006)).

83. See SSA REPORT, *supra* note 4, at 5 ("From our review, we determined the laws of the States [relating to garnishment and account freezes] were not uniform.").

84. See *Finberg v. Sullivan*, 634 F.2d 50, 86–93 (3d Cir. 1980) (Aldisert, J., dissenting) (surveying garnishment law in the District of Columbia and forty-nine states).



seven states and the District of Columbia, provides no clear procedure (and sometimes no procedure at all)<sup>85</sup> for notifying the debtor of garnishment.

California, Connecticut, New York, and Pennsylvania all provide extraordinary protection to beneficiary debtors. California, Connecticut, and New York each require a bank, if an account contains reasonably identifiable exempt funds, to exempt a certain dollar amount from garnishment. In California, this amount depends on the type of benefits received and the number of accountholders.<sup>86</sup> In Connecticut, a flat \$1,000 exemption applies to all accounts containing identifiable exempt funds deposited within the thirty days prior to the garnishment order.<sup>87</sup> New York recently enacted a law exempting \$2,500 from accounts containing readily identifiable electronically deposited exempt benefits.<sup>88</sup> Pennsylvania provides an even more extraordinary protection; any account in which an agency regularly deposits exempt funds electronically—even an account containing both exempt and nonexempt funds—is completely immune from garnishment.<sup>89</sup> Pennsylvania's statutory scheme also protects banks from good faith errors made when asserting exemptions in their responses to garnishment orders.<sup>90</sup> While the Pennsylvania statutory scheme may raise issues of what happens when a bank fails, in good faith, to identify exempt funds, it relieves banks from the threat of liability for claiming exemptions on behalf of debtors.

Most states fall into the second class. This class of states provides for garnishment notice to debtors, but places the burden upon debtors to assert the exemption. Intricacies of notice requirements vary widely amongst these states. Some states define a detailed garnishment form that includes a list of the most

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85. See, e.g., S.C. CODE ANN. §§ 15-39-350 to -490 (2005) (setting forth a garnishment scheme without requiring notice to the judgment debtor). Such a scheme may not survive a due process challenge. See *infra* note 98 (describing similar state statutes overruled on due process grounds).

86. See CAL. CIV. PROC. CODE § 7.04.080(b) (West Supp. 2008) (defining account exemption amounts—from \$1,225 to \$3,650—based on the number of depositors and type of benefits).

87. See CONN. GEN. STAT. ANN. § 52-367b(c) (West 2005 & Supp. 2008) (exempting the lesser of the account balance or \$1,000 from garnishment if the account contains readily identifiable exempt funds deposited within thirty days of the bank receiving the garnishment order).

88. See N.Y. C.P.L.R. 5205(l) (McKinney 1997 & Supp. 2009) (exempting \$2,500 in any account containing reasonably identifiable exempt benefits deposited within forty-five days of the garnishment order). The law took effect on January 1, 2009.

89. See PA. R.C.P. NO. 3111.1 (West Supp. 2008) (exempting all funds in an account in which funds are deposited electronically on a regularly recurring basis).

90. See *id.* at No. 3146(b)(2) (immunizing garnishee from liability to creditor for funds identified as exempt).

common exemptions.<sup>91</sup> Others only inform the debtor that she may have the right to assert exemptions.<sup>92</sup> Still others do not address exemptions at all.<sup>93</sup> The notice may provide a form for the debtor to request a hearing.<sup>94</sup> It may suggest the debtor take certain action to assert exemptions.<sup>95</sup> It may not describe the process for asserting exemptions at all.<sup>96</sup>

The third class of states provides no notice to debtors of the garnishment or exemptions.<sup>97</sup> Several courts in states with such laws have held that garnishment of exempt benefit funds without notice to the debtor constitutes a deprivation without due process in violation of the Fourteenth Amendment.<sup>98</sup> While no case law suggests that these statutes would survive a due process challenge today, such statutes remain on the books in six states and the District of Columbia.

Although this Note categorizes the states based primarily on notice provided to the debtor, some state laws impact the process in other ways. Some statutes, for instance, speak to the rights and obligations of garnishee banks to act on behalf of debtors.<sup>99</sup> Some states also provide for general monetary

91. *See, e.g.*, VA. CODE ANN. § 8.01-512.4 (2007) (requiring notice to debtor of exemptions with a form for claiming them and instructions for filing the claim and requesting a hearing).

92. *See, e.g.*, KAN. STAT. ANN. § 60-735(a)(2) (2005) (defining Kansas notice procedure, which informs debtor of right to assert exemptions, but does not require notice of what exemptions might exist).

93. *See, e.g.*, COLO. REV. STAT. § 13-55-102 (2008) (stating that in Colorado, notice must be served to debtor upon a property seizure writ, but not defining contents thereof).

94. *See supra* note 91 (identifying Virginia exemption and hearing request form requirements).

95. *See, e.g.*, TENN. CODE ANN. § 26-2-404 (2000 & Supp. 2008) (directing the debtor to go to the clerk's office and complete a form).

96. *See, e.g.*, N.J. STAT. ANN. § 2A:17-63 (West 2000) (identifying that notice to debtor is required while mentioning nothing as to the content of the notice).

97. According to a letter from one bank, some state laws may actually *prohibit* notice to the debtor. *See* Beggs, Response to Proposed Guidance, *supra* note 14, at 3 n.1 ("Some seizure warrants and forfeiture notices issued on behalf of federal or state authorities are filed under seal and the financial institution is prohibited from notifying the accountholder of the seizure.").

98. *See* Davis v. Paschall, 640 F. Supp. 198, 203 (E.D. Ark. 1986) (holding that Arkansas statutes did not contain adequate procedural safeguards to protect debtor due process rights); Dorwart v. Caraway, 966 P.2d 1121, 1146-47 (Mont. 1998) (holding that Montana law violates due process by not providing notice of seizure, exemptions, and hearing procedure), *overruled on other grounds by* Trs. of Ind. Univ. v. Buxbaum, 69 P.3d 663, 674 (Mont. 2003). In both Arkansas and Montana, these decisions led to state legislation providing for notice to the debtor. *See* ARK. CODE ANN. § 16-110-402(1)(A) (2006) (requiring notice to debtor of garnishment and hearing rights); MONT. CODE ANN. § 25-13-211 (2007) (requiring notice to debtor of the seizure, right to exemptions, and procedure for contesting the garnishment).

99. *See* 735 ILL. COMP. STAT. ANN. 5/12-707 (West 2003) (setting forth duties of

exemptions that appear to justify exempting funds from any source in a bank account.<sup>100</sup> Some statutes shield banks from liability when acting in good faith to assert an exemption,<sup>101</sup> to freeze the account,<sup>102</sup> and in one state even for delivering the funds to the creditor.<sup>103</sup> Three states require creditors to sign an affidavit stating that they have a "reasonable basis to believe" that the garnishee has nonexempt property of the debtor.<sup>104</sup>

When mentioning state laws that impact exempt fund garnishment, no discussion would be complete without mentioning garnishee liability. Virtually every state has a statute holding a garnishee liable for ignoring or failing to comply with a garnishment order.<sup>105</sup> In such instances, the bank is personally liable to the creditor for the amount of the debt.<sup>106</sup> Notable, however, is the lack of a single reported case in which a bank was held liable for asserting that funds were exempted by law from garnishment.<sup>107</sup> While banks (and the

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garnishee to hold any "non-exempt" property, thereby implying a right to identify exemptions and refuse to turn over exempt property); MD. RULE 2-645(e) (LexisNexis 2008) (allowing garnishee to assert "any defense that the judgment debtor could assert").

100. See 42 PA. STAT. ANN. § 8123 (West 2007) (providing a general monetary exemption of \$300); W. VA. CODE ANN. § 38-8-1 (LexisNexis 2005) (including \$1,000 on deposit as a general exemption); WIS. STAT. ANN. § 815.18 (West 2007) (including \$1,000 in a depository account as a personal use exemption).

101. See, e.g., CONN. GEN. STAT. ANN. § 52-367b(o) (West 2005 & Supp. 2008) (providing good faith immunity for banks making "bona fide error[s]" in attempting to prevent garnishment of exempt funds).

102. See, e.g., MINN. STAT. ANN. § 571.73 (West 2000) (shielding garnishees from liability for wrongful retention of funds if such retention is done in good faith).

103. See N.M. STAT. § 35-12-12 (1996) ("In any action by a defendant against a garnishee based on any indebtedness of the garnishee or on possession of any personal property, it is a conclusive defense for the garnishee to show that the . . . property [was] delivered under judgment of the magistrate court in a garnishment proceeding.").

104. ALASKA STAT. § 09.38.080(b) (2006); ARIZ. REV. STAT. ANN. § 12-1572(2) (2003); OHIO REV. CODE ANN. § 2716.11 (West 2006). Imposing the duty upon creditors to verify the nonexempt status of funds in an account provides considerable beneficiary protection, exceeded only by first-class state laws requiring banks to prevent freezes on certain levels of exempt funds.

105. See, e.g., IOWA CODE ANN. § 642.13 (West 1995) (holding garnishee liable if it has money from debtor that it does not pay according to the garnishment order). As of November 2008, the author is unaware of any state that does not hold a garnishee liable for *ignoring* a garnishment order, although this does not mean that *asserting an exemption* leads to liability. Some states explicitly reject the notion of bank liability for asserting a debtor's exemptions. See, e.g., PA. R.C.P. No. 3146(b)(2) (West Supp. 2008) (providing safe harbor for banks that misidentify funds as exempt).

106. See *Mazzuka v. Bank of N. Am.*, 280 N.Y.S.2d 495, 500–01 (N.Y. Civ. Ct. 1967) (holding a bank liable for negligently releasing funds to a debtor). No exemption was at issue in *Mazzuka*.

107. See Saunders, Response to Proposed Guidance, *supra* note 14, at 16 ("[W]e have

agencies that regulate them) often assert the threat of liability under state law as a reason for freezing the account while a court considers the exemption,<sup>108</sup> this threat has never materialized. State garnishee liability laws, as applied to exempt fund garnishment, stand as nothing more than paper tigers that banks have no rational basis to fear (unless, of course, they ignore garnishment orders altogether).

Overall, state law gives one great cause for concern, but also offers glimmers of hope for beneficiary debtor protection. Several banks have endorsed the statutory schemes in California and Connecticut as potential models for nationwide legislation or regulation.<sup>109</sup> Additionally, twenty-five states have enacted laws since 1980 improving debtor notice or protection.<sup>110</sup> Yet in all states but four, banks find support in state statutes and rules for freezing accounts containing exempt funds. And in every state but Pennsylvania,<sup>111</sup> the debtor may be required to assert the burden of proving the exemption before the bank will release all funds in the account. The demands of this structure on the often indigent and almost always vulnerable population of beneficiaries seem startlingly inconsistent with the broad statutory protections that 42 U.S.C. § 407 affords federal benefits.

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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.").

108. For two examples of agencies asserting that this threat of liability justifies bank freezes, see *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing before the S. Fin. Comm.*, 110th Cong. (2007) [hereinafter Kelsey, *Frozen Out*], <http://www.senate.gov/~finance/hearings/testimony/2007test/092007testsk.pdf> (statement of Sara Kelsey, General Counsel, Federal Deposit Insurance Corporation, 11) (identifying bank liability that could potentially follow from a bank failing to freeze a debtor's account) and Williams, *Frozen Out*, *supra* note 35, at 2 ("Where financial institutions impose a freeze on an account, as noted above, they are doing so pursuant to court orders or state law procedures.").

109. See Beggs, Response to Proposed Guidance, *supra* note 14, at 2 ("We believe that the California and Connecticut garnishment laws provide good examples of a workable scheme for automatic exemptions, and we would support federal regulations with a similar approach."); Letter from James S. Keller, PNC Financial Services Group, at 4 (Nov. 27, 2007), in response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) [hereinafter Keller, Response to Proposed Guidance], available at [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_12\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_12_1.pdf) (recommending the California approach).

110. See *infra* Appendix: State Law Survey (identifying these states with an asterisk).

111. See PA. R.C.P. No. 3111.1 (West Supp. 2008) (banning banks from freezing any account containing any exempt funds).

## 2. Focus: Virginia

Virginia, sitting within the second class of states as defined above in subpart III.B.1, provides as good an example of a state statutory garnishment scheme as any other.<sup>112</sup> Virginia has codified its garnishment procedure in VA. CODE ANN. §§ 8.01-511 to -525 (2007). *Harris v. Bailey*,<sup>113</sup> a 1983 case holding that the garnishment procedures in effect at the time violated the debtor's due process rights, significantly shaped Virginia procedure.<sup>114</sup> The *Harris* court chastised Virginia's statutory scheme for failing to provide notice to beneficiary debtors at the time of garnishment and for allowing five months to pass between the institution of garnishment proceedings and recovery of the exempt funds.<sup>115</sup> Virginia statutes now require notice to the debtor and a prompt hearing to assert exemptions.<sup>116</sup>

To begin a post-judgment garnishment proceeding in Virginia, the creditor first fills out a form suggesting to the court issuing the judgment that a certain bank may have funds to pay the judgment.<sup>117</sup> The judgment creditor provides contact information for the bank and the judgment debtor to the clerk of court, who prepares a garnishment summons and mails it to both bank and debtor.<sup>118</sup> The creditor must also provide the total amount of the debt due and attempt in good faith to provide the debtor's Social Security number.<sup>119</sup> Virginia also

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112. For a general overview of exemptions and bank account garnishment in Virginia, see DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA §§ 3.6–3.8 (2d ed. 1994 & Supp. 2008). Professor Rendleman also collects and discusses recent developments in exempt fund garnishment jurisprudence across the country, including issues of bank setoff against exempt funds, attorney liability for misstatements relating to garnishment requests, communications from debt collectors to debtors, and limitations on the amount of funds in an account that may be frozen. *Id.* § 3.6(A) (Supp. 2008).

113. *Harris v. Bailey*, 574 F. Supp. 966, 970 (W.D. Va. 1983) (concluding that "the Virginia post-judgment garnishment procedures demonstrate[] several deficiencies").

114. *Id.*

115. *Id.*

116. See VA. CODE ANN. § 8.01-512.4 (2007) (requiring that creditor mail a prescribed notice form to debtor listing exemptions and explaining how to assert them); *id.* § 8.01-512.5 (mandating a hearing within seven days of filing the exemption form).

117. *Id.* § 8.01-511 (stating that the clerk of the court will issue the garnishment summons upon creditor's request and provision of information); *id.* § 8.01-512.3 (defining required content of garnishment summons form).

118. See *id.* § 8.01-511 (identifying required information that a creditor must provide about the debtor, debt, and garnishee).

119. See *id.* (stating requirement, and authorizing creditor to serve interrogatories upon debtor for purposes of obtaining this information).

requires that the summons specify whether it seeks to garnish wages or property.<sup>120</sup>

The bank receives a garnishment summons<sup>121</sup> and a garnishee answer form.<sup>122</sup> Virginia gives the garnishee ninety days to answer a property garnishment summons.<sup>123</sup> The garnishee summons provides detailed instructions to the bank for filling out the garnishee answer form.<sup>124</sup> Between 2004 and 2006, this summons informed the garnishee that if the account contained only federal benefits funds, such as Social Security payments, the funds were exempt.<sup>125</sup> In 2006, responding to bank pressure, the Virginia Supreme Court Rules Committee removed this exemption language from the form.<sup>126</sup> In 2006, before removal of this exemption language, a state trial judge held a large bank in contempt for ignoring the summons' warning that federal benefits were exempt from garnishment, awarding attorney's fees to the beneficiary.<sup>127</sup> Today, the basis for that finding of liability no longer exists, simply because one sentence was removed from the garnishment form.

While the bank fills out the garnishee answer form, the beneficiary debtor (assuming she has the individual capacity or advice of competent counsel) fills out the exemption form. Presumably, the debtor must request a hearing within

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120. *See id.* (directing the creditor to select wage garnishment for notices sent to employers, and property garnishment for notices sent to banks, such as those that end up catching exempt federal benefits); *id.* § 8.01-512.3 (informing employer garnishees of statutory limitations on the amount of wages that may be garnished, but providing no analogous notification of exemptions for property garnishment).

121. *See* Garnishment Summons, Va. Form DC-451 (2007), <http://www.courts.state.va.us/forms/district/dc451.pdf> (last visited Oct. 14, 2008) (providing detailed instructions to the bank receiving the garnishment order) (on file with the Washington and Lee Law Review).

122. *See* Garnishee's Answer, Va. Form DC-456 (2006), <http://www.courts.state.va.us/forms/district/dc456.pdf> (last visited Oct. 14, 2008) (providing the form for answering a garnishment request) (on file with the Washington and Lee Law Review).

123. *See* VA. CODE. ANN. § 8.01-514 (2007) (contrasting with 180 days to answer a wage garnishment summons).

124. *See supra* note 122 (identifying the Garnishee's Answer form in Virginia).

125. *See* Katie Kuehner-Hebert, *Who Determines Whether a Deposit Can Be Garnished?*, AM. BANKER, Dec. 15, 2006, at 7, 7 (describing banks' desire for relief from the burden of identifying exempt funds).

126. *See* James W. Speer, *Protecting Disability Benefits from Creditors*, 41 CLEARINGHOUSE REV. 382, 387 (2007) (describing the battle between legal aid attorneys and large banking interests over the content of the garnishment summons form, and noting the willingness of some small banks to refrain from freezing accounts automatically upon receiving a garnishment summons).

127. *Id.* (noting that this case prompted banks to "flex their political muscle" to get the garnishment form changed back to the pre-2004 version, which did not mention exemptions).

the ninety days the bank has to answer,<sup>128</sup> although the notice form does not give a timeline.<sup>129</sup> The debtor mails or personally delivers this form to the court issuing the garnishment order, and the statute promises a hearing within seven days of filing the exemption claim.<sup>130</sup> If all goes as it should, the debtor brings benefits documentation to the hearing, the judge recognizes the exemption, the court issues the garnishment disposition form,<sup>131</sup> and the bank releases the funds; the process takes at least three weeks from freeze to recovery. If all does not go as it should, the commingling of nonexempt funds with exempt funds may present an obstacle to asserting the exemption,<sup>132</sup> or the debtor may not be able to respond to the request for hearing—in which case the exemption, not asserted, is lost.

The pitfalls of this scheme for elderly and disabled beneficiaries are easy to identify. The federal law's guarantee of benefits protection gets lost in the mundane details of statutes, court orders, and forms. Yet, as noted above, many states have similar (and worse) schemes in place. If such schemes do not directly violate the letter of federal exemption law, they certainly violate its spirit.

#### *IV. Constitutional Challenges to State Garnishment Statutes*

Beneficiary debtors aggrieved by state garnishment laws have taken their grievances to court on two constitutional bases. First, the beneficiary may argue that, under the Fourteenth Amendment, the state procedure denied her due process commensurate with the deprivation.<sup>133</sup> Second, she may contend

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128. See VA. CODE ANN. § 8.01-514 (2007) (noting that the bank has ninety days to respond to a garnishment order).

129. See *id.* § 8.01-512.4 (defining notice exemption form, but not defining the due date). Presumably, the court assumes that the debtor will be motivated to act quickly by the need to recover funds needed for subsistence.

130. See *id.* § 8.01-512.5 (noting the seven-day hearing requirement).

131. See *supra* note 33 and accompanying text (identifying the Virginia Garnishment Disposition form).

132. See *Bernardini v. Cent. Nat'l Bank of Richmond*, 290 S.E.2d 863, 865 (Va. 1982) (holding, in a setoff case, that benefits lost their exempt status when commingled with nonexempt funds); *Rue & Assocs., Inc. v. White*, 71 Va. Cir. 6, 9 (2006) (following *Bernardini*, despite acknowledging that several federal courts have questioned the decision, in allowing a judgment creditor to garnish a joint bank account containing exempt Social Security benefits).

133. See U.S. CONST. amend. XIV, § 1 (prohibiting state deprivation of "life, liberty, or property, without due process of law"); see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (announcing a three-factor framework for due process analysis: (1) private interest; (2) "risk of an erroneous deprivation . . . and the probable value, if any, of additional or substitute procedural safeguards"; and (3) government interest).

that the state statutory scheme violates the Supremacy Clause.<sup>134</sup> Under the existing body of case law, her likelihood of success on the merits depends largely upon the notice and other protections that her state provides. In all states but Pennsylvania,<sup>135</sup> however, a court may construe—and this Note contends *should* construe—the statutory scheme to violate both constitutional provisions referenced above.

#### A. Due Process

The Fourteenth Amendment of the U.S. Constitution guarantees that no person shall be deprived of "life, liberty, or property, without due process of law."<sup>136</sup> Federal benefits constitute property, and are thus subject to due process protections.<sup>137</sup> Due process arguments rest on the analysis that the Supreme Court set forth in *Mathews v. Eldridge*.<sup>138</sup> Noting the flexibility of procedural due process analysis, the *Mathews* Court asserted three factors to weigh in assessing the adequacy of existing pre-deprivation process: (1) the private interest involved; (2) the risk of erroneous deprivation, and value of additional procedures to prevent it; and (3) the government (or public) interest.<sup>139</sup> Although this test does not fit neatly with the garnishment scenario's multiple private actors, it does provide a framework for assessing the deprivation in light of the interests at stake and potential procedural alternatives.<sup>140</sup>

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134. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . ."); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (framing the issue of federal supremacy as whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

135. See PA. R.C.P. NO. 3111.1 (West Supp. 2008) (banning banks from freezing any account containing any exempt funds).

136. U.S. CONST. amend. XIV, § 1.

137. See *Mathews*, 424 U.S. at 332 ("The interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment.")

138. See *id.* at 349 (holding that the Social Security Administration's benefits termination procedures did not violate due process). For an analysis of debtor due process rights under *Mathews* in 1986, see Diana Gribbon Motz & Andrew H. Baida, *The Due Process Rights of Postjudgment Debtors and Child Support Obligor*, 45 MD. L. REV. 61, 66–80 (1986).

139. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (identifying the three-factor test); see also *id.* at 347 (referring to the government interest factor as "the public interest").

140. See *Finberg v. Sullivan*, 634 F.2d 50, 84 (3d Cir. 1980) (Aldisert, J., dissenting)



### 1. Due Process: Theory

Before examining how courts have assessed due process in the exempt fund garnishment context, this subpart examines how the three *Mathews* factors apply conceptually. The first factor, private interest, clearly implicates the beneficiary's interest in her benefits—both in freedom from deprivation, and in uninterrupted access.<sup>141</sup> The interests of banks and creditors represent separate private interests, primarily in maximizing profit and minimizing liability.<sup>142</sup> Although these bank and creditor interests need not conflict with the beneficiary's interests, most state statutory schemes place bank and beneficiary interests in unavoidable opposition.

The second factor, risk of erroneous deprivation, includes two types of risk in this context. First and most severely, a bank may wrongfully transfer benefit funds to the creditor.<sup>143</sup> Second, an account freeze may deny the beneficiary access to her benefits for a period of weeks.<sup>144</sup> Many state procedures appear to tolerably ameliorate the first risk type, frequently preventing total deprivation of the benefit. The risk of temporary deprivation through an account freeze, however, is not a "risk"—it is a virtual certainty in most states.<sup>145</sup>

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(paraphrasing the *Mathews* test as asking a two-part question: "[H]ow seriously is the complainant being hurt and how much will it cost to afford him or her a more effective procedure?"); *Granger v. Harris*, No. CV-05-3607 (SJF)(ARL), 2007 WL 1213416, at \*7 (E.D.N.Y. Apr. 17, 2007) (distinguishing a prior judge's refusal to reapply the *Mathews* balancing test in light of changed technology).

141. See *Finberg*, 634 F.2d at 58 (noting a "very compelling" debtor interest in funds often needed for subsistence, and often deprived for two weeks or longer).

142. See *id.* (noting the creditor's "strong interest in a prompt and inexpensive satisfaction of the debt"). The *Finberg* court did not mention the bank's interests in its analysis. Banks often characterize themselves as uninvolved parties caught between the competing interests of creditors and debtors. See, e.g., Letter from Joseph R. Crouse, Legislative and Regulatory Counsel, Consumer Bankers Association, at 3 (Nov. 27, 2007), in response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) [hereinafter Crouse, Response to Proposed Guidance], available at [http://www.federalreserve.gov/SECRC/2007/November/20071129/OP-1294/OP-1294\\_8\\_1.pdf](http://www.federalreserve.gov/SECRC/2007/November/20071129/OP-1294/OP-1294_8_1.pdf) ("[W]hen a Garnishment is received, the bank is the innocent third party caught between a creditor and a debtor, operating without clear rules governing how it is supposed to respond, but having all the liability if it errs in favor of one side or the other."). Banks do, however, assert their own independent interests when freezing accounts to avoid liability under state law.

143. See, e.g., *infra* note 162–164 (identifying a case in which the creditor received the funds).

144. See, e.g., *infra* note 165 (identifying a case in which several banks froze the accounts of several beneficiaries and ultimately released the funds back to the beneficiaries).

145. See *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837(CPS), 2005 WL 2105810, at \*14 (E.D.N.Y. Aug. 31, 2005) (noting an increased risk of deprivation in the modern era of electronic deposit and, in New York, electronic restraining notice upon banks).

The other inquiry under the second *Mathews* factor, the value of additional procedure, assesses the potential of new processes to protect beneficiaries.<sup>146</sup> Additional procedures provide clear value to the debtor in this context. If exempt funds are not frozen, beneficiaries suffer neither the near-certain temporary deprivation nor the possibility of total deprivation.

The third factor, government and public interests, concerns both the cost to the public of implementing extra procedures to protect the deprived party, as well as any benefits to the public or government from the change in procedures.<sup>147</sup> A given set of procedures may have a positive, negative, or negligible impact on the public interest. In terms of positive impact, the government interest in keeping beneficiaries out of poverty benefits from additional procedures.<sup>148</sup> On the other side of the ledger, the government must pay many costs of enforcing and adjudicating new debtor protection laws. These examples present only two of the numerous ways that new garnishment procedures would affect the public interest.<sup>149</sup> Courts weigh these impacts along with the other variables in the *Mathews* analysis.<sup>150</sup>

Balancing these factors, the beneficiary has a substantial interest in uninterrupted access to subsistence funds, and additional procedures have considerable value. Beyond implementation, the costs of additional procedures to the government are negligible. The major costs of additional procedures to

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146. For purposes of this discussion, additional procedures include: notice to debtor (in states not currently requiring notice); a requirement that banks determine whether an account contains exempt funds before freezing it; and a requirement that creditors verify whether an account contains exempt funds before seeking a garnishment order.

147. Analytically, one might also view the government interest as including the impact on banks and creditors as state actors. See *Mayers*, 2005 WL 2105810, at \*9–10 (identifying banks as state actors when complying with statutory directives to freeze accounts). For example, procedures requiring creditors to investigate whether funds are exempt prior to issuing a garnishment summons help debtors at the expense of creditors. See *supra* note 22 (discussing this requirement of OHIO REV. CODE ANN. § 2716.11 (West 2006)). Similarly, procedures requiring the bank to assert exemptions on behalf of the beneficiary help debtors at the possible expense of banks. Whether one considers these impacts as affecting private interest or government interest matters not; what does matter is that one identifies and weighs these interests in the due process analysis.

148. See *supra* note 6 and accompanying text (arguing, on policy grounds, against fees devolving from freezes).

149. See *McCahey v. L.P. Investors*, 774 F.2d 543, 549 (2d Cir. 1985) (identifying state interests in providing rapid judgment collection mechanisms, making "efficient use of judicial resources," and ensuring that creditors do not evade exemption laws).

150. See, e.g., *Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir. 1980) (finding that providing notice to the debtor "would not place a great burden on the state").

prevent account freezes fall upon creditors and banks.<sup>151</sup> On close examination, overall long-term costs to banks and creditors also appear minimal.

Modern information technology has reduced the labor needed to identify exempt funds considerably over the past thirty years.<sup>152</sup> For a creditor to assess whether funds in an account are exempt before seeking a garnishment order, a creditor may simply call or email the bank. For a bank to determine whether funds are exempt before freezing them, the bank reviews recent electronic deposits to determine whether they constitute exempt funds.<sup>153</sup> Automation has the potential to further simplify this process for banks and creditors alike.<sup>154</sup>

This calculation should also include cost savings to creditors and banks. If a creditor identifies that funds are exempt before issuing a garnishment summons, costs are limited to the inquiry identifying the exemption. A creditor not identifying this exemption up front will continue pursuing the funds, incurring all of the procedural costs through the exemption hearing, and will still end up unable to recover the exempt funds.<sup>155</sup> Banks also currently face time-consuming procedures when responding to garnishment orders.<sup>156</sup> If the bank may assert the exemption up front, however, it avoids all subsequent response costs.

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151. In measuring the private interests of banks and creditors, one must limit consideration to those interests that comply with federal law. Absent this limitation, procedures affording minimal debtor protection maximize bank and creditor profits—the bank gains maximum fees and the creditor collects maximum debt when the debtor has minimal notice of garnishment and her right to contest it. However, to the extent that profit maximization seizes exempt funds in violation of federal law, due process analysis should not take illicit private interests into consideration.

152. Thirty years ago, a bank needed to manually locate and review all deposits into the account, examining each paper source to determine exempt status. Today, a bank's computer system stores (or could store) all information needed to assess exemptions. Although systems interface and accounting issues point to areas of potential further improvement, *see infra* Part V.A.1, the ability of banks to identify exemptions has already improved greatly over the past three decades.

153. *See* Beggs, Response to Proposed Guidance, *supra* note 14, at 4–5 (describing the bank's process for identifying exempt funds and declining to freeze the account if only exempt funds were deposited within the past ninety days). Identifying funds deposited by check may prove more difficult, *see id.* at 5, although process and technology enhancements may reduce the manual processing required for identifying check deposits as well.

154. *See infra* Parts V.A.2 and V.B (discussing potential improvements to both the government system of encoding benefits and banking information technology systems—for the benefit of both creditors and banks—to identify exempt funds).

155. This argument postulates a debtor who is willing and able to assert her rights.

156. *See, e.g.,* Beggs, Response to Proposed Guidance, *supra* note 14, at 6–7 (describing the complex and resource-intensive nature of garnishment processing).

## 2. Due Process: Application in Court

Not surprisingly, the success of due process challenges varies according to the nature of the state law challenged. Challenges to laws that do not provide notice to the debtor of garnishment, exemptions, and right to a hearing have met with resounding success. Challenges to laws that *do* provide notice to the debtor have not fared so well. Two recent courts, however, have demonstrated a willingness to reconsider due process in light of technological advances.

As noted in subpart III.B above, cases such as *Harris v. Bailey* have declared due process violations when state statutory schemes have failed to provide notice to the debtor.<sup>157</sup> Beginning with *Finberg v. Sullivan*<sup>158</sup> in 1980, virtually every court reviewing a state statutory scheme that failed to provide notice has invalidated the statute. For cases in which the debtor received notice but with less than a full explanation of exemptions and hearing request procedures, courts have split.<sup>159</sup>

If the debtor received notice of garnishment, exemptions and right to a hearing, most courts have held such procedure to comport with due process requirements. One case explicitly stated that a beneficiary was not entitled to "self-executing exemptions"<sup>160</sup> in denying a challenge to the bank's freezing of his account. Another case explicitly declined to reweigh due process factors in light of modern technology.<sup>161</sup>

Two recent New York cases, however, have made a bit of headway in challenging state schemes that provide notice but allow freezes. *Granger v. Harris*<sup>162</sup> held that the debtor stated a claim when he alleged that the creditor

157. See *Harris v. Bailey*, 574 F. Supp. 966, 970 (W.D. Va. 1983) (invalidating the Virginia procedure); see also *supra* note 98 (describing two declarations of state no-notice garnishment laws as unconstitutional, and identifying subsequent remediation by both state legislatures).

158. See *Finberg v. Sullivan*, 634 F.2d 50, 62 (3d Cir. 1980) (holding that statutes failing to require notice to plaintiff of garnishment, exemptions, and right to hearing violated due process).

159. Compare *Reigh v. Schleigh*, 784 F.2d 1191, 1199 (4th Cir. 1986) (holding that a statutory scheme failing to provide a complete list of exemptions did not violate due process), with *Dionne v. Bouley*, 757 F.2d 1344, 1354 (1st Cir. 1985) (finding that despite actual notice received by debtor, "Rhode Island ha[d] not provided judgment debtors . . . with sufficient, defined procedural process to meet the requirements of the due process clause").

160. *Zeppieri v. New Haven Provision Co.*, 163 F. Supp. 2d 126, 138 (D. Conn. 2001). Although not mentioned in the opinion, the Connecticut law requiring a bank to leave \$1,000 accessible in accounts containing exempt funds, CONN. GEN. STAT. ANN. § 52-367b(c) (West 2005 & Supp. 2008), may have influenced the court's refusal to find a due process violation.

161. See *Huggins v. Pataki*, No. 01-CV-3016(JG), 2002 WL 1732804, at \*4 (E.D.N.Y. July 11, 2002) (suggesting that the plaintiff direct his valid concerns to the state legislature).

162. See *Granger v. Harris*, No. CV-05-3607 (SJF)(ARL), 2007 WL 1213416, at \*8-9

deprived him of due process rights under color of state law.<sup>163</sup> In this case, however, the bank did not just freeze the funds but distributed them to the creditor.<sup>164</sup> In *Mayers v. New York Community Bancorp, Inc.*,<sup>165</sup> the court went even further, denying the bank's summary judgment motion on a due process claim in which the account was frozen but the funds were not disbursed to the creditor.<sup>166</sup> These two cases give beneficiaries a modest precedential basis for challenging any state statutory scheme that allows freezing of exempt funds.

### B. Supremacy Clause

The Supremacy Clause operates differently from the due process clause, applying only when comparing federal law to state law. In the exempt fund garnishment context, the most common Supremacy Clause argument assesses the relationship between 42 U.S.C. § 407, which "imposes a broad bar against the use of any legal process to reach all social security benefits,"<sup>167</sup> and state garnishment laws conflicting therewith.<sup>168</sup> Supreme Court precedent clearly and unequivocally rejects state law that allows permanent deprivation of benefits in contravention of 42 U.S.C. § 407.<sup>169</sup> Courts have differed, however, as to whether laws allowing temporary deprivation of funds—with a possible permanent deprivation if debtor does not assert her rights—violate the Supremacy Clause.<sup>170</sup> Given the "all-inclusive"<sup>171</sup> language of 42 U.S.C.

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(E.D.N.Y. Apr. 17, 2007) (holding that the plaintiff stated a claim that state procedures violated his due process rights under 42 U.S.C. § 1983).

163. *Id.*

164. *See id.* at \*2 (describing the bank's assessment of a \$100 fee before closing the account and sending the remaining funds to the creditor).

165. *See Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837(CPS), 2005 WL 2105810, at \*14 (E.D.N.Y. Aug. 31, 2005) (holding that plaintiff stated a valid due process claim).

166. *Id.*

167. *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973).

168. *See, e.g., Harris v. Bailey*, 574 F. Supp. 966, 971–72 (W.D. Va. 1983) (assessing the Virginia statutory scheme in light of 42 U.S.C. § 407 and finding a Supremacy Clause violation).

169. *See Philpott*, 409 U.S. at 417 (holding that the Supremacy Clause banned a state from garnishing Social Security benefits).

170. *Compare Finberg v. Sullivan*, 634 F.2d 50, 63 (3d Cir. 1980) (finding a Supremacy Clause violation), *with Huggins v. Pataki*, No. 01-CV-3016(JG), 2002 WL 1732804, at \*4 (E.D.N.Y. July 11, 2002) ("[T]he possibility of a temporary loss of access to benefits does not constitute a violation of 42 U.S.C. § 407(a).").

171. *Philpott*, 409 U.S. at 415.

§ 407, the failure of some courts to include an account freeze within the prohibition's purview warrants closer inspection.

In assessing the relationship of 42 U.S.C. § 407 to state laws that allow account freezes, the word "subject" and the term "legal process" emerge as the most crucial determinants of conflict between state and federal law.<sup>172</sup> The word "subject" mitigates strongly toward finding an account freeze unconstitutional. Congress did not state that benefits shall not be *deprived* by garnishment or other legal process—but that they shall not be *subject* to legal process. A plain-language understanding of "subject" in this context warrants shielding the benefit from the vicissitudes of any legal action, particularly action ultimately aiming—and sometimes succeeding—to permanently divest the beneficiary of her exempt funds.

The "legal process" prohibited by 42 U.S.C. § 407 presents a somewhat slipperier concept. The Supreme Court recently addressed the definitional question in *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*.<sup>173</sup>

"[O]ther legal process" should be understood to be process much like the processes of execution, levy, attachment, and garnishment, and at a minimum, would seem to require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability.<sup>174</sup>

In *Keffeler*, the Supreme Court unanimously held that assignment of foster children's Social Security benefits to the state for foster care expenses did not constitute legal process.<sup>175</sup>

Freezing exempt funds pursuant to a garnishment order, however, distinguishes itself markedly from *Keffeler*—the account freeze is not made

172. See 42 U.S.C. § 407(a) (2000) ("The right of any person to any future payment under this title shall not be . . . *subject* to execution, levy, attachment, garnishment, or other legal process . . .") (emphasis added).

173. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003) (holding that a state's garnishment of children's Social Security benefits to reimburse itself for foster care expenses did not violate 42 U.S.C. § 407).

174. *Id.* at 385.

175. *Id.* at 375. The Court listed two primary justifications for this holding. First, the statutory benefits regulation scheme specifically allowed this type of assignment to the state as payee, and 42 U.S.C. § 407 should not be read as inconsistent therewith. *Id.* at 384 n.7. Second, canons of statutory construction suggested that this state process was not similar enough to the relevant statutory term (garnishment) for inclusion within the statute's protection. *Id.* at 384–85.

pursuant to federal law, and provides nothing positive for the beneficiary. More importantly, the account freeze, particularly when made on behalf of a consumer creditor, fits comfortably within the Supreme Court's definition of legal process. The freeze is executed pursuant to a garnishment order—a type of legal process explicitly mentioned in the statute.<sup>176</sup> It flows directly from explicit judicial instruction not to release the funds. "[C]ontrol over property passes from one person to another"<sup>177</sup> when the bank freezes the account. Moreover, the sole purpose of the freeze is to "secure discharge of an allegedly existing or anticipated liability"<sup>178</sup>—without the court order, the freeze itself would be *illegal* process. Viewing the freeze as either an extension of the garnishment order or as a separate legal process, it lies squarely within the broad parameters of 42 U.S.C. § 407.

Case law provides little analysis of the Supremacy Clause's applicability to account freezes. Some cases, in finding a no-notice statute to violate the Supremacy Clause, have construed a long interruption of benefits as incompatible with 42 U.S.C. § 407.<sup>179</sup> In the same opinions, however, the courts promoted a prompt hearing on the exemption as a cure.<sup>180</sup> Such language implies that the length of the deprivation determines whether state and federal law conflict. The federal statute, however, makes no allowance for any length of deprivation.

At some point, evaluating the compatibility of state and federal law requires judicial line-drawing. A year-long deprivation would undeniably violate 42 U.S.C. § 407. A shorter deprivation may lead a court to allow a freeze of several weeks.<sup>181</sup> Statutory language and the Supreme Court's interpretation thereof,<sup>182</sup> however, demand that judges draw the line at the

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176. See 42 U.S.C. § 407(a) (mandating that benefits "shall not be . . . subject to execution, levy, attachment, *garnishment*, or other legal process") (emphasis added).

177. *Keffeler*, 537 U.S. at 385.

178. *Id.*

179. See *Harris v. Bailey*, 574 F. Supp. 966, 969, 972 (W.D. Va. 1983) (finding that "a prompt post-seizure hearing is constitutionally required," and that Virginia garnishment law violated the Supremacy Clause by denying access to exempt funds "for a long period of time"); *Deary v. Guardian Loan Co.*, 534 F. Supp. 1178, 1189 (S.D.N.Y. 1982) (finding a Supremacy Clause violation because "the lack of a meaningful opportunity for prompt hearing suggests that the interruption in benefits for one who wished to challenge the enforcement could be significant").

180. See *supra* note 179 (noting the calls for prompt hearings in *Deary* and *Harris v. Bailey*).

181. See *Huggins v. Pataki*, No. 01-CV-3016(JG), 2002 WL 1732804, at \*4 (E.D.N.Y. July 11, 2002) (rejecting plaintiff's Supremacy Clause argument despite a deprivation of at least several weeks, though not specifying the exact length of the deprivation).

182. See *supra* note 167 and accompanying text (identifying the "broad bar" against

moment of deprivation. Drawing it anywhere else invites speculation and ensures fragmentation of case law interpreting a federal statute that should apply uniformly.

*Mayers*, a recent New York case, provides a precedential leg to stand on when arguing that an account freeze of any duration violates the Supremacy Clause. In denying the bank's motion for summary judgment, the *Mayers* court held that plaintiffs stated facts sufficient to support their Supremacy Clause argument—that the state law obstructed "the purpose of [42 U.S.C.] § 407 to ensure that recipients have the resources necessary to meet their most basic needs."<sup>183</sup> In *Granger*, the court also recognized *Mayers*'s Supremacy Clause argument, although the plaintiff in *Granger* did not make this contention.<sup>184</sup> These two cases, while not exactly foreshadowing a revolution in exempt fund garnishment jurisprudence, provide persuasive reasoning for finding bank freezes to violate the Supremacy Clause if the account contained any reasonably identifiable exempt funds.

## V. Public and Private Solutions

Thus far, this Note has examined the many challenges facing the persons and institutions that exempt fund garnishment affects. This Part moves from challenges to solutions, discussing various steps that public and private actors can take to minimize the incidence of freezes, fees, and garnishment. This Part does not provide a comprehensive list of fixes, but rather suggests approaches—from single-beneficiary action to federal legislation—to combat the numerous problems facing beneficiary debtors.

### A. Public Solutions

Numerous public actors play a role in shaping the garnishment processes that affect exempt funds. Legislatures define (or neglect to define) the processes that private actors must follow and the burdens each party must bear.

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tampering with exempt benefits); *supra* note 174 and accompanying text (defining "legal process" to include procedures similar to garnishment and involving judicial action).

183. *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837(CPS), 2005 WL 2105810, at \*17 (E.D.N.Y. Aug. 31, 2005). The court limited the ruling to accounts containing only directly deposited exempt funds. *Id.*

184. *See Granger v. Harris*, No. CV-05-3607 (SJF)(ARL), 2007 WL 1213416, at \*8 (E.D.N.Y. Apr. 17, 2007) (noting that the Supremacy Clause rationale in *Mayers* may not have applied if argued because the account did not contain solely exempt funds).



Administrative agencies interpret (or decline to interpret) existing legislation as needed through regulations and guidance, filling in the specifics that statutes do not address.<sup>185</sup> Courts step in (or stand aside) when beneficiaries challenge statutes and regulations permitting exempt fund garnishment. Legislatures stand in the best position to effect comprehensive change, but legislative inertia does not foreclose all opportunities for improvement. Regulations can promote interpretations of existing laws favorable to beneficiaries, and courts may be in position to encourage legislative change.<sup>186</sup>

### 1. Legislative Solutions

Congress, with a few quick strokes of its proverbial pen, could virtually eliminate exempt fund account freezes with a simple five-point plan.<sup>187</sup> First, the legislation would order the Department of Treasury to promulgate regulations ensuring that its Automated Clearing House (ACH) codes clearly identify exempt federal benefits. Second, it would require any creditor excepted from the ban on garnishing benefits to indicate its favored status on the garnishment order.<sup>188</sup> Third, it would require banks to assert exemptions on behalf of depositors whose benefits are deposited electronically and provide safe harbor for erroneous good faith exemption claims. Fourth, it would implement an accounting system that enables banks to identify the specific dollar amount of funds to exempt within an account. Finally, the legislation would provide for administrative enforcement in addition to a private right of action.

The first element, requiring that the systems interfacing between the Department of Treasury and banks make all exemptions readily identifiable by the banks' automated systems, contains too much technical detail to cover thoroughly in this Note. Suffice it to say, banks have complained of difficulty in identifying exemptions based on the information that the ACH codes provide

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185. Although courts may perform rulemaking that impacts exempt fund garnishment, *see supra* notes 125–27 and accompanying text (describing the Virginia Supreme Court Rules Committee's change to garnishment forms), this Note considers judicial administrative rulemaking as conceptually distinct from agency rulemaking.

186. *See supra* note 98 and accompanying text (discussing two judicial findings of statutory schemes' constitutional inadequacy, and subsequent amendment of those two states' statutes).

187. A draft of this proposed legislation appears later in this subsection.

188. *See supra* note 44 and accompanying text (identifying the familial and governmental creditors allowed to garnish exempt funds by federal statute).

with each transaction.<sup>189</sup> Technical experts are best suited to define the specific codes that would allow banks to clearly identify exempt federal benefits. Under the current system, banks cannot clearly identify that some deposits are benefits, although banks can identify that these deposits originated from a government agency.<sup>190</sup> If the bank cannot identify the exemption from the ACH codes, the bank must conduct further inquiry into the transaction to determine whether it contains exempt benefits. Such inquiry increases both costs to banks and error rates in identifying exemptions. Modification of ACH codes to ensure that banks receiving the electronic benefits deposit have all information needed to identify exemptions would eliminate the need for manual exemption identification and the problems associated therewith.<sup>191</sup>

The second element, a requirement that preferred creditors indicate their preferred status on a garnishment order,<sup>192</sup> would specifically preempt state law. To implement this requirement, states would add a paragraph to the garnishment order instructing creditors to check a box if any provision of federal law allows the creditor to garnish otherwise exempt funds.<sup>193</sup> This requirement would inform the bank that it should proceed with the garnishment order despite a general exemption, according to the limitations prescribed by the CCPA.<sup>194</sup>

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189. See Keller, Response to Proposed Guidance, *supra* note 109, at 2 (recommending a transaction code to identify exempt funds); Letter from Daniel W. Morton, Senior Counsel, Huntington National Bank, at 4 (Nov. 27, 2007), *in response to* Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007), *available at* [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_5\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_5_1.pdf) (last visited Oct. 14, 2008) (requesting standardization of ACH benefit codes to facilitate bank identification of specific benefits) (on file with the Washington and Lee Law Review).

190. See Keller, Response to Proposed Guidance, *supra* note 109, app. (providing an illustration of information the bank receives with an electronic deposit). Some benefits can be clearly identified from the contents of the "description" field (e.g., "SOC SEC" means Social Security Benefits; "SUPP SEC" means Supplemental Security Income benefits). *Id.* Other transactions, however, are not identifiable as benefit payments and could conceivably constitute government employee salary deposits.

191. The Social Security Administration has reached a similar conclusion, identifying ACH code modification as the first of four "potential safeguards to protect Social Security recipients." SSA REPORT, *supra* note 4, at 10. The American Bankers Association concurs with this recommendation. *Id.* app. F at F-4.

192. This objective may also be accomplished by requiring creditors to garnish benefits directly from the benefits-administering agency. SSA, for example, maintains a Court Ordered Garnishment System (COGS) to pay domestic relations and government creditors directly out of the recipients' benefits; total funds garnished in this manner amounted to nearly \$418 million in fiscal year 2007. SSA REPORT, *supra* note 4, at 14.

193. For a list of these preferred credit obligations, see *supra* note 44 and accompanying text.

194. See *supra* note 66 and accompanying text (describing garnishment limitations).

The third element, requiring banks to assert exemptions on behalf of depositors, constitutes the heart of the legislation.<sup>195</sup> The requirement is as simple as it is important: When banks receive garnishment orders, they must investigate the account to ensure that it contains no exempt funds before freezing it. If the account contains only exempt funds, the bank informs the creditor that nothing in the account may be garnished. To ensure that banks do not incur liability for allowing beneficiaries to withdraw funds, the legislation should also provide a safe harbor for banks asserting exemptions in good faith.<sup>196</sup>

The fourth element provides for a universal accounting method that determines precisely which funds are exempt when nonexempt funds are commingled with the exempt funds.<sup>197</sup> This element is needed for uniform effectuation of the third element. Although no exact statistics are available, banks assert that the majority of accounts containing exempt funds also contain not only nonexempt funds but also funds deposited by a joint accountholder.<sup>198</sup> Commingling thus presents a significant challenge to determining the extent of an exemption.<sup>199</sup> The most beneficiary-friendly accounting mechanism, the "First In, Last Out" principle, considers all nonexempt funds withdrawn before

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195. The SSA OIG report provides inferential support for this proposition, in suggesting that the Social Security Administration "revisit its interpretation of the garnishment exemption provision for Social Security benefits to determine if it should be an absolute bar against the imposition of the freeze or hold." SSA REPORT, *supra* note 4, at 11.

196. Connecticut and Pennsylvania currently have such provisions at the state level. *See* CONN. GEN. STAT. ANN. § 52-367b(o) (West 2005 & Supp. 2008) (providing good faith immunity for banks making "bona fide error[s]" in attempting to prevent garnishment of exempt funds); PA. R.C.P. NO. 3111.1 (West Supp. 2008) (exempting all funds in an account in which funds are deposited electronically on a regularly recurring basis). The American Bankers Association would like to extend this safe harbor to banks when a creditor asserts an exception to the exemption that would allow a domestic relations or governmental creditor to garnish exempt funds. SSA REPORT, *supra* note 4, app. F at F-6.

197. The SSA OIG report also recommends establishment of a universal accounting method, although it does not endorse any method in particular. SSA REPORT, *supra* note 4, at 11.

198. *See* Letter from Chris Scribner, Vice President, Regions Financial Corp., at 2 (Nov. 27, 2007), *in response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds*, 72 Fed. Reg. 55,273 (Sept. 28, 2007), *available at* [http://www.federalreserve.gov/SECRS/2007/November/20071127/OP-1294/OP-1294\\_6\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071127/OP-1294/OP-1294_6_1.pdf) (last visited Oct. 14, 2008) ("[T]he majority of exempt funds at Regions are deposited into jointly-held accounts, where the balance is legally owned by multiple customers.") (on file with the Washington and Lee Law Review).

199. Although banks contend that separation of exempt from nonexempt funds presents an insurmountable challenge, courts must perform this separation under current law to determine the extent of exemptions. *See supra* note 36 (contrasting the views of a bank and a consumer advocate).

any exempt funds are withdrawn.<sup>200</sup> Whether the law mandates this accounting principle or a different one, the mandate will give banks the clear direction needed to uniformly segregate commingled funds into their exempt and nonexempt portions. Once the law establishes the principle, banks can incorporate it into their information systems to track both the exempt and nonexempt balance of an account at all times, facilitating compliance with garnishment requests.

Finally, the legislation should provide an administrative enforcement mechanism, while specifically granting a private right of action. A private right of action allows any aggrieved beneficiary to assert her rights. The threat of government enforcement would serve as an additional motivational tool to spur compliance. Allowing both public and private actions provides for maximum deterrence. Ideally, aggressive early enforcement would prod all banks to comply soon after the law is passed. Because the major costs of compliance come during implementation, the need for enforcement should decrease over time to almost nothing once banks implement new exemption identification and assertion technology and procedures. The Department of Justice Office of Consumer Litigation, which already enforces violations of the CCPA and FDCPA, among other enforcement responsibilities on behalf of the Federal Trade Commission (FTC),<sup>201</sup> appears best equipped to handle enforcement.

As a less comprehensive (but still beneficial) interim solution, Congress could propose blanket exemptions similar to those in California or Connecticut; for example, ensuring that \$1,000 remains accessible to the depositor.<sup>202</sup> This solution has relatively low implementation costs and ensures access to enough funds for beneficiaries to avoid complete destitution. It would require the definition of a "look-back" period to define how far in the past a bank would need to check for directly deposited exempt funds.<sup>203</sup> Although potentially both overinclusive (denying garnishment of nonexempt funds under the threshold)

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200. See Saunders, *Frozen Out*, *supra* note 4, at 5, 16 n.38 (describing, exemplifying, and recommending this accounting method).

201. See Office of Consumer Litig., Other Acts Administered by the FTC, [http://www.usdoj.gov/civil/ocl/monograph/other\\_ftc.htm](http://www.usdoj.gov/civil/ocl/monograph/other_ftc.htm) (last visited Oct. 14, 2008) (describing laws that the Office enforces) (on file with the Washington and Lee Law Review).

202. See *supra* notes 37, 87 (describing California and Connecticut requirements that banks make a certain portion of any account containing electronically deposited exempt funds available to the depositor); see also *infra* Part V.A.1 (proposing this interim solution as part of a broader legislative package).

203. See, e.g., CONN. GEN. STAT. ANN. § 52-367b(c) (West 2005 & Supp. 2008) (defining the look-back period as thirty days); see also SSA REPORT, *supra* note 4, at 11 (identifying the need to define a look-back period). This note recommends a ninety-day look-back period to ensure maximum beneficiary protection.

and underinclusive (allowing freezing of exempt funds exceeding the threshold), it provides far greater beneficiary protection than most states mandate today. Several banks have endorsed this approach.<sup>204</sup>

Although only Congress has the power to solve the problem nationwide, every state has the power to prevent federal benefit freezes within its borders, although not the power to compel regulations that would enable full automation. States can also expand protection to include state law exemptions in addition to the federal ones. California, Connecticut, New York, and Pennsylvania all provide models for beneficiary protection statutes.<sup>205</sup> Additionally, states may require creditors to investigate whether an account contains exempt funds before issuing a garnishment order, as does Ohio.<sup>206</sup>

This Note recommends federal legislation as the optimal solution to exempt fund garnishment problems because Congress stands in the best position to drive meaningful change for federal beneficiaries. Federal legislation would clearly preempt state law, eliminating the disparities currently causing fragmented application of federal exemption laws.<sup>207</sup> Congressional action would not face litigation challenging its authority as would federal agency action. Legislation also cannot be overturned or circumvented as easily as regulatory action, which may be reversed without the safeguards of the deliberative democratic process.

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204. See *supra* note 109 (describing two banks' endorsement of the California model).

205. See *supra* notes 86–90 and accompanying text (discussing these four states' extraordinary beneficiary protections).

206. See OHIO REV. CODE ANN. § 2716.11 (West 2006) (requiring creditors to have a reasonable basis for believing the bank has nonexempt funds of the judgment debtor).

207. Some banks have argued that any federal regulation affecting garnishment processes inappropriately impinges on state sovereignty (*see, e.g.*, Letter from Charles A. Stones, President, Kansas Bankers Association, at 3 (Oct. 29, 2007), *in response to* Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007), available at [http://www.federalreserve.gov/SECRS/2007/October/20071030/OP-1294/OP-1294\\_2\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/October/20071030/OP-1294/OP-1294_2_1.pdf) (last visited Oct. 14, 2008) ("We believe that procedural matters such as these are the purview of the state lawmakers.")) (on file with the Washington and Lee Law Review). This author disagrees. National interests in benefits administration and consumer protection (both frequent targets of federal legislation) override any state interest in maintaining the current garnishment procedures. Furthermore, states have no strong policy reasons for maintaining disparate garnishment processes. Even viewing states as "laboratories of democracy," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), the four first-class states have, through experimentation, developed procedures that protect benefits well. Realizing the full value of these experiments requires bringing their beneficial results to the entire nation. States may assert a right to provide greater degrees of preference to creditors and debtors, but this interest cannot trump a legitimate exercise of congressional power. State garnishment laws may fill gaps in federal legislation, but they do not occupy a separate, superior sphere of sovereignty over the garnishment process.

Congress has made one attempt at addressing the exempt fund garnishment problem through legislation. In April of 2008, Senators Kohl and McCaskill introduced the Illegal Garnishment Prevention Act.<sup>208</sup> Despite its encouraging name, however, the act would only prevent the Social Security Administration from using funds to promote direct deposit until they developed proposed regulations to solve the exempt fund garnishment problem<sup>209</sup>—that is to say, it is very short on substance. Additionally, the act implies that direct deposit itself is a bad idea, when on the whole, direct deposit produces efficiencies that help both beneficiaries and agencies when the system works well. One positive element is the bill's grant of clear authority to the Department of the Treasury to issue regulations addressing the problem.<sup>210</sup> As of this writing, the bill has not escaped committee.

So as not to criticize without suggesting an alternative solution, this Note proposes the following draft legislation:

An Act

To protect federally exempt benefit funds from freezes, fees and garnishment.

Section 1. Short Title.

- (a) This Act may be cited as the "Benefits Protection Act of 2009."

**TITLE I—Interim Uniform Exemption**

Section 101. Interim Exemption requirement

- (a) Immediately upon the effective date of this act, all depository institutions will, upon receipt of a garnishment order, ensure that the accountholder retains access to the lower of the account balance or \$1,000 if the account contains exempt funds deposited electronically within ninety days of the date the institution receives the garnishment order.
- (b) No institution shall be held liable under any state garnishment law for an erroneous good-faith

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208. Illegal Garnishment Prevention Act, S. 2850, 110th Cong. (2008).

209. *Id.* § 2(b).

210. *Id.* (granting the Treasury Secretary clear authority, pursuant to 42 U.S.C. § 407, to establish regulations to ensure protection of Social Security benefits). However, such regulations would cover only Social Security benefits, not other exempt benefits such as Veterans' and Federal Civil Service Retirement benefits. *See supra* note 3 (listing categories of exempt federal benefits).

assertion of exemption when acting pursuant to subsection (a) of this Section. Any party challenging the institution's good faith shall bear the burden of proving bad faith.

- (c) Subsection (a) does not supersede any state law exempting an amount greater than \$1,000 from freezing.
- (d) This Title shall cease to have any force or effect when the provisions of Title II have been fully implemented.

## **TITLE II—Full Identification and Assertion of Exemptions**

### **Section 201. Department of Treasury to Promulgate Interface Code**

- (a) Within one year after the effective date of this Act, the Department of the Treasury shall promulgate regulations modifying Automated Clearing House (ACH) codes for electronically deposited benefits to include all information necessary for a depository institution's information technology system to identify the exempt status of the benefit.
- (b) The ACH codes shall identify all federally exempt benefits, including but not limited to:
  - (i) Social Security benefits under 42 U.S.C. § 407(a);
  - (ii) Supplemental Security Income benefits under 42 U.S.C. § 1383(d)(1);
  - (iii) Veterans' benefits under 38 U.S.C. § 5301(a)(1);
  - (iv) Federal Civil Service Retirement benefits under 5 U.S.C. § 8346; and
  - (v) Federal Railroad Retirement benefits under 45 U.S.C. § 231m.
- (c) Supplemental Security Income benefits in subsection (b)(ii) shall be identifiable as benefits that may not be garnished for any purpose.
- (d) The protections granted under this Section stand in addition to any protections granted by state

law; this Section shall not be construed to limit a debtor's right to assert any exemptions granted to the debtor by state law.

Section 202. Identification of Preferred Familial and Governmental Creditors (adding 15 U.S.C. § 1673a)

- (a) All state garnishment forms shall give creditors the opportunity to indicate whether they meet any of the following qualifications:
  - i. Child Support or Alimony Creditor pursuant to 42 U.S.C. § 659(a);
  - ii. Federal Tax Creditor pursuant to 26 U.S.C. §§ 6331(h) or 6334(c); or
  - iii. Federal Administrative Creditor pursuant to 31 U.S.C. § 3716(c)(3)(A).
- (b) Creditors failing to indicate preferred status according to subsection (a) shall not garnish the exempt funds identified in § 201(b) above.

Section 203. Depository Institutions to Assert Exemptions on Behalf of Federal Beneficiaries (adding 15 U.S.C. § 1673b):

- (a) Any institution receiving by electronic deposit funds exempted from legal process under § 201(b) shall assert that exemption on behalf of a beneficiary accountholder upon receipt of a garnishment order.
- (b) No institution shall limit accountholder access to federal benefits funds for any length of time in response to a garnishment order.
- (c) No institution shall be liable under any state garnishment law for an erroneous good-faith assertion of an exemption when acting pursuant to subsection (a) of this section. Any party challenging the institution's good faith shall bear the burden of proving bad faith.

Section 204. Method of Distinguishing Exempt from Nonexempt Funds in a Commingled Account (adding 15 U.S.C. § 1673c):

- (a) A bank acting pursuant to § 203(a) shall use the First In, Last Out accounting method when determining the extent of the exemption to an



account containing both exempt and nonexempt funds.<sup>211</sup>

Section 205. Private and Public Rights of Action (amending 15 U.S.C. § 1676):

- (a) Section 1676 of Title 15 of the United States Code shall be amended as follows:  
-after "title," insert "other than 15 U.S.C. § 1673a–c, which shall be enforced in administrative proceedings by the Federal Trade Commission, and shall also be subject to private rights of action by depositors."

The interim provisions of § 101 above would provide far better beneficiary protection than the current systems in most states that allow account freezes and enable transfer of funds to creditors when beneficiaries do not assert their exemptions. The long-term provisions of §§ 201–205 would provide a solution for banks to effectively assert the exact amount of the exemption. Congress should work towards enacting any elements of this legislation upon which it can reach consensus. In a situation that leaves ever more beneficiaries destitute with each passing week, the perfect solution should not stand as an obstacle to a good solution.

## 2. Administrative Solutions

Federal regulations and state legislation hold significant promise for helping beneficiary debtors. Federal agencies could accomplish all that congressional legislation could, except for the enforcement mechanism. State legislatures can bring significant debtor protection to beneficiaries within their borders. Though federal regulations and state legislation have certain weaknesses, they could effectuate many improvements that private action cannot.

Two types of federal agencies have the power to issue regulations protecting beneficiaries: (1) agencies administering benefits; and (2) agencies regulating financial institutions. For the first type, each agency that administers benefits could issue regulations interpreting its benefits as not subject to

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211. Alternatively, the legislation could leave the accounting method to the bank's discretion, similarly to at least one existing state law that leaves the accounting method to the discretion of the debtor asserting the exemption. *See* MONT. CODE ANN. § 25-13-610(3) (2007) ("Proceeds are traceable under this section by application of the principles of first-in first-out, last-in first-out, or any other reasonable basis for tracing selected by the judgment debtor.").

account freezes. For example, the Social Security Administration could issue regulations that incorporate most elements of the legislation above to ban benefit freezes. These regulations, however, would apply only to Social Security benefits and could compel neither ACH code modification nor alteration of enforcement mechanisms, rendering them inferior to a legislative solution. Ideally, all agencies that administer benefits would collaborate to issue regulations applicable to all benefit types to prevent further fragmentation of law in this area. Still, benefits agencies would need to rely on banking agencies to enforce their regulations.<sup>212</sup>

The second type of federal agency with authority in this area, the banking agency,<sup>213</sup> could issue regulations that cover all of the proposed legislation above except the enforcement mechanism. These agencies have not ignored the matter, although they have not yet taken meaningful action. In September 2007, four agencies issued proposed guidance on the issue, requesting public comment.<sup>214</sup> The guidance proposed a list of best practices that did not challenge account freezes.<sup>215</sup> The proposed guidance may prove to have some value in promoting dialogue between banks and government. The direct impact of the guidance itself, however, is zero—it mandates nothing and recommends no concrete action, as recognized by an interested Senator.<sup>216</sup>

Independently of this initiative, the Office of Thrift Supervision (OTS) recently issued an Advance Notice of Proposed Rulemaking affecting exempt fund garnishment.<sup>217</sup> Although only one line in the proposal addressed exempt fund garnishment, the line tackled the issue head-on: It proposed to label

212. See SSA REPORT, *supra* note 4, at 11 ("If SSA interprets the garnishment exemption provision as an absolute bar, then [banking] regulators (such as Treasury, Federal Deposit Insurance Corporation, Credit Unions etc.) need to enforce SSA's interpretation.").

213. These banking agencies include the Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), Office of Thrift Supervision (OTS), the Federal Reserve Board (FRB), and the National Credit Union Administration (NCUA).

214. See Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273, 55,274–75 (Sept. 28, 2007) (seeking comments on proposed guidance and asking broad questions about bank practices).

215. See *id.* at 55,275 (suggesting prompt notice, cost minimization, and lifting a freeze as soon as possible).

216. See *Frozen Out: A Review of Bank Treatment of Social Security Benefits: Hearing Before the S. Finance Comm.*, 110th Cong. (2007) [hereinafter Baucus, *Frozen Out*], <http://www.senate.gov/~finance/hearings/statements/092007mb.pdf> (statement of Sen. Max Baucus, Chairman, S. Fin. Comm., 2) (stating that he "had high hopes" for the joint agency guidance, but that the draft guidance "disappointed" him).

217. See Unfair or Deceptive Acts or Practices, 72 Fed. Reg. 43,570, 43,574–75 (proposed Aug. 6, 2007) (considering a "Targeted Practices Approach" that would list exempt fund account freezing and bank fee set-off as unfair and deceptive practices).

account freezes, and fees charged pursuant thereto, as unfair and deceptive acts or practices (UDAP).<sup>218</sup> Although this approach would leave banks (and likely the courts) to sort out the details, it would be a step in the right direction. The Department of the Treasury could also accomplish the goals of this approach by amending the original regulations that established direct deposit to explicitly disallow account freezes.<sup>219</sup>

Although banking agencies may promulgate regulations, the banking agencies indicate that benefits agencies, as holders of primary authority over benefits administration, are better positioned to regulate.<sup>220</sup> Banking agencies may even question benefits agencies' very authority to issue regulations.<sup>221</sup> Overall, benefits agencies appear to possess a more solid foundation of authority for administering regulations, but banking agencies appear better able to regulate comprehensively. Still, regulations from either type of agency could provide real value to beneficiaries, although without the strength or breadth of federal legislation.

Benefits agencies can also help their beneficiaries in other ways. These agencies can specifically inform and educate beneficiaries regarding their exemption rights.<sup>222</sup> Benefits agencies can also encourage beneficiaries to seek legal advice if they have any concerns or questions about exemption laws (which, as anyone who has read this far can attest, are far from straightforward in their operation).

Federal regulation, particularly when coordinated amongst multiple agencies, could prove quite helpful. Codification of the OTS proposed rulemaking to include account freezes in the UDAP scheme would severely

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218. *Id.* at 43,575.

219. *See supra* note 14 and accompanying text (describing the regulations governing direct deposit of benefits); *see also* Brief of Amicus Curiae New York Bankers Association in Support of Defendant-Appellee HSBC Bank USA at 25, *Huggins v. Pataki*, No. 02-7950 (2d Cir. 2003), *available at* 2003 WL 23475663 (citing the existing regulation for the proposition that the department rejected consumer group requests to prohibit bank attachment of any funds).

220. *See Kelsey, Frozen Out, supra* note 108, at 11 ("[T]he agencies responsible for implementation and interpretation of their benefit programs . . . are in the best position to provide guidance on the garnishment exemption issue.").

221. *Compare Williams, Frozen Out, supra* note 35, at 11 (deferring to agencies as to whether they have authority to issue regulations preventing benefits freezes), *with Saunders, Frozen Out, supra* note 4, at 7 (contending that banking agencies have authority to regulate; "federal banking agencies have provided numerous regulations and guidance preempting and interpreting state laws for the benefit of their regulated institutions").

222. Such action would raise the possibility that some beneficiaries may abuse this privilege, running up consumer debt without intending to pay it. However, one wonders who would knowingly choose the life of constant hounding by creditors that comes with nonpayment of consumer debt. Congress could pass legislation to address such abuses if they did arise.

discourage (if not eliminate) freezes.<sup>223</sup> More detailed regulations could address the problem even more comprehensively. Federal regulation does, however, pose two distinct disadvantages. First, banks and creditors would likely litigate to challenge the authority of agencies to issue regulations banning freezes. The regulations would get some deference<sup>224</sup> and would probably withstand a challenge to authority, but the risk of failure detracts from the desirability of regulating as opposed to legislating. Second, these regulations could not effectively define public and private rights of action as could congressional legislation.

State regulations, following the models of the extraordinary debtor protection states, can give citizens in other states these same protections.<sup>225</sup> States may also adopt versions of the Ohio provision that places a burden upon debt collectors to verify exemptions before obtaining a garnishment order.<sup>226</sup> This Ohio approach provides considerable protection,<sup>227</sup> although not to the extent of the first-class states; it still allows freezes, and a debtor who never asserts the exemption will lose it regardless of the creditor's duty, while the law also places a substantial burden on creditors. Ideally, states would adopt duties for both creditors and banks to serve as a double-hulled safeguard against exempt fund garnishment. The major disadvantages to state action as opposed to federal legislation (aside from the obvious jurisdictional limitation) are (1) the further fragmentation of federal law, and (2) the inability to compel automation and enforcement provisions.

State administrative measures may also influence the process. Even in states that specify procedural requirements in great detail, state agencies may

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223. See *supra* notes 217–18 and accompanying text (describing the proposed rule). This regulation would, however, leave two important questions unanswered. First, what happens when exempt and nonexempt funds are commingled? Second, what happens to preferred domestic support or governmental creditors? The single-sentence OTS regulation, while admirable and desirable, does not comprehensively address this complex issue.

224. See *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001) (comparing the deferential standard that courts give agency regulations when Congress expressly delegates rulemaking authority to the purely persuasive value of regulations issued without such delegation).

225. See *supra* notes 86–90 and accompanying text (describing first-class states).

226. See *supra* note 22 and accompanying text (describing Ohio law).

227. This protection may be even stronger if a recent class certification of plaintiffs alleging violations of the Ohio Code is any indication. In *Stewart v. Cheek & Zeehandelaar, LLP*, 252 F.R.D. 387, 389 (S.D. Ohio 2008), the court certified plaintiffs' class in their suit seeking injunctive relief and statutory damages against a law firm alleging inadequate investigation of whether funds were exempt prior to seeking garnishment. However, the class was not certified as to individual money damages, as the court found that would take too much individualized inquiry, *id.* at 396, but did note that a finding against defendants in the suit seeking injunctive relief would facilitate recovering damages in individual suits, *id.*

modify the content of forms that control the garnishment process.<sup>228</sup> Courts in their administrative capacities may change the forms for the good (or to the detriment) of beneficiary debtors.<sup>229</sup> Because most state statutory schemes do not define whether the debtor or bank has the burden of asserting the exemption, such change can be effected through administrative rules. Overall, state administrative agencies have most of the power that state legislatures have, so long as agency action complements (and does not contradict) statutes on the books.

### 3. Judicial Solutions

Federal courts, as seen above in Part IV, have the power to strike down state statutes as violating the Due Process and Supremacy Clauses. A judge's authority to nullify a state statute does not depend heavily on the specific facts of the case—if the case includes a freezing of exempt funds, it provides the rationale for finding constitutional violations. While some may pejoratively condemn decisions nullifying state law as judicial activism, the language of federal statutes and precedent provides a solid basis for finding constitutional violations. Moreover, these decisions often provide the impetus needed for state legislatures to take action.<sup>230</sup> A critical mass of opinions finding constitutional violations when state laws enable account freezes could provide the impetus for Congress to tackle the issue.

Federal judges may, in some states, remedy certain abuses by debt collectors without challenging the underlying statutory scheme. Ohio, for example, contains a requirement that a debt collector sign an affidavit when pursuing garnishment that it seeks nonexempt funds.<sup>231</sup> A court imposed liability on a debt collector who signed an affidavit without investigation, finding this action to constitute a deceptive practice in violation of the FDCPA.<sup>232</sup> With the right fact pattern, a judge might also find a CCPA

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228. See *supra* notes 125–27 and accompanying text (describing one item on a form that made the difference as to whether banks or debtors were required to assert the exemption).

229. See *supra* notes 125–27 and accompanying text (describing the Virginia Supreme Court Rules Committee's change to the form).

230. See *supra* note 98 and accompanying text (noting two U.S. District Court decisions that drove legislative change to provide notice and hearings for debtors in Arkansas and Montana).

231. See OHIO REV. CODE ANN. § 2716.11 (West 2006) (requiring creditors to assert a reasonable basis for believing an account has nonexempt funds).

232. See *Lee v. Javitch, Block & Rathbone, LLP*, 484 F. Supp. 2d 816, 820 (S.D. Ohio 2007) (identifying a case finding a FDCPA violation in a debt collector's misrepresentation on affidavit required to obtain a garnishment order).

violation. For example, if a creditor issues a garnishment summons pursuant to a domestic support obligation, the CCPA limits the amount that a creditor may garnish.<sup>233</sup> Garnishing funds in excess of this limitation, while not challengeable as completely violating the exemption, may be subject to challenge for a failure to abide by the CCPA's limitations.<sup>234</sup>

State court judges have little opportunity to impact the process, particularly given the prevalence of default judgments. Individual judges could require creditors, as a condition of garnishment authorization, to request only nonexempt funds on the garnishment order. Most judges are unlikely, however, to deviate from the forms promulgated by the state authority. Furthermore, the garnishment process itself may be handled not by judges, but by local court clerks, who would not assert this power without approval from the state.<sup>235</sup>

### B. Private Solutions

In the absence of public action, private actors (banks, beneficiaries, and creditors) can exercise some control over exempt fund garnishment. While many private actors will find little incentive to act, perhaps some banks and creditors will value the goodwill of beneficiary protection enough to voluntarily improve their processes. Particularly in the age of retiring baby boomers and ever-escalating consumer debt, the incidence of exempt fund garnishment will likely increase. Banks protecting their accountholders from exempt fund garnishment may find a competitive advantage amongst consumers receiving federal benefits.

Banks stand in the best position to take private action. They can issue policies, as has at least one major national bank, that accounts containing solely directly deposited exempt funds will not be garnished.<sup>236</sup> Banks can develop

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233. See *supra* notes 65–66 and accompanying text (describing CCPA garnishment limitations).

234. Although *Dunlop v. First National Bank of Arizona*, 399 F. Supp. 855, 858 (D. Ariz. 1975) interpreted the CCPA garnishment limitation as inapplicable to funds deposited in a bank account, one could certainly argue that the Supreme Court's decision in *Porter v. Aetna Casualty & Surety Co.*, 370 U.S. 159, 162 (1973)—finding that exempt funds do not lose their exemption when deposited into a bank account—should control, rendering the CCPA garnishment limitation applicable.

235. E-mail from Henry Woodward, Gen. Counsel, Legal Aid Society of the Roanoke Valley, to Allen Myers (Apr. 2, 2008, 16:56 EST) (discussing the garnishment order process in Virginia) (on file with the Washington and Lee Law Review).

236. See Beggs, Response to Proposed Guidance, *supra* note 14, at 5 (describing JPMorgan Chase's policy of not freezing accounts containing solely exempt funds). Of course,

technology systems and operating procedures to ensure that receipt of a garnishment order triggers identification of exempt funds directly deposited into the account. Process and system enhancements would allow the bank to provide an authoritative answer to any creditor challenging the bank's assertion that funds are exempt (in the unlikely event that this challenge occurs).<sup>237</sup> Since no universally defined accounting method exists for determining what portion of funds is exempt when nonexempt funds are commingled with exempt funds, a bank's commitment to use one method may not be challenged as violating existing law.<sup>238</sup> Additionally, the time saved by implementing these procedures and by cutting garnishment orders off at the early stages would generate long-term cost savings.<sup>239</sup>

Beneficiary debtors, with knowledge, can mitigate the hardships of exempt fund garnishment. Responsible consumer spending, like abstinence, provides the safest solution. In a less utopian vein, beneficiaries should also understand the importance of responding to all communications from the court as quickly as possible. A beneficiary savvy enough to assert her exemption during the state court judgment could conceivably avoid garnishment of an account identified as exempt.<sup>240</sup> Beneficiaries should also notify their banks of the exempt funds directly deposited into their accounts. Some banks rely on customer notification to assert exemptions.<sup>241</sup> If a bank refuses to commit to

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banks could provide even greater protection by refusing to freeze any exempt funds in any account.

237. See *supra* note 107 and accompanying text (noting no documented instances of banks suffering even the "burden of legal inquiry" for refusing to hand over exempt funds).

238. See *supra* Part V.A.1 (identifying the lack of a mandated accounting system); see also MONT. CODE ANN. § 25-13-610(3) (2007) (allowing any reasonable method of tracing funds).

239. See *supra* note 66–67 and accompanying text (describing the steps required to accurately process a domestic support garnishment order). Technology to track the exempt and nonexempt portions of funds in an account and calculate the percentage of benefits that may be garnished would save bank employees considerable time and effort. See *supra* note 156 and accompanying text (describing effort saved by early disposition of garnishment orders).

240. A leading practitioner in this area, however, discourages this course of action. "[T]he notion that debtors can protect themselves by asserting the exemption at the judgment entry stage is wholly unrealistic in Virginia," asserts the practitioner, because the issue would not be before the court and no record would be made of the assertion; the debtor would thus travel to court for nothing. E-mail from Henry Woodward, Gen. Counsel, Legal Aid Society of the Roanoke Valley, to Allen Myers (Apr. 2, 2008, 16:56 EST) (on file with the Washington and Lee Law Review).

241. See, e.g., Letter from Julius L. Loeser & Carl E. Spradlin, Jr., Senior Vice Presidents, Comerica Bank, at 1 (Nov. 7, 2007), in response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007), available at [http://www.federalreserve.gov/SECERS/2007/November/20071127/OP-1294/OP-1294\\_4\\_1.pdf](http://www.federalreserve.gov/SECERS/2007/November/20071127/OP-1294/OP-1294_4_1.pdf) ("If a customer tells us that [the account contains government benefits], it is noted in the account records and that fact is honored.").

honoring exemptions, beneficiaries may threaten to take their business elsewhere. If the bank does promise to honor the exemption, the most important thing a beneficiary can do is to keep her account "pure"<sup>242</sup>—that is, free of nonexempt funds.

Another action that beneficiaries can take is to voice their complaints. Blogs such as Creditslips.org have identified the problem and sought comment from scholars and citizens alike.<sup>243</sup> Another channel, constituent communication with state and national representatives, will not change the problem overnight but may contribute to a critical mass of concern that moves the issue from the discussion stage into the action stage.

Creditors can also reduce the incidence of exempt fund garnishment. When deciding whether to extend credit to a consumer, creditors can apply different standards to income from federal benefits than apply to nonexempt income. These standards would recognize that the creditor cannot seize exempt income to pay the debt if the beneficiary defaults. Creditors can also work to reduce extensions of credit that will foreseeably end up as collection actions. While this may result in reduced credit available to beneficiaries, alternative current practices that encourage beneficiaries to overextend themselves seem far worse.

As far as the likelihood of private action correcting exempt fund garnishment problems, the issue does not appear remediable through market-based efficiencies. The market has shaped this process to the detriment of beneficiaries—the most efficient process allows creditors to garnish exempt funds and banks to charge corresponding fees. Most banks will not change the process voluntarily due to general risk-aversion, and also due to an unwillingness to incur implementation costs or forfeit fees. Additionally, to the extent that banks lend money, reducing freezes will lower their profits as creditors. Beneficiaries often do not have the capacity to take the requisite action to defend themselves once the garnishment process has begun, and thus present easy opportunities for profiteering. And while bank private action can be expected to accomplish little, creditors have even fewer economic incentives (and more disincentives) than banks to voluntarily change their practices to help beneficiary debtors.

Banks have not suffered appreciable negative consequences from the current standard practice of freezing exempt funds. Banks identify state law

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242. Woodward, *supra* note 29.

243. See Nathalie Martin, *Think Public Benefits Are Exempt from Execution? Think Again.*, Jan. 5, 2008, <http://www.creditslips.org/creditslips/2008/01/think-public-be.html> (last visited Oct. 14, 2008) (discussing exempt fund garnishment) (on file with the Washington and Lee Law Review).



liability for releasing funds to the beneficiary, and claim significant risk. This threat, illusory as it may be, prevents banks from asserting (or provides cover to banks not wishing to assert) exemptions on behalf of the debtor and avoiding account freezes.

Banks will also recoil from implementation costs. Although exemption identification appears capable of full automation, banks will need to pay for the system modifications to make that automation a reality.<sup>244</sup> Banks must also retrain staff to operate under new procedures required to utilize the automation. Moreover, a congressional committee has already begun to discuss the issue.<sup>245</sup> Banks will exhibit even more hesitancy in instituting a significant voluntary process change because they perceive that Congress may mandate a far different process that could require different compliance measures and corresponding costs.

Two additional motivations (that no bank would ever acknowledge) may influence a bank's decision not to adopt voluntary measures to help beneficiaries. First, banks would lose the garnishment and insufficient fund fees that they currently collect pursuant to garnishment.<sup>246</sup> Banks collect these fees at virtually no risk—the bank knows that the account contains the money to cover the fees, and, if the money is eventually turned over to the creditor, the bank levies its fees before distributing the remainder of the account. Second, many banks are also creditors.<sup>247</sup> Serving in this dual bank-creditor capacity gives banks an interest in collection of funds pursuant to garnishment orders, undermining many banks' assertions that they are merely innocent parties

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244. Judging from the various banks' responses to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007) (banks' responses available at [http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc\\_id=OP%2D1294&doc\\_ver=1](http://www.federalreserve.gov/generalinfo/foia/index.cfm?doc_id=OP%2D1294&doc_ver=1)), banks appear to have significantly varying levels of automation in place; banks with less sophisticated systems would incur higher proportional implementation costs.

245. See *Frozen Out: A Review of Bank Treatment of Social Security Benefits*, Hearing Before the S. Fin. Comm., <http://www.senate.gov/~finance/sitepages/hearing092007.htm> (last visited Oct. 14, 2008) (providing testimony from seven hearing participants) (on file with the Washington and Lee Law Review).

246. See text accompanying *supra* note 27 (describing standard bank fees). Most banks, however, assert that they do not profit from the labor-intensive, time-consuming process of complying with a garnishment order. See, e.g., Beggs, Response to Proposed Guidance, *supra* note 14, at 6–7 (describing the complexities involved in garnishment compliance).

247. See, e.g., Letter from Christopher T. Curtis, Assoc. Gen. Counsel, Capital One Financial Corp., at 2 (Nov. 27, 2007), in response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds, 72 Fed. Reg. 55,273 (Sept. 28, 2007), available at [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_13\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_13_1.pdf) (describing Capital One as "offer[ing] a broad spectrum of financial products and services" while also noting its "\$83.3 billion in deposits and \$146.4 billion in managed loans outstanding").

caught in disputes between creditors and debtors.<sup>248</sup> These additional financial incentives, though involving collection of funds pursuant to violations of federal law, weigh against voluntary bank action.

The proposed banking agency guidance demonstrates the futility of private action. The guidance exhorts banks in the most general terms to take measures that banks either already take or would never consider taking.<sup>249</sup> The guidance offers no rewards for compliance, nor threatens any consequences of non-compliance. Bank responses to the OTS Notice of Proposed Rulemaking indicate a flat unwillingness to change, and even indignation at being asked to do so.<sup>250</sup>

In fairness, some banks do maintain policies that oppose freezing accounts.<sup>251</sup> Other banks recognize the hardships but say that they cannot avoid freezes without incurring state law liability.<sup>252</sup> Some banks even support a national solution.<sup>253</sup> Several banks have taken steps to ensure beneficiaries that their funds will not be frozen.<sup>254</sup> If more beneficiaries raise this issue with their

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248. See Crouse, Response to Proposed Guidance, *supra* note 142, at 3 (portraying banks as innocent intermediaries). This does not even consider the bank's right of direct setoff when the bank that holds the debtor's account has issued the line of credit, which is discussed thoroughly in Prizant, *supra* note 13. Although the bank's setoff right is beyond the scope of this Note, Congress should consider combining anti-setoff legislation with anti-garnishment legislation.

249. See *supra* notes 214–16 and accompanying text (discussing the proposed guidance).

250. See, e.g., Letter from Steven Zeisel, Senior Counsel, Consumer Bankers Association, at 4 (Nov. 5, 2007), in response to Proposed Rulemaking on Unfair or Deceptive Acts or Practices, 72 Fed. Reg. 43,570 (Aug. 6, 2007), available at <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=0900006480360530&disposition=attachment&contentType=pdf> ("Freezing accounts under a court order pending determination of account fund sources is merely an example of a practical response to judicial process that protects the institution from liability. It has no business on this list [of targeted practices]."); Letter from Richard Whiting, Exec. Dir., Financial Services Roundtable, at 8 (Nov. 5, 2007), in response to Proposed Rulemaking on Unfair or Deceptive Acts or Practices, 72 Fed. Reg. 43,570 (Aug. 6, 2007), available at <http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064803604ad&disposition=attachment&contentType=pdf> (stating that "complying with a garnishment order should not be considered an unfair or deceptive act or practice," thereby implying that freezes are necessary for compliance).

251. Some banks already follow this policy. See Beggs, Response to Proposed Guidance, *supra* note 14, at 5 (identifying JPMorgan Chase's policy of refusing to freeze an account containing wholly exempt funds).

252. See, e.g., Koch, Response to Proposed Guidance, *supra* note 14, at 2 ("A bank assumes financial risk if it releases funds before [a state] court determines how much of the account balance is subject to federal exemption.").

253. Indeed, even the American Bankers Association has proposed a national solution along the lines of the statutory schemes in California and Connecticut. See SSA REPORT, *supra* note 4, app. F at F-4 to F-6.

254. See Saunders, *Frozen Out*, *supra* note 4, at 15 n.33 (providing a list of banks that

banks, more banks might see the value of implementing processes that prevent freezing of exempt funds. Overall, however, most banks will likely continue to view an account freeze as a standard, practical approach to avoiding liability.<sup>255</sup>

Private actions by beneficiary debtors and creditors will do very little to address the problem. Responsible consumer spending is easy to advocate but impossible to effect. Particularly given the typically low income of beneficiaries, can one blame a person for using a credit card if it provides the only means to buy both food and medicine? Creditor voluntary action looks equally unlikely. So long as the pursuit of exempt funds presents a low risk of adverse action with a chance of debt collection, creditors will continue to seek garnishment orders against bank accounts without regard to whether they contain exempt funds.

### VI. Conclusion

This Note concludes with some recommendations for overcoming the political challenges facing the legislation proposed in Part V. The public interest benefits of this legislation are clear; the advantages of protecting the vulnerable beneficiary population do not require detailed explication.<sup>256</sup> Making this legislation palatable to banks and creditors, however, may present a challenge, requiring clear explanation of the benefits to all parties. Banks and creditors should understand that a well-crafted law will provide them with long-term cost savings.

Benefiting both banks and creditors, this legislation would eliminate the existing patchwork of state laws. This standardization would allow banks and creditors to streamline and centralize garnishment management processes. Such legislation would also reduce costs of handling invalid garnishment orders for banks and creditors, as they could dismiss these orders quickly without going through the whole cumbersome process.<sup>257</sup> Creditors assert that

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promise not to freeze exempt funds). Such promises, however, are not always clear-cut. *See* Taliaferro, *Frozen Out*, *supra* note 1, at 2–3 (describing how commingling of \$25 in account-opening bonus funds with his benefit funds nullified the bank's promise not to freeze his account).

255. *See supra* note 250 and accompanying text (identifying common bank attitude towards garnishing exempt funds).

256. *See, e.g.*, Baucus, *Frozen Out*, *supra* note 216, at 1 (invoking scripture to describe the injustice of account freezes).

257. *See supra* notes 152–56 and accompanying text (describing reduced labor costs for banks and creditors in balancing due process interests).

uncollected debt hurts all consumers.<sup>258</sup> Conversely, efficiencies in creditor operations will drive down costs, helping all consumers.

Benefiting banks, this legislation eliminates the threat of liability for wrongly distributing exempt funds to the accountholder. The legislation could also distribute some garnishment costs to creditors, as do some states.<sup>259</sup> This concession to banks, however, comes at the clear cost of increased creditor opposition.

Banks and creditors may contend that this Note's proposed legislation will lead beneficiaries to spend recklessly and abuse credit.<sup>260</sup> The exempt fund garnishment scenario, however, does not appear ripe for abuse. Few would consciously trade a modest extension of credit (most beneficiaries are not eligible for large credit extensions) for years of creditor harassment. Most of the beneficiaries in reported instances of exempt fund garnishment are unsophisticated consumers who let their debt get the better of them and have minimal if any awareness of the garnishment process and their exemptions. Moreover, these beneficiaries are far less likely than the average citizen to be able to afford counsel to protect their rights.<sup>261</sup>

Overall, this Note has attempted to shed light upon a discrete but serious problem. While benefits freezes may affect a small number of people in

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258. See Letter from Rozanne M. Andersen, Gen. Counsel, ACA International, at 5 (Nov. 27, 2007), in *response to Proposed Guidance on Garnishment of Exempt Federal Benefit Funds*, 72 Fed. Reg. 55,273 (Sept. 28, 2007), available at [http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294\\_17\\_1.pdf](http://www.federalreserve.gov/SECRS/2007/November/20071129/OP-1294/OP-1294_17_1.pdf) (citing a 2006 study asserting that debt collection saves each household \$351 per year).

259. See, e.g., MO. ANN. STAT. § 525.240 (West 2002) (granting a garnishee the full costs of handling any garnishment that does not result in recovery of the funds sought in the garnishment order).

260. While such a contention makes logical sense, it assumes patterns of debtor behavior that may not hold. In the bankruptcy context, Professors Susan Block-Lieb and Edward J. Janger examined a comparable contention—that debtors used the Bankruptcy Code's discharge provisions to recklessly run up debt with no intention of ever paying it off—in light of empirical data indicating that debtors, when faced with easy access to credit on disadvantageous terms, did not behave "rationally." See generally Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Debtor*, 84 TEX. L. REV. 1481 (2005). Demographic study of bankruptcy filers indicates that increased borrowing occurs when "[d]ebtors are pushed over the financial edge by personal tragedy—events such as divorce, job loss, and uninsured medical expenses." *Id.* at 1485 (citing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 15–21 (2000)). Although these scholars discuss bankruptcy filers, the scholars' logic applies equally to the debtors discussed in this Note.

261. See, e.g., *Granger v. Harris*, No. CV-05-3607 (SJF)(ARL), 2007 WL 1213416, at \*1 (E.D.N.Y. Apr. 17, 2007) (noting that plaintiffs argued *pro se*); Taliaferro, *Frozen Out*, *supra* note 1, at 3 (gaining legal assistance from Brooklyn Legal Services). This demonstrates another potential positive impact of benefits protection legislation—freeing up legal aid resources to do other important work.

proportion to the general population, the effects are often devastating. With massive baby boomer retirements just beginning, and with consumer debt steadily increasing, one can expect the incidence of exempt fund garnishment to keep rising until government takes action to prevent it. One can only hope that Congress will not sit idly by while its proffered protection to beneficiaries lies impotent, caught in the tangled tendrils of conflicting state and federal law.

*Appendix*

This appendix surveys current garnishment law in all fifty states and the District of Columbia. Compare this survey with a similar appendix developed in 1980 by Judge Aldisert for his dissenting opinion in *Finberg v. Sullivan*, 634 F.2d 50, 86–93 (3d Cir. 1980). The three tables below address each of the three classes of states as specified *supra* Part III.B.1. The tables below also identify, with asterisks, states that have amended garnishment laws since 1980 to improve debtor protection. This appendix provides only a brief overview of each state's notice and exemption provisions; for more detail, review each state's individual code.

\*Indicates state adding debtor protection since 1980

<b>First-Class States</b>	
<b>State</b>	<b>Law</b>
CA*	California exempts a certain amount—ranging from \$1,225 to \$3,650, depending upon the number of depositors and type of benefits—from garnishment without the debtor having to assert a claim, preventing a bank from freezing the beneficiary's account in its entirety. CAL. CIV. PROC. CODE § 704.080(b) (West Supp. 2008).
CT*	Under CONN. GEN. STAT. ANN. § 52-367b (West 2005 & Supp. 2008), a bank must leave the lesser of the account balance or \$1,000 in an account containing readily identifiable benefits directly deposited within thirty days. Banks asserting exemptions on behalf of debtors are immune from "bona fide error[s]." <i>Id.</i> § 52-367b(o). If the debtor has more than \$1,000 exempt funds in an account and wishes to assert the additional amount as exempt, she may notify the garnishee and creditor of this exemption claim. <i>Id.</i> § 52-367b(e). The creditor may then request a hearing to contest the exemption. <i>Id.</i> § 52-367b(f).
NY*	N.Y. C.P.L.R. 5205 (McKinney 1997 & Supp. 2009) lists exemptions. New York refers to a garnishment order as a "restraining notice." <i>Id.</i> 5222. Subsection (e) requires notice to the debtor in a form including a list of exemptions. The notice directs the debtor to rules 5239–40, which define the exemption claim procedure—this procedure may lead to a protective order shielding the exempt funds; notice instructs the debtor to "act promptly." <i>Id.</i> 5222(e). In 2008, New York enacted legislation preventing up to \$2,500 in a bank account containing reasonably identifiable exempt funds deposited within forty-five days. <i>Id.</i> 5205(l). This law became effective on January 1, 2009. <i>Id.</i>

PA*	PA. R.C.P. NO. 3108 (West 2002) provides for notice to the debtor in garnishment action, although no exemption list is specified. Most importantly, <i>all</i> funds in a bank account are exempt if the account contains electronically deposited exempt benefits. <i>Id.</i> NO. 3111.1 (West Supp. 2008). Banks are also shielded from liability when asserting exemptions on behalf of debtors. <i>Id.</i> NO. 3146(b)(2) (West Supp. 2008). 42 PA. STAT. ANN. § 8124 (West 2007) lists exempt property.
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<b>Second-Class States</b>	
<b>State</b>	<b>Law</b>
AL*	ALA. CODE § 6-10-37 (LexisNexis 2005) governs garnishment proceedings; the statute does not provide for notice to the debtor. ALA. R. CIV. P. 64A (LexisNexis 2007–2008), however, does require notice, including a list of exemptions and instructions on how to claim them. If a creditor fails to contest the exemption within fifteen days, the exemption is allowed. <i>Id.</i> 64B. If the creditor does contest the exemption, the state must schedule a hearing within seven days. <i>Id.</i> Also, notice of garnishment must be served "contemporaneously" on the debtor and garnishee. <i>Id.</i>
AK	Under ALASKA STAT. § 09.38.080(b) (2006), the creditor must sign an affidavit asserting that it has "reason to believe" the debtor has non-exempt property. Any interested party may pursue a hearing "as soon as practicable." <i>Id.</i> § 09.38.080(e). The individual claiming the exemption must carry the burden of proving that the property is exempt. <i>Id.</i> § 09.38.080(f). To inform debtors of exemptions, the state statutory scheme requires a summary statement in lay terminology of exemptions to be included with the notice of garnishment. <i>Id.</i> § 09.38.085(a). A \$1,400 liquid asset exemption may also cover bank accounts. <i>Id.</i> § 09.38.030(b).
AZ*	ARIZ. REV. STAT. ANN. § 12-1572-2 (2003) requires a creditor to assert "good reason to believe" that a garnishee has nonexempt debtor property. The creditor must notify the judgment debtor of the garnishment. <i>Id.</i> § 12-1574. Notice must include an explanation of the debtor's exemption rights and a form with which to request a hearing. <i>Id.</i> § 12-1596. The debtor must request the hearing within ten days of notice, and the court must schedule the hearing within five days of the request unless the matter is continued for "good cause." <i>Id.</i> § 12-1580.
AR*	ARK. CODE ANN. § 16-110-402 (2006) controls garnishment procedure, requiring notice to defendant of the garnishment, specific

	exemptions (including federal benefits) and the right to a hearing. If the debtor asserts exemptions, the court must hold a hearing within five days. <i>Id.</i> § 16-66-211 (2005).
CO	COLO. REV. STAT. § 13-54.5-106 (2008) requires notice to the debtor of garnishment. The statutory scheme also requires notice of property exemptions, <i>id.</i> § 13-54-102, and earnings exemptions, <i>id.</i> § 13-54-104, which appear to cover federal benefits. The notice must also include the method of claiming exemptions and right to a hearing. <i>Id.</i> §§ 13-54.5-106(k) to -106(l). If the debtor requests a hearing, it must be held within ten days. <i>Id.</i> § 13-54.5-109(1)(a). A garnishee is not required to assert exemptions on behalf of the debtor. <i>Id.</i> § 13-54.5-108.5.
FL*	FLA. STAT. ANN. § 77.041 (West 2004 & Supp. 2008) requires notice to defendant of garnishment, exemptions, and a hearing "as soon as possible." If plaintiff does not contest the exemption within eight days, the garnishment writ is dissolved. <i>Id.</i> The bank must answer a garnishment order within twenty days. <i>Id.</i> § 77.04.
GA	GA. CODE ANN. § 18-4-62 (2004) defines the notice that the creditor must give the garnishee. The creditor must serve notice of garnishment filing upon the debtor. <i>Id.</i> § 18-4-64. The garnishment summons requires the garnishee to hold all property "except what is exempt." <i>Id.</i> § 18-4-66. The debtor may become a party to the garnishment proceedings by filing a "traverse," which triggers a hearing within ten days, although the statute does not mention exemptions. <i>Id.</i> § 18-4-93.
HI*	HAW. REV. STAT. §§ 653-1 to -17 (1993) covers garnishment of government beneficiaries, but these statutes appear to contemplate direct garnishment of the distributing agency, not garnishment of bank accounts. The statutory scheme for garnishment, <i>id.</i> §§ 652-1 to -15, does not provide notice to the postjudgment debtor. HAW. DIST. CT. R. CIV. P. 70 (2007), however, requires a creditor to file an affidavit or declaration stating that the funds the creditor seeks to garnish are not traceable to public assistance funds, nor to funds that are "not non-garnishable under the law." This rule does not state what a debtor must do to assert an exemption.
ID	IDAHO CODE ANN. §§ 8-507 to -507D (2004) requires notice of garnishment and exemptions, and a form for claiming exemptions. Statutes prescribe the form content, including notification of federal benefits exemptions and instructions to assert exemptions within fourteen days of notice. <i>Id.</i> § 8-507C. The judgment creditor has five days to contest an exemption, or the funds are released to the debtor. <i>Id.</i>



IL*	735 ILL. COMP. STAT. ANN. 5/12-701 (West 2003) requires the creditor to file a garnishment affidavit affirming that the creditor has served a garnishment summons on the garnishee and provided a copy to the debtor. This summons lists exemptions and the judgment debtor's right to a hearing. <i>Id.</i> § 5/12-705 (West 2003 & Supp. 2008). The garnishee must hold any "non-exempt" property. <i>Id.</i> § 5/12-707. No creditor may collect on a garnishment order unless the debtor receives notice of both the garnishment order and the garnishee's answer. <i>Id.</i> § 5/12-711.
IN*	IND. CODE ANN. § 34-25-3-2 (LexisNexis 1998) provides procedures for garnishment, which do not specify notice to debtor of garnishment or right to exemptions or hearing. When garnishing a financial institution, however, the creditor must serve the bank (which then serves the debtor) with notice of the debtor's right to exemptions and a hearing request form. <i>Id.</i> § 28-9-3-4 (LexisNexis 2000).
IO	IOWA CODE ANN. § 642.14 (West 1995) prevents entry of judgment against the garnishee until the debtor has ten days' notice. The debtor may plead the exemption in the garnishment proceedings. <i>Id.</i> § 642.15. The statute does not clarify how the debtor receives notice of hearing and exemption rights.
KS*	KAN. STAT. ANN. § 60-735 (2005) provides comprehensive notice, immediately after the creditor serves the garnishee, of the debtor's right to assert exemptions and request a hearing within ten days. If a hearing is requested, it must be held five to ten days after request, <i>id.</i> § 60-735(b), and the debtor has the burden to prove property is exempt, <i>id.</i> § 60-735(c). For garnishment orders served on financial institutions, the institution is instructed to withhold 110% of the judgment creditor's claim. <i>Id.</i> § 60-733. Rendition of a garnishment judgment against exempt moneys or property is prohibited. <i>Id.</i> § 60-724(3).
KY	KY. REV. STAT. ANN. § 425.501 (LexisNexis 2005 & Supp. 2008) requires notice to the debtor of garnishment (though not of the right to exemptions or hearing), and allows the debtor to appear to assert exemptions. It also directs the creditor to pay the garnishee a \$10 processing fee. <i>Id.</i> The statutory scheme defines exemptions, but not the procedure for asserting them. <i>Id.</i> §§ 427.005-.990. KY. R. CIV. P. 69.02 (West 2008) describes garnishment procedure with reference to general rules regarding service and answer.
LA*	LA. REV. STAT. ANN. § 13:3881 (2006 & Supp. 2008) defines exemptions, but not the procedure for asserting them. LA. CODE CIV.

	PROC. ANN. art. 2411 (2002 & Supp. 2008) addresses garnishment of financial institutions. The debtor must receive notice of garnishment (but not of exemption or hearing rights) by "mail or electronic means," and the garnishee must answer within fifteen days. <i>Id.</i> art. 2412.
ME*	ME. REV. STAT. ANN. tit. 14, § 3127-A (2003) describes the notice and hearing process: The bank holds funds for twenty days, during which time the debtor may assert an exemption and request a hearing. The statute does not indicate how the debtor is notified of her right to exemptions and hearing.
MD	MD. RULE 2-645 (LexisNexis 2008) governs property garnishment, requiring creditors to notify judgment debtors of exemptions and of the right to contest the garnishment. The garnishee may assert "any defense that the judgment debtor could assert," which presumably allows banks to assert exemptions on behalf of debtors. <i>Id.</i> 2-645(e). The garnishee must answer within thirty days. <i>Id.</i> 2-645(g).
MI	MICH. COMP. LAWS ANN. § 600.4011 (West 2000) provides for garnishment but does not require the creditor to notify the debtor. Michigan Court Rules dictate that the garnishee must notify the debtor within seven days of receiving the garnishment order. MCR 3.101(F)(2) (2007). The debtor then has fourteen days to file an objection. <i>Id.</i> 3.101(K). A hearing must be held within twenty-one days of the date objections are filed. <i>Id.</i> Notice to the debtor of exemptions and hearing rights is not required by statute, although a state form provides this notice. <i>See</i> Draft, Request and Writ for Garnishment Form, <i>available at</i> <a href="http://courts.michigan.gov/scao/courtforms/publicationdrafts/mc13.pdf">http://courts.michigan.gov/scao/courtforms/publicationdrafts/mc13.pdf</a> .
MN	The debtor must receive notice of garnishment and exemptions within five days of service on the garnishee. MINN. STAT. ANN. § 571.72(4) (West 2000 & Supp. 2008). Any party may move for the court to determine the validity of an asserted exemption. <i>Id.</i> Failure to provide exemption notice renders the garnishment void. <i>Id.</i> § 571.911. The debtor may obtain the money seven days after filing an exemption notice unless the creditor objects. <i>Id.</i> § 571.913. If the creditor does object, a hearing must be held within five days of the objection. <i>Id.</i> § 571.914(1). A garnishee is exempt from wrongful retention liability if it believes in good faith that the funds are subject to the garnishment summons. <i>Id.</i> § 571.73.
MO	It appears that the debtor receives a copy of the garnishment notice, but not a list of exemptions. MO. ANN. STAT. §§ 521.170, 525.020 (West 2002). The statutory scheme provides a process for a

	<p>creditor to contest the garnishee’s answer, but no similar process for the debtor to contest the garnishment or exemptions. <i>Id.</i> § 525.190. Attachment of property exempted by statute is prohibited; this may extend to garnishment. <i>Id.</i> § 521.240. An executing officer must notify a judgment debtor of her exemption rights. <i>Id.</i> § 513.445.</p>
MT*	<p>MONT. CODE ANN. § 25-13-211 (2007) requires notice to the debtor of the seizure, right to exemptions and procedure for contesting the garnishment. Federal benefits exemptions are listed in section 25-13-608. The debtor must file an exemption claim within ten days of receiving the execution order, and is entitled to a hearing within ten days of filing. <i>Id.</i> § 25-13-212.</p>
NE	<p>NEB. REV. STAT. § 25-1056 (1995 &amp; Supp. 2006) requires that the garnishee answer a garnishment summons within ten days. The court must provide debtors with a notice of exemptions form upon issuance of a writ of execution, <i>id.</i> § 25-1516; this presumably applies to garnishments as well. The notice includes a hearing request form; the debtor must act within twenty days. <i>Id.</i></p>
NV*	<p>NEV. REV. STAT. § 21.076 (2007) requires the sheriff to notify the judgment debtor. Notice includes an exemption form, which specifies federal benefits as exempt and describes the procedure for claiming the exemption. <i>Id.</i> § 21.075. If the creditor does not object within five days, the funds are released to the debtor; if the creditor does object, a hearing must occur within ten days. <i>Id.</i></p>
NH*	<p>Garnishment is called "trustee process" in New Hampshire. N.H. REV. STAT. ANN. § 512:9-b (1997 &amp; Supp. 2007) governs trustee process on bank accounts. The writ must be served on both the trustee and the debtor, although notice of exemptions and right to a hearing are not required. <i>Id.</i> § 512:3. Exemptions are listed at <i>id.</i> § 512:21. The court may equitably stay proceedings if the trustee is found to have money not payable, <i>id.</i> § 512:37; this could be construed to cover exempt funds.</p>
NJ	<p>N.J. STAT. ANN. § 2A:17-63 (West 2000) requires that the debtor receive a copy of the garnishment order, but does not mention the debtor’s right to exemptions or a hearing. Case law demonstrates that the debtor may assert an exemption, <i>Halliburton Co. v. Mor</i>, 555 A.2d 55, 55–56 (N.J. Super. Ct. Law Div. 1988), which may occur during the exemption inventory prescribed by statute, N.J. STAT. ANN. § 2A:17-20, although it is unclear whether this exemption inventory applies to garnishment.</p>

NM*	<p>N.M. STAT. § 35-12-2 (1996) provides for service of the garnishment summons, which the garnishee must answer within twenty days. The statutory scheme prescribes the form of this summons. <i>Id.</i> § 35-12-18. Exemptions are defined to include only wage and salary exemptions. <i>Id.</i> § 35-12-7. The garnishee has a conclusive defense against the debtor if it pays the creditor per the terms of the garnishment order. <i>Id.</i> § 35-12-12. The debtor may contest the garnishee's answer. <i>Id.</i> § 35-12-5. The requirement for notice to the debtor is found in N.M. RULES ANN. § 2-802 (2008): The garnishee must serve this notice to the debtor within four days of receiving the garnishment order, and notice (for non-wage garnishments) must include a form for claiming exemptions.</p>
NC*	<p>The statutory scheme does not identify garnishment per se as a remedy, although N.C. GEN. STAT. § 1-360 (2007) allows creditors to proceed against "[d]ebtors of judgment debtor." State exemptions are listed <i>id.</i> § 1C-1601. The creditor must provide notice to judgment debtors, with an extremely long, complex listing of exemptions. <i>Id.</i> § 1C-1603. The debtor has twenty days to file an exemption claim or request a hearing. <i>Id.</i> The North Carolina Constitution provides additional exemptions, including \$500 of personal property. N.C. CONST. art X, § 1. This exemption could conceivably apply to a bank account.</p>
ND	<p>N.D. CENT. CODE § 32-09.1-07 (Supp. 2007) prescribes garnishment notice to the debtor, including a form; the notice does not describe exemption or hearing rights. The garnishee may assert exemptions on behalf of the defendant. <i>Id.</i> § 32-09.1-09. If the debtor claims exemptions, she must fill out a personal property schedule within twenty days of notice. <i>Id.</i> § 32-09.1-22. The debtor's exemption claim will be heard any time, provided the creditor receives three days' notice. <i>Id.</i> 32-09.1-23.</p>
OH*	<p>OHIO REV. CODE ANN. §§ 2716.01–.21 (West 2006) govern garnishment. The creditor must fill out an affidavit stating a "reasonable basis to believe" that the garnishee has nonexempt debtor property. <i>Id.</i> § 2716.11. The debtor must receive notice with a list of exemptions and an explanation of how to request a hearing; the debtor must assert exemptions within five days of receiving notice. <i>Id.</i> § 2716.13.</p>
OK	<p>OKLA. STAT. ANN. tit. 12, § 1173.3 (West 2000 &amp; Supp. 2008) sets forth general garnishment procedures. The garnishee may assert an exemption on behalf of the debtor. <i>Id.</i> § 1173.3(E)(3). The summons</p>

	<p>serves as a lien "to the extent the property is not exempt from garnishment." <i>Id.</i> § 1173.3(F). The debtor must receive notice that identifies exemptions and instructs the debtor to claim any exemptions within five days. <i>Id.</i> § 1174. The statutory scheme specifically allows for a mutual garnishee-defendant exemption defense. <i>Id.</i> § 1181.</p>
OR	<p>OR. REV. STAT. § 18.658 (2007) requires creditors to deliver the exemption notice form and a challenge form as prescribed by sections 18.845 and 18.850. The notice warns the debtor to act promptly (within ten days). <i>Id.</i> § 18.845. Sections 18.345–.428 define exempt property.</p>
SD	<p>S.D. CODIFIED LAWS §§ 21-18-1 to -53 (2004) govern garnishment. The creditor must affirm in an affidavit that the property sought is, "to the best of the knowledge and belief" of the creditor, not exempt. <i>Id.</i> § 21-18-3. The debtor must receive a copy of the garnishment summons; any garnishment not providing this notice is void. <i>Id.</i> § 21-18-10. A debtor must also receive notice of any levy; this notice must inform the debtor of her right to exemptions. <i>Id.</i> § 21-19-3.</p>
TN*	<p>TENN. CODE ANN. § 26-2-403 (2000 &amp; Supp. 2008) prohibits garnishment without notice. Notice is specified <i>id.</i> § 26-2-404, which alerts the debtor to possible exemptions and the process for asserting them. If the debtor acts within twenty days, the court will hear the debtor's claim within fourteen days of receiving it. <i>Id.</i></p>
TX*	<p>TEX. R. CIV. P. 657–679 (1967 &amp; Supp. 2008) control the garnishment process. Rule 663a requires notice to the debtor informing her of the right to file a motion to dissolve the writ, although not notifying her of exemptions. Rule 664b outlines the dissolution motion procedure. The debtor may raise exemptions as grounds for dissolution. <i>See</i> Gen. Elec. Capital Corp. v. ICO, Inc., 230 S.W.3d 702, 706–07 (Tex. App. 2007).</p>
UT*	<p>UTAH R. CIV. P. 64D (2008) defines garnishment procedure. The garnishee must "serve the writ, its answers, notice of exemptions and . . . the reply form on the debtor." <i>Id.</i> 64D(g)(3). Either the creditor or the debtor may request a hearing. <i>Id.</i> 64D(h). Form 41 provides notice of exemptions and request for hearing; the debtor has ten days to request a hearing. <i>Id.</i> F41.</p>
VT	<p>VT. STAT. ANN. tit. 12, § 3168 (2002) allows for trustee process, made applicable to bank account funds by section 2732. VT. R.C.P. 4.2(j)(3) (2000 &amp; Supp. 2008) requires that the debtor receive notice of process and a list of exemptions. Rule 4.2(k) provides for the same</p>

	notice in "postjudgment process." Form 34 lists exemptions, and encourages the debtor to contact an attorney for help in claiming them. <i>Id.</i> F34.
VA*	Virginia provides notice to the debtor of the garnishment, exemptions and hearing rights. <i>See supra</i> notes 112–32 and accompanying text for a detailed description.
WA	WASH. REV. CODE ANN. § 6.27.130 (West 1995 & Supp. 2008) requires that the debtor receive garnishment notice on the same day as or before notice to the garnishee. Section 6.27.140 sets forth the notice of exemptions form and instructions for claiming the exemptions. <i>Id.</i> § 6.27.140. The debtor has twenty-eight days to file, after which the creditor has ten days to object; if the creditor objects, a hearing must be held within fourteen days. <i>Id.</i>
WI	WIS. STAT. ANN. § 812.07 (West 2007) requires service on both the garnishee and the debtor. The garnishee may assert the debtor's exemptions, <i>id.</i> § 812.11(4), and the debtor can join in the trial, <i>id.</i> § 812.15. Wisconsin provides a long list of exemptions, including \$1,000 in a bank account. <i>Id.</i> § 815.18. Failure to claim an exemption constitutes a waiver thereof. <i>Id.</i> § 815.18(6)(a). The scheme does not appear to inform the debtor that these exemptions exist.
WY*	WYO. STAT. ANN. § 1-15-402 (2007) allows garnishment only of property not exempt by state or federal law. The debtor must receive a copy of the garnishment summons within five days of its service on garnishee. <i>Id.</i> § 1-15-409. Either the creditor or the debtor may contest the garnishee's answer. <i>Id.</i> § 1-15-412. The statutory scheme does not explain how the debtor learns of exemptions or the right to assert them at trial.

<b>Third-Class States</b>	
<b>State</b>	<b>Law</b>
DE	DEL. CODE ANN. tit. 10, § 3512 (1999) gives the Delaware Superior Court authority to make rules respecting attachments. Rules issued pursuant to this authority include DEL. SUPER. CT. CIV. R. 4(c)(2) (2008) (giving a garnishee twenty days to answer in the form provided in Form 45). The state statutory scheme makes no mention of notice to the debtor of the garnishment, exemption or right to a hearing.
DC	D.C. CODE ANN. § 15-501(a)(7) (LexisNexis 2005 & Supp. 2008) exempts "the debtor's <i>right</i> to receive" benefits from attachment for heads of household (emphasis added). The debtor is also promised

	<p>a trial to assert exemptions. <i>Id.</i> § 15-521. The code does not, however, define how the debtor receives notice of the garnishment, exemptions and trial rights. The garnishee must hold assets pending judicial determination of the propriety of the attachment. <i>Id.</i> § 16-547.</p>
MA	<p>The state refers to garnishment as "trustee process," but the governing statutes refer to prejudgment remedies; postjudgment trustee process is not mentioned. MASS. GEN. LAWS ANN. ch. 246, §§ 1-67 (2004). Exemptions are listed with no explanation of how to assert them. <i>Id.</i> ch. 235, § 34 (2000). The trustee must answer within twenty days, <i>id.</i> ch. 246, § 10, and is liable after thirty days, <i>id.</i> § 41. Although a federal court found prejudgment trustee process without notice and a hearing to be unconstitutional, <i>Schneider v. Margossian</i>, 349 F. Supp. 741, 745 (D. Mass 1972), the statutory scheme does not require notice to the postjudgment debtor.</p>
MS	<p>Although MISS. CODE ANN. § 11-35-33 (West 1999) allows the garnishee to claim exemptions on behalf of the debtor, it does not provide for notice to the debtor if the garnishee does not claim exemptions. The code provides for service on the garnishee, but not the debtor. <i>Id.</i> § 11-35-9. The debtor can contest the garnishee's answer if the defendant manages to obtain notice of the garnishment. <i>Id.</i> § 11-35-47. If the garnishee fails to claim exemptions and turns the funds over to the creditor, the debtor's remedy is against the garnishee, not the creditor. <i>See Folse v. Stennett-Yancey</i>, 757 So. 2d 989, 992 (Miss. 2000).</p>
RI	<p>R.I. GEN. LAWS § 9-25-12 (1997) defines the form used for trustee process, and does not include notice to the debtor. A garnishee may assert mistake in response to a garnishment order, <i>id.</i> § 9-25-24, which could shield a bank's good faith erroneous belief of exemption. Bank accounts may also be attached pursuant to a judgment. <i>See Dionne v. Bouley</i>, 757 F.2d 1344, 1346 (1st Cir. 1985). One code section, R.I. GEN. LAWS § 10-5-2, does require notice, although it appears to address provisional attachment, not post-judgment attachment.</p>
SC	<p>S.C. CODE ANN. § 15-39-350 (2005) provides for garnishment, referring to it as "examination of debtors of [a] judgment debtor." The code provides for application of non-exempt property towards a debt, <i>id.</i> § 15-39-410; presumably, any order to apply exempt property is invalid under this statute. Exempt property is listed <i>id.</i> § 15-41-30. The statutory scheme neither provides notice to the debtor nor defines the procedure for asserting exemptions.</p>

WV	<p>W. VA. CODE ANN. § 38-7-15 (LexisNexis 2005) provides for garnishment. The code section that defines the garnishee's answer does not mention exemptions. <i>Id.</i> § 38-7-24. The list of personal property exemptions includes \$1,000 on deposit, <i>id.</i> § 38-8-1; this could conceivably serve as the basis for a self-executing exemption. Although <i>id.</i> § 38-7-30 may require notice to the debtor, this statute does not specify whether it applies to garnishment notice. Certain retirement accounts are listed as exempt, but the code lists no other exemptions. <i>Id.</i> § 38-7-7. The civil procedure rule that addresses garnishment does not require notice to the debtor. W. VA. R. CIV. P. 64 (LexisNexis 2008).</p>
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