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OFFSETTING JUSTICE: PROTECTING FEDERALLY-EXEMPT BENEFITS FROM GARNISHMENT AND BANK SET-OFFS

Arianna Tunsky-Brashich*

Abstract: For the millions of Americans who rely on direct deposit for receipt of their monthly federal benefits, section 207 of the Social Security Act provides a necessary protection against creditors. This federal law protects federal benefits from garnishment, attachment and other legal processes, but the courts, federal agencies, consumer groups and other stakeholders are in disagreement over its scope. This Note serves as a comprehensive review of the exemption, discussing its policy and history as well as case law that highlights the difficulty of applying its provisions to modern day banking practices. This Note concludes by advocating legislative and administrative actions to protect recipients of federal benefits payments.

INTRODUCTION

In September 2007, seventy-year old Waverly Taliaferro testified before the Senate Finance Committee about how he and his wife had their bank account frozen as a result of mounting credit-card debt.\(^1\) At the time that it was frozen, the account held forty-seven dollars remaining from the social security payment that had been directly deposited the month before.\(^2\) Mr. Taliaferro only learned of the freeze when he went to the grocery store to do his shopping.\(^3\) On the day that his next monthly social security check should have been deposited, he was unable to access any of the funds in his bank account.\(^4\) Even with the help

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2 Hearings, supra note 1, at 1.

3 Id.

4 Id.
of a legal services attorney, it took twenty-three days for the bank to un-
freeze the account.\(^5\) During this period, Mr. Taliaferro and his wife
were forced to sell keepsakes and survive on brown rice; he lost forty
pounds and she lost three dress sizes.\(^6\) When the account was finally
unfrozen, rather than give Mr. Taliaferro an apology, the bank charged
him forty-five dollars for applying the freeze.\(^7\) Since this incident, Mr.
Taliaferro has received his social security payment by check and has
suffered a “loss of dignity” as he has been forced to use a neighborhood
check cashing store.\(^8\) Although Mr. Taliaferro tried to open up a new
account with a different bank, that account, too, was frozen just days
after he opened it.\(^9\)

The Senate Finance Committee held the hearings—collectively
entitled “Frozen Out”—to examine the policies and procedures that
banks, like the ones used by Mr. Taliaferro, follow when they receive
state court orders to freeze assets.\(^10\) Representatives of the Federal De-
posit Insurance Corporation (FDIC), Office of the Comptroller of the
Currency (OCC), Office of Thrift Supervision (OTS), and the National
Consumer Law Center (NCLS) were among the federal agencies and
consumer groups that testified.\(^11\) Their statements addressed the gravity
and complexity of a problem that has been exacerbated in recent
years as more and more individuals receiving federal benefits have
them directly deposited in bank accounts.\(^12\) Under federal law, Social

\(^5\) Id. at 2.

\(^6\) *Hearings, supra* note 1, at 2 (statement of Taliaferro).

\(^7\) Id.

\(^8\) Id.

\(^9\) Id. The bank advertised it would not freeze accounts that contained only direct de-
posit social security payments, and gave him a $100 signing bonus for opening the ac-
count. Id. However, because the account still had $25.25 left over from the signing bo-
num—and therefore did not contain solely direct deposit social security payments—the
bank could legally freeze the account and all of Mr. Taliaferro’s funds. *Id.* at 3.

\(^10\) See *id.* (all statements). Senator Max Baucus, Chairman of the Senate Finance Com-
mittee, chastised the banks and the federal banking regulatory agencies in his opening
statement for not honoring an ancient rule set forth in the Book of Leviticus; rather than
treating beneficiaries fairly and according to the law, he accused banks of “keeping Social
Security beneficiaries’ payments far longer than all night, far longer than until morning.”
See *id.* at 1 (statement of Sen. Max Baucus). He went on to express disappointment with
the federal banking regulatory agencies and the draft comment they issued that refused to
recognize that the federal law protecting social security benefits preempted state law. *Id.* at
2.

\(^11\) See *Hearings, supra* note 1 (all statements).

\(^12\) See *id.* at 1–12 (statement of Sara A. Kelsey, Gen. Counsel, Fed. Deposit Ins. Co.), 1–9
(statement of Margot Saunders, Counsel, Nat’l Consumer Law Ctr.), and 1–12 (statement
of Julie L. Williams, First Senior Deputy Comptroller & Chief Counsel, Office of the
Comptroller of the Currency).
Security Benefits, Supplementary Security Income Benefits, Veterans’ Benefits, Federal Civil Service Retirement Benefits, and Federal Railroad Retirement Benefits are supposed to be protected from garnishment and attachment that would freeze bank accounts.\(^\text{13}\) However, banks, federal agencies, consumer groups, and other stakeholders are in disagreement over the extent of relevant federal law, which agency should regulate, and whether the banks should take the initiative to make sure that the accounting systems and processes that they use for managing accounts with directly deposited social security benefits protect those exempt assets.\(^\text{14}\)

Creditors obtain garnishment and attachment orders in state court that direct banks to freeze accounts.\(^\text{15}\) Once the banks freeze the assets to prevent withdrawals, they will also freeze subsequent deposits, including those originating from the U.S. Department of the Treasury.\(^\text{16}\) Furthermore, banks will assess fees for overdrafts while accounts are frozen and for complying with state court orders against frozen accounts and deduct them from the account.\(^\text{17}\) In order to unfreeze the account, beneficiaries must go to the courthouse with supporting social security and account documentation and fill out a form stating that the funds are exempt.\(^\text{18}\) If a creditor agrees to release the funds, it will send a notice to the bank of its decision.\(^\text{19}\) However, if it disagrees, and chooses not to release the funds, usually the debtor’s only recourse is to request a hearing.\(^\text{20}\) The majority of banks do not review the source of deposited funds in the account they have been ordered to freeze.\(^\text{21}\) Even if it is marked as an account into which federal benefits are directly deposited or electronic transfers from the Treasury Department


\(^{14}\) See Hearings, supra note 1, at 1–12 (statement of Kelsey), 1–9 (statement of Sanders) and 1–12 (statement of Williams).

\(^{15}\) See id. at 2 (statement of Kelsey) and 2 (statement of Williams).

\(^{16}\) See id. at 2, 6 (statement of Kelsey), 4 (statement of Saunders) and 2 (statement of Williams).

\(^{17}\) See Nat’l Consumer Law Ctr., Consumer Banking and Payments Law 47 (Supp. 2007).

\(^{18}\) See Hearings, supra note 1, at 4 (statement of Saunders).

\(^{19}\) Id.

\(^{20}\) See id. at 2 (statement of Kelsey) and 4 (statement of Saunders).

\(^{21}\) See id. at 4 (statement of Saunders).
are readily apparent, banks more often than not choose to freeze the
exempt assets.\footnote{22 See id.}

State and federal case law do little to clarify how banks should
handle such garnishment and attachment orders.\footnote{23 See Hearings, supra note 1, at 3 (statement of Kelsey).} Banks take a
“damned if we do, damned if we don’t” attitude; if they don’t freeze the
funds, they claim they will be liable under state law to the creditor, and
if they do freeze the funds, they claim they can be threatened with suit
by the account holder.\footnote{24 See id. at 3–5; cf. id. at 6 (statement of Saunders) (arguing that in most states, banks
are required to attach only non-exempt funds and that banks would not be exposed to
liability if they refused to honor a freeze on exempt assets).} Accordingly, many financial institutions
choose to comply with state garnishment orders and, if it comes to it,
let the courts determine entitlement to the funds that the beneficiaries
claim are federally-exempt.\footnote{25 See id. at 4–5 (statement of Kelsey).}

The testimony at the September 2007 hearings combined with a
recent one billion dollar judgment against Bank of America highlight
just how serious this problem is becoming, especially as baby boomers
hit retirement age and more elderly individuals rely on federal benefits
as their primary source of income.\footnote{26 See Miller v. Bank of Am., No. CGC-99–301917, 2004 WL 3153009, at *32–35 (Cal. App. Dep’t Super. Ct. Dec. 30, 2004), rev’d, 51 Cal. Rptr. 3d 223 (Ct. App. 2006), cert. granted, 154 P.3d 997 (Cal. 2007); Hearings, supra note 1, at 1 (statement of Saunders) (stating that bank freezing of exempt funds “has become one of the most alarming and fre-
quent reasons for emergency requests for assistance to legal services lawyers all over the
nation”) and 4–6 (statement of Johnson M. Tyler, SSI Unit Dir., S. Brooklyn Legal Servs.). Mr. Tyler testified that he is seeing a dramatic increase in the number of federal benefici-
aries having their accounts frozen. Id. at 4–6 (statement of Tyler). According to Mr. Tyler,
about 750,000 New Yorkers have no source of income other than their monthly social se-
curity or Supplementary Security Insurance checks. Id. at 4.} At stake are potentially billions of
dollars over an issue that raises questions of federal preemption, con-
gressional intent, and conflicting business and consumer interests.\footnote{27 See, e.g., Miller, 2004 WL 3153009, at *32–35; Hearings, supra note 1, at 9–11 (statement
of Kelsey) (suggesting that possible solutions include legislative action and the prom-
ulgation of regulations by the Social Security Administration), 12 (statement of Saunders)
(arguing that federal banking agencies have the statutory authority and must regulate to
protect affected consumers), and 1 (statement of Williams) (“[A] solution will require
involvement by and actions by multiple agencies . . . . The issues presented include unclear
and undefined provisions of Federal Law, state laws and judicial processes that may unin-
tentionally produce results conflicting with Federal public policy objectives, and question-
able practices by debt collectors. The issues presented also implicate important Federal
policy objectives affecting how Federal benefits payments are made . . . .”); B of A Ordered to
Pay Millions for Fees for Tapping Direct Deposit Accounts, BNA, Mar. 27, 2007 (noting that dam-
gees for the the plaintiff-class were estimated at over 1.3 billion dollars).}
This Note will serve as a comprehensive review of the current, growing problem—focusing on the social security exemption—and will suggest concrete and realistic legislative and administrative changes.

Part I of this Note will review the policy and history behind the federal benefits exemption and the requirement that federal payments be electronically deposited. Part II will briefly discuss the involuntary payments that banks garnish or set-off from a patron’s bank account. Part III will look at conflicting case law through analysis of the divide between Ninth and Tenth Circuit decisions. This section will also review the pending litigation and legal questions at issue in Miller v. Bank of America. Finally, Part IV will suggest legislative and administrative actions that must be taken to protect recipients of federal benefits payments.

I. The Social Security Act Exemption

In 1935, Congress passed the Social Security Act as a mechanism to protect Americans from the devastating consequences of unemployment and old-age.28 Prior to the passage of the Act, there were only piecemeal approaches to social insurance, such as almshouses and the post-Civil War pension system.29 However, these were entirely inadequate in the face of economic insecurity that ravaged the country in the wake of the Great Depression.30 Grim realities of the Depression shifted popular support and elite attitudes and forced an understanding that the consequences of economic insecurity necessitated comprehensive government action.31 President Franklin Delano Roosevelt, addressing Congress in 1934, proclaimed that it was the federal government’s duty to provide assistance to the country’s neediest citizens.32 For President

30 See W. Andrew Achenbaum, Social Security: Visions and Revisions 16–18 (1986). As banks collapsed, families saw their savings wiped out. Id. at 17. Many companies were unable to provide their pension obligations; close to fifty plans covering over 100,000 employees were abandoned between 1929 and 1932. Id. Other companies seized money that was tied up in pension funds and applied it to other expenses. See id.
31 See id. at 13.
32 President Roosevelt, Message to Congress (June 8, 1934), available at http://www.socialsecurity.gov/history/fdrstmts.html#message1.
Roosevelt, “the security of the home, the security of livelihood, and the security of social insurance . . . constitute a right which belongs to every individual and every family willing to work.”33 These sentiments were embodied in the Act which provided a comprehensive national response to the plight of the elderly, disabled workers, retirees in need of medical care, and war survivors.34

A. Protecting Basic Subsistence Needs from Creditors

Social security eligibility provides a level of financial stability that is becoming more important as average national savings per person dwindles and an economic recession, which began in 2007, forces families to use their retirement savings for basic necessities.35 There are three kinds of social security benefits: Old Age and Survivors Insurance (OASI), Social Security Disability Insurance (SSDI) and Supplemental Security Insurance (SSI).36 OASI provides benefits to retired workers and their survivors, SSDI provides benefits for disabled individuals under the retirement age and is calculated based on the individual’s work history and payroll taxes, and SSI is a means-tested program that provides benefits for those who are over the age of 65, blind, or disabled and fit a definition of having low-incomes and few assets.37

33 Id.
35 See Catherine Rampell, Layoffs Spread to More Sectors of the Economy, N.Y. TIMES, Jan. 27, 2009, at A1 (discussing how massive layoffs are forcing many to use their retirement savings prematurely); Mary Williams Walsh & Tara Siegel Bernard, In Need of Cash, More Companies Suspend 401(k) Match, N.Y. TIMES, Dec. 21, 2008, at A1 (discussing how employers are suspending matching 401(k) contributions as revenues decline because of the recession); Editorial, The Thrift Imperative, N.Y. TIMES, May 5, 2005, at A34 (discussing how, from 2002 through 2004, the national savings rate was lower than at any time since the Great Depression). The most popular private sector retirement plans are 401(k) retirement plans that are tax-qualified deferred compensation plans. IRS, Tax Topics: 401(k) Plans, http://www.irs.gov/taxtopics/tc424.html (last visited Apr. 2, 2009). The economic recession that began in 2007 caused the value of many investments to drop and prompted many employers to suspend matching contributions; this highlights the unreliable nature of 401(k) plans. See Susan Cornwall, Interview: U.S. Lawmakers to Mull Reforms for Shrunken 401(k)s, REUTERS, Jan. 22, 2009; Burton Frierson, U.S. Economy Faces Heavy Blow from Stocks Funk, REUTERS, Nov. 26, 2008; Walsh & Bernard, supra.
In Title II of the 1935 Act, Congress included a provision against assignment of federal old-age benefits that, at its core, has remained largely unchanged.38

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, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.39

This section—which at the time was numbered section 208 but was later changed to section 207—is not treated in the voluminous legislative history of the 1935 Act.40

In 1983, Congress amended the Social Security Act.41 Although most of the amendments were directed towards managing the financing problems faced by the Old-Age, Survivors and Disability Insurance Program (OASDI), there were several minor technical provisions included in the amendments as well.42 One of these provisions added subsection (b) to section 207, making it clear that the protections of the assignment provision are not superseded by any other law, including bankruptcy law, unless that law explicitly references section 207.43

1959, the full retirement age is 67. Social Security Administration, Retirement Benefits by Year of Birth, http://www.ssa.gov/retire2/agereduction.htm (last visited Mar. 26, 2009). However, individuals can apply for benefits as early as age 62, although these benefits are reduced a fraction of a percent for each month before full retirement age. Id. An individual’s work history and social security taxes are used to calculate eligibility for retirement benefits. See SOC. SECURITY ADMIN., HOW YOU EARN CREDITS 1–5 (2008), available at http://www.ssa.gov/pubs/10072.pdf. Each quarter worked in a year is considered one credit, so long as you earn above the minimum amount for that year. See id. at 1, 3. The number of credits needed to retire depends on the person’s age. See id. at 3. For example, anyone born in 1929 or later must have worked for a minimum of ten years (or forty credits). See id. at 3.

39 Id.
42 H.R. Rep. No. 98-25, pt. 1, at 1–2 (1983); John A. Svahn & Mary Ross, Social Security Amendments of 1983: Legislative History and Summary of Provisions, 46 SOC. SECURITY BULL. 3, 3 (1983). In addition to a projected long-term deficit, it was estimated that $100–200 billion would be needed to restore fiscal viability to the program through the 1980s. The SSDI program is a subset of the OASDI program. CRS REPORT TO CONGRESS, supra note 36, at 4.
43 Social Security Act Amendments of 1983, Pub. L. No. 98-21, § 335, 97 Stat. 65, 130. Section 208 of the 1935 Act had been renumbered section 207 by the time of the 1983 Amendments. The addition reads: “[n]o other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or
tery of the Amendments suggests that this revision was made in reaction to the Bankruptcy Reform Act of 1978.\footnote{44} According to a report of the Committee on Ways and Means of the U.S. House of Representatives, some bankruptcy courts were treating social security benefits as income in Chapter 13 bankruptcy cases and were ordering the Social Security Administration (SSA) to send all or a portion of the debtor’s monthly benefit check to the bankruptcy trustee.\footnote{45} The 1983 Amendment thus clarified that Congress considered assignment through bankruptcy proceedings to be unlawful.\footnote{46}

The minimal legislative history of section 207 makes it difficult to discern its scope and purpose. However, given its inclusion in the 1935 Act and the goals of the federal insurance program, courts have interpreted that the purpose of section 207 is to insure that beneficiaries are able to meet basic subsistence needs, despite debts that may be owed to creditors.\footnote{47} In her testimony at the Senate Finance Committee hearings, counsel for the NCLS, cited that the five principle justifications for general exemptions that are commonly put forth by the courts are: 1) to provide the debtor with subsistence funds; 2) to protect the debtor’s dignity; 3) to provide the debtor with the possibility of a fresh start; 4) to protect the debtor’s family; and 5) and “to spread the debtor’s burden from society to his creditors.”\footnote{48} Courts are sensitive to the remedial and humanitarian ends to which exemptions are directed and interpret them liberally across circuits.\footnote{49} For example, in Depart-

\footnote{44} H.R. Rep. No. 98-25, pt. 1, at 82.
\footnote{45} Id.
\footnote{46} Id. This suggested provision in the House bill was not amended by the Senate and the conference agreement thus followed the House bill. H.R. Rep. No. 98–47, at 153 (1983).
\footnote{47} See In re Neavear, 674 F.2d 1202, 1205 (7th Cir. 1982); Dep’t of Health and Rehabilitative Servs., Fla. v. Davis, 616 F.2d 828, 831 (5th Cir. 1980). When interpreting statutory construction, courts look at the language of the statute, as well as congressional intent and legislative history. See Watt v. Alaska, 451 U.S. 259, 265–67 (1981).
\footnote{48} Hearings, supra note 1, at 3 (statement of Saunders) (citing In re Johnson, 880 F.2d 78, 83 (8th Cir. 1989); N. Side Bank v. Gentile, 385 N.W.2d. 133, 138–39 (1986) (stating that the Wisconsin article on exemptions was “a humane provision intended to protect persons from sudden calamity, destitution and misery”); see Alan N. Resnich, Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy, 31 Rutgers L. Rev. 615, 621 (1978); William T. Vukowich, Debtors Exemption Rights, 62 Geo. L.J. 779, 784–88 (1974).
\footnote{49} See Hearings, supra note 1, at 3 (statement of Saunders); see, e.g., Brown & Bartlett v. United States, 330 F.2d 692, 696 (6th Cir. 1964) (stating that the circuit favors an interpretation of the Social Security Act that gives effect to its “beneficent” purposes); Schroeder v. Hobby, 222 F.2d 713, 715 (10th Cir. 1955) (“The Social Security Act is to be liberally con-
ment of Health and Rehabilitative Services, Florida v. Davis, the court found that the purpose of section 207 was to protect federal beneficiaries from creditors. The court declared that the exemption “evinces a clear legislative purpose of precluding beneficiaries from diverting their social security payments away from the statute’s seminal goal of furnishing financial, medical, rehabilitative and other services to needy individuals.” Thus, when a levy or legal process results in the denial of basic resources, section 207 and its protections are properly invoked. Furthermore, the courts have interpreted the exemption to apply not only to benefits that have been paid, but also to those that the beneficiary will be entitled to in the future.

Ambiguities created by the Act, perhaps as a result of this liberal construction, are generally construed in the plaintiff’s favor when it is reasonable to do so.

B. Favoring Electronic Payments

In 1996, Congress passed the Debt Collection Improvement Act (EFT 99), requiring that most federal government payments be electronically transmitted by the start of 1999. One of the alleged benefits of this policy as it applies to beneficiaries is that it encourages low-
income individuals and the elderly to utilize established banks.\textsuperscript{56} Banks and Automatic Teller Machines (ATMs) are thought to be safe, simple, and accessible for the old-aged and disadvantaged, limiting theft and the opportunities for check-cashing stores to take advantage of these individuals.\textsuperscript{57} However, the major impetus behind EFT 99 was the estimated cost-savings to the federal government.\textsuperscript{58} Sponsors of the bill estimated that the move to mandatory direct deposit could save the federal government almost $195 million each year.\textsuperscript{59} Such savings would be possible because an electronic transfer costs less than two cents to make while government checks can be stolen, forged, or counterfeited.\textsuperscript{60} Although recipients of federal benefits can still receive their checks by mail, the Treasury Department and the federal reserve banks have been pushing hard for this transition and developed a marketing campaign to encourage payees to opt-in to direct deposit.\textsuperscript{61}

The Treasury Department also rolled out Electronic Transfer Accounts (ETAs) in partnership with participating banks and other federally insured financial institutions.\textsuperscript{62} ETAs are advertised as a low-cost and convenient way to receive benefits.\textsuperscript{63} The marketing efforts of the federal government appear to be having their intended effect; in fiscal


\textsuperscript{57} See Dugas, supra note 56; Jaffe, supra note 56. Check cashing stores are used by individuals who do not have bank accounts, such as poorer immigrants and those with poor credit. See Wyatt Buchanan, Bank Accounts Put in Reach of Poor, Immigrants, S.F. CHRON., Dec. 4, 2007, at A1. These stores are notorious for charging high fees in exchange for cashing checks. See id. Individuals cashing checks worth $100 to $200 can be charged upward of $30 to $40. See id.

\textsuperscript{58} See Jim Landers, U.S. Backs Off Direct-Deposit Requirement: Benefit Recipients Objected to Being Forced into Banks, DALLAS MORNING NEWS, Dec. 31, 1998, at 1D.

\textsuperscript{59} See id.

\textsuperscript{60} See Jaffe, supra note 56. Two cents is far less than the cost of cutting a check and of using the postal system. Id. Each year, an estimated sixty-five million dollars are lost because of theft, forgery, and counterfeiting of government checks. Id.


\textsuperscript{63} See id. Beneficiaries can remove funds up to four times a month from ETAs and are only charged a maximum of three dollars per month. Id.
year 2009, 85.7% of social security recipients and 60.8% of SSI recipients are receiving their monthly benefits payments electronically.\textsuperscript{64}

As testimony at a Congressional Hearing in June 2008 illustrated, however, there were serious oversights made in the implementation of EFT 99.\textsuperscript{65} Current law permits non-bank financial service providers (FSPs), such as check cashing companies and payday lenders, to open accounts at established banks for social security recipients and to have benefits checks directly deposited.\textsuperscript{66} The social security recipients, however, do not have control over these funds.\textsuperscript{67} Once the funds are deposited in the accounts, the bank, less a transaction fee, makes the funds available to the non-bank FSP.\textsuperscript{68} The non-bank FSP then deducts additional fees before making the funds available to the beneficiary.\textsuperscript{69} According to testimony of the Inspector General of the SSA, this practice is inconsistent with section 207 and other policies that prohibit assignment-like practices.\textsuperscript{70}

\section*{II. Debt Collection Procedures}

Bank customers are subject to involuntary payments when the banks “set-off” funds from accounts to cover overdrafts and bank fees.\textsuperscript{71} Account garnishment—when a third party obtains a court order direct-

\begin{footnotesize}
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\item \textsuperscript{64} Social Security Administration, Trend in Direct Deposit Participation, http://www.ssa.gov/deposit/trendenv.shtml (last visited Mar. 26, 2009). Here, social security recipients include retirees and SSDI recipients. Id. These figures represent a significant increase from 1985 when only 41.5\% of social security beneficiaries and 12.4\% of SSI recipients received their payments electronically. Id.

\item \textsuperscript{65} See Hearings II, supra note 1 (statement of Patrick O’Carroll, Jr., Inspector Gen., Soc. Security Admin.).


\item \textsuperscript{67} See Hearings II, supra note 1 (statement of O’Carroll).

\item \textsuperscript{68} See id.

\item \textsuperscript{69} See id. According to the Treasury Department, social security recipients pay between $6 and $16 in fees for each benefit check cashed by a non-bank FSP. Id. A limited audit of five banks known to have relationships with non-bank FSPs, found that as of March 2008, over 63,065 individuals receiving SSI had accounts controlled by non-bank FSPs. Id.

\item \textsuperscript{70} See id. He also noted, however, “though some SSA policies appear to prohibit these types of arrangements, other policies outline steps to send payments directly to non-bank FSPs.” Id.

\item \textsuperscript{71} Nat’l Consumer Law Ctr., supra note 61, at 116.
\end{itemize}
\end{footnotesize}
ing the bank to freeze the funds—is another mechanism through which creditors can force involuntary payments from bank accounts.\textsuperscript{72}

A. Garnishment

The U.S. Supreme Court has held that garnishment is allowed to enforce post-judgment debts, but not prejudgment garnishment procedures.\textsuperscript{73} Even if a creditor obtains a court order before it garnishes a bank account, the debtor is still entitled to due process, although some courts have held that the notice requirement may be satisfied at the same time, or immediately following, the garnishment.\textsuperscript{74} To satisfy due process, the notice that garnishment has occurred must list major federal exemptions—such as social security and veterans’ benefits—and procedures the debtor can use to contest the order.\textsuperscript{75} However, even though notice given to the debtor is required by state law, it is not uniform.\textsuperscript{76} According to counsel for OCC, Arizona, Florida, Illinois, and New York have model notices; these list specific exemptions the debtor should be aware of and the procedure for requesting a hearing so that debtors can assert the affirmative defense their exemption provides.\textsuperscript{77}

In addition, the Federal Consumer Protection Act protects a portion of an individual’s earnings from garnishment.\textsuperscript{78} This safeguard is

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  \item[\textsuperscript{72}] Id. at 113. A debtor’s wages can also be subject to garnishment. U.S. DEP’T OF LABOR, EMPLOYMENT LAW GUIDE: WAGE GARNISHMENT (2007), available at http://www.dol.gov/compliance/guide/garnish.htm (last visited Mar. 26, 2009). A sheriff or other official presents the debtor’s employer with an order that the employer take out a specified amount from the debtor’s paycheck each week until the debt is paid off. Id.
  \item[\textsuperscript{73}] See Sniadach v. Family Fin. Corp., 395 U.S. 337, 337–42 (1969). In Sniadach, the petitioner alleged that a Wisconsin statute giving the creditor ten days from service on the garnishee in which to serve summons and complaint on the debtor violated the procedural due process requirements of the Fourteenth Amendment. See id. at 338. Noting the enormous leverage that creditors had on wage earners, the court held that notice and prior hearing were required prior to an in rem seizure of wages. See id. at 341, 342.
  \item[\textsuperscript{74}] Nat’l Consumer Law Ctr., supra note 61, at 113.
  \item[\textsuperscript{75}] Id. at 113–14.
  \item[\textsuperscript{76}] See Hearings, supra note 1, at 2–3 (statement of Williams).
  \item[\textsuperscript{77}] See id. at 3. State laws differ on who must provide notice of a debtor’s rights to the debtor. See id. In most states, either the court or a creditor must provide notice. Id. In a minority of states, the bank that has been served with a court order must notify the debtor that their funds have been levied by a creditor. See id.
  \item[\textsuperscript{78}] See Consumer Credit Protection Act, 15 U.S.C. §§ 1671–1677 (2000). Congress found that the ability of a creditor to garnish a debtor’s earnings would lead to predatory lending that would interfere with interstate commerce by diverting money towards high interest rates and related fees. See id. § 1671(a) (1). With some limitations, the Act limits the amount of a debtor’s wages that can be garnished to the lesser of twenty-five percent of the debtor’s weekly disposable income or thirty times the federal minimum hourly wage. See id. § 1673(a) (1), (2); In re Kokoszka, 479 F.2d 990, 996–97 (2nd Cir. 1973) (noting that
lost once earnings are deposited in the consumer’s bank account, although many states’ laws either protect certain exemptions after deposit or provide that a minimum amount of money be exempt regardless of its origins. Most of these state protections must be asserted by the debtor as affirmative defenses. However, Pennsylvania and California have taken the initiative to make exceptions to their debt collections procedures where federally-exempt funds are affected. In Pennsylvania, when a debtor uses direct deposit to receive their monthly benefits, state regulations prevent banks from attaching any exempt funds on deposit. California takes a different approach and limits that a minimum amount in each account into which exempt benefits are directly deposited may not be attached.

Unlike the examples of California and Pennsylvania, most states require the debtor to go to court and demand the release of the exempt property. Since indigent debtors generally do not have access to legal services or attorneys that are willing to work on small consumer debt cases, an account freeze is the equivalent of losing all of the assets in their account. Additional problems arise when the exempt funds are commingled with nonexempt funds, as happened to Mr. Taliferro. However, most courts hold that exempt funds should be protected if there is commingling—even when deposited into accounts with non-exempt funds—so long as the funds are traceable.

Congressional intent was to ensure that debtors could take home enough pay so that they could meet basic needs and avoid bankruptcy.

See Usery v. First Nat’l Bank, 586 F.2d 107, 107–08 (9th Cir. 1978) (holding that banks do not have an affirmative duty to determine a debtor’s right to an exemption and to calculate its amount under the Act). The Consumer Credit Protection Act allows states to make their own laws more restrictive, reflecting Congressional intent to maximize the protection of debtors. 15 U.S.C. § 1677(1).

See id. supra note 1, at 3 (statement of Williams).

Id. supra note 1.

Id.

Id. at 3–4. In California, a debtor must go to court and request an exemption for funds in the account in excess of the statutory minimum. See id. at 4. California law specifies the minimum as $2425 for individual accounts and $3650 for joint accounts. Id. at 3–4.

See NAT’L CONSUMER LAW CTR., supra note 61, at 115.

See Hearings, supra note 1, at 4 (statement of Saunders) (“The effect of a freezing of exempt funds is thus—generally—a full taking of these funds, because rarely does the recipient have the wherewithal to pursue the process of claiming the exemptions.”).

See id. at 4 (statement of Saunders).

See id. at 4 (statement of Saunders) However, other courts reason that exempt funds lose their special status when they are commingled with nonexempt funds. See Cotton States Mut. Ins. Co. v. Citizens & S. Nat’l Bank, 308 S.E.2d 199, 203 (Ga. Ct. App. 1983)
There are some banks that look at accounts to determine if the funds in them are exempt, a process that is made easier by the fact that accounts into which federal benefits are deposited are either marked by the computer programs of most financial institutions or clearly have funds deposited into them from the Treasury Department.\(^{88}\) Despite what appear to be easy measures, the majority of banks ignore any signs that there are exempt funds, choosing instead to freeze the account.\(^{89}\) These banks argue that it is too costly and time consuming to check the account.\(^{90}\) This has been further confused and aided by the SSA’s interpretation of garnishment procedures as the agency implies that the exemption is merely a defense.\(^{91}\)

**B. Bank Set-Offs**

State statutes and common law generally allow banks to set-off customer funds without first notifying the customer.\(^{92}\) A “set-off” refers to a fee that a bank debits from a customer’s account for debts that the customer owes to the bank, such as late-fees and overdrafts.\(^{93}\) Unless a statute provides otherwise, banks are not required to notify customers of this practice either in the documents that the customer signs when opening the account or the transaction documents creating the customer obligation giving right to the set-off.\(^{94}\) Some banks even require that the account holder release them of any claims that might arise from the bank exercising its right to a set-off.\(^{95}\) These fees that the bank applies are expensive and dispropor-

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\(^{88}\) See *Hearings, supra* note 1, at 4–5 (statement of Saunders).

\(^{89}\) See *id.* at 4.

\(^{90}\) See *Nat’l Consumer Law Ctr., supra* note 61, at 116; *Hearings, supra* note 1, at 4–5 (statement of Saunders).

\(^{91}\) See *Hearings, supra* note 1, at 4 (statement of Kelsey).

\(^{92}\) See *Nat’l Consumer Law Ctr., supra* note 61, at 116.

\(^{93}\) See *id.*

\(^{94}\) See *id.*

\(^{95}\) See Park View Federal Savings Bank, Deposit Account Agreement, https://www.parkviewfederal.com/deposit.asp (last visited Mar. 26, 2009). The Park View Federal Savings Bank based in Ohio is an example of one bank that has tried to limit its liability in this manner. *Id.* The relevant portion of the Deposit Account Agreement reads:
tionate to what should be considered equitable. When accounts are frozen, banks will normally charge a fee, anywhere from $100 to $150, that is taken from the assets in the accounts.\(^96\) If an account is frozen, checks, electronic transfers for utilities and rent, and ATM debits that have been drawn on the account will be returned for insufficient funds.\(^97\) Each time these are returned, the account is charged anywhere from $25 to $30 as a penalty or Not Sufficient Funds (NSF) fee.\(^98\) In her testimony before the Senate Finance Committee, counsel for the NCLS advocated that these fees assessed against beneficiaries be limited to the actual cost of the expense incurred.\(^99\) The organization argued that it was contrary to public policy to ask taxpayers to subsidize recipients so that they could avoid destitution, only to have banks charge onerous fees and profit at taxpayers’ expense.\(^100\)

C. Changes in Debt Collection Practices Exacerbate the Problem

Technology and the proliferation of a market for consumer debt have exacerbated garnishment and set-off of exempt funds by making the collection process less individualized and subject to a higher rate of error.\(^101\) Collection agencies purchase debts for pennies on the dollar and pursue debtors relentlessly.\(^102\) They often misrepresent the size of

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\text{RIGHT OF SET-OFF—Each signer agrees that we may (without prior notice and when permitted by law) set off the funds in this account against any due and payable debt owed to us now or in the future, by any signers having the right of withdrawal, to the extent of such persons’ or legal entities right to withdraw. If the debt arises from a note, “any due and payable debt” includes the total amount of which we are entitled to demand payment under the terms of the note at any time we set off, including any balance the due date for which we properly accelerate under the note. This right of set-off does not apply to this account if: (a) it is an Individual Retirement Account or other tax-deferred retirement account, or (b) the debt is created by a consumer credit transaction under a credit card plan, or (c) the debtor’s right of withdrawal arises only in a representative capacity. The Bank will not be liable for the dishonor of any check when the dishonor occurs because we set off a debt against this account. The signers agree to hold the Bank harmless from any claim arising as a result of the Bank exercising its right of set-off.}
\]

\(^96\) See Nat’l Consumer Law Ctr., supra note 17, at 47.
\(^97\) Id.
\(^98\) Id.
\(^99\) See Hearings, supra note 1, at 7 (statement of Saunders).
\(^100\) See id.
\(^101\) See Hearings, supra note 1, at 4 (statement of Williams).
the debt, contact friends and relatives of the debtor, make threatening phone calls, and neglect to investigate claims by the debtor that the debt is no longer valid.\textsuperscript{103}

Many of these agencies inundate small claims courts with collection actions that have incorrect names or addresses for the debtor.\textsuperscript{104} Often debtors will not receive action of the notice against them or will not recognize the debt as theirs and will fail to show up in court, resulting in default judgments.\textsuperscript{105} Once a judgment has been obtained, debt collectors send out mass e-mails to banks demanding that any funds of the debtor be seized in satisfaction of the judgment.\textsuperscript{106} Demands will be sent to financial institutions even if the collection agency does not have knowledge that the debtor has an account with that bank, or that the funds in the account aren’t exempt under state or federal law.\textsuperscript{107} Even if a debtor can prove that the seized funds are exempt, debt collectors can obtain another court order levying against the same account despite not having a reasonable basis for believing that the status of the funds in the account has changed.\textsuperscript{108} According to the FDIC, this “can present significant consumer hardships, and [it is] particularly daunting for elderly and disabled recipients of federal benefits payments.”\textsuperscript{109}

III. \textbf{How Exempt are Exempt Funds?: Judicial Interpretation of Section 207}

The Senate Finance Committee held the “Frozen-Out” hearings in response to the increased scrutiny that banks are coming under as more and more federal beneficiaries—those who are most at risk for

\textsuperscript{103} \textit{Id.} Judith Guillet’s experience is representative. \textit{See id.} Guillet, a retired nurse on full disability who has never owned a car, received a credit card bill for $2300 that had charges from gas stations on it. \textit{Id.} Even though she was able to convince the bank that the charges were false, because the bank turned the debt over to a collection agency, her bank account was frozen after the collection agency received a court order. \textit{Id.}

\textsuperscript{104} \textit{See Hearings, supra} note 1, at 4 (statement of Williams).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.} In his testimony at the hearing, Mr. Tyler explained how creditors in New York can issue information subpoenas with restraining notices on local banks without going to court. \textit{See id.} at 5 (statement of Tyler). Debt collection firms can easily serve every bank in the state to locate a debtor’s account. \textit{Id.} These firms serve banks with CD-ROM disks containing the names and social security numbers of thousands of judgment debtors. \textit{Id.}

\textsuperscript{108} \textit{Id.} at 5. Because technology has lowered the costs associated with issuing restraints, creditors repeatedly try to freeze the account in the hope that the debtor’s circumstances have changed (that is, that the debtor has returned to work or commingled his account). \textit{Id.} at 6.

\textsuperscript{109} \textit{See Hearings, supra} note 1, at 5 (statement of Williams).
being easily taken advantage of—find themselves forced to pay disproportionate penalties from funds that Congress intended to make exempt. The tension between the opinions of the Ninth and Tenth Circuits discussed below highlight a rift in case law as courts interpret social security legislation against a modernized, electronic marketplace. The conflicting decisions of the Ninth and Tenth Circuits will be persuasive in Miller v. Bank of America, a pending case that, regardless of its outcome, promises to spur Congress to legislate and the SSA to regulate on the issue.

A. A Circuit Split on Whether Set-Offs Are “Other Legal Processes”

The Tenth Circuit held in Tom v. First American Credit Union that a bank’s equitable right of set-off was encompassed by section 207’s “other legal processes,” and that the bank violated the Social Security Act when it seized the contents of a plaintiff’s account. In 1989, the Tom plaintiff opened an account with First American Credit Union and signed a credit plan agreement. The agreement authorized the bank to seize the funds in her account without prior notice if she failed to make payment when due. In 1994, the bank notified plaintiff that it was planning to deduct $2379.20 from her account for past due loan payments that the plaintiff and her late husband had accrued. Over the plaintiff’s objections, the bank seized the $1769 from her account.

In its analysis, the court relied on Philpott v. Essex County Welfare Board in which the Supreme Court held that a state welfare board could not collect a beneficiary’s social security benefits as reimbursement for the welfare benefits that it had extended to that resident. The Philpott

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110 See id. at 1–2 (statement of Sen. Chuck Grassley, S. Fin. Comm.)

111 See Ana I. Torres-Davis & Ryan McNew, Banks Seizing Social Security Benefits: Read the Fine Print on Account Agreement, AARP National Legal Training Project 1 (on file with author).

112 See Tom v. First Am. Credit Union, 151 F.3d 1289, 1291–94 (10th Cir. 1998).

113 Id. at 1290.

114 Id. at 1290–91.

115 Id. at 1291.

116 Id. These funds consisted entirely of social security and Civil Service Retirement funds. Id.

117 See 409 U.S. 413, 414–17 (1973). At issue in Philpott was a New Jersey law that required, as a condition of receiving welfare from the state, that potential beneficiaries execute an agreement promising to pay back the welfare board should the recipient subsequently acquire sufficient real or personal property. Id. at 414–15. Wilkes, whose account was being held in trust by plaintiff Philpott, was awarded retroactive social security benefits. Id. at 415. The welfare board sued to reach the $1864.20 in retroactive payments. Id.
court noted that section 207 imposed a broad bar against the use of any legal process to reach social security benefits, and that this bar applied to all claimants, even a state.\textsuperscript{118}

The court in \textit{Tom} refused to distinguish the legal process at issue in \textit{Philpott} from the bank set-off, stating it could see no reason why Congress would “choose to protect Social Security beneficiaries from creditors who utilized the judicial system, a system that is built upon principles of fairness and protection of the rights of litigants, yet, on the other hand, leave such beneficiaries exposed to creditors who devised their own extra-judicial methods of collecting debts.”\textsuperscript{119} According to the court, the agreements signed by the plaintiffs in both cases were contracts of adhesion designed to enable creditors to attach social security payments.\textsuperscript{120} Construing “other legal processes” to apply only to judicial processes, and not set-offs, ran counter to the intent of the Social Security Act.\textsuperscript{121} Because the Supreme Court refused to carve out an exception to section 207 that would enable a state to defray the costs of supporting its indigent residents, the court could not reason how the private interest of a bank trying to recover on bad-debt was any more tolerable.\textsuperscript{122} The court concluded that set-off fell into the category of “other legal processes” for purposes of section 207, and that the bank violated federal law when it seized plaintiff’s assets.\textsuperscript{123}

The first major Ninth Circuit opinion to look at what constituted a legal process within the definition of section 207 came in \textit{Crawford v. Gould}.\textsuperscript{124} The question on appeal was whether section 207 preempted the state practice of psychiatric hospitals using social security benefits to offset the costs of patient care.\textsuperscript{125} The plaintiffs in the case were patients that had been involuntarily committed at state psychiatric hospitals in California.\textsuperscript{126} At the time, it was state practice for the hospitals to maintain hospital trust accounts for patients into which assets prior to admission and those acquired after admission were held.\textsuperscript{127} Soon after

\textsuperscript{118} \textit{Id.} at 417.
\textsuperscript{119} \textit{See Tom}, 151 F.3d at 1292.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{See id.}
\textsuperscript{122} \textit{See id.} In addition to relying on \textit{Philpott} in support of this reading, the court also cited \textit{Bennett v. Arkansas}, in which the Supreme Court rejected Arkansas’s argument that section 207 should allow the state to recover federal funds from prisoners to help offset the cost of imprisonment. \textit{See id.; Bennett v. Arkansas}, 485 U.S. 395, 397–98 (1988).
\textsuperscript{123} \textit{See} 42 U.S.C. § 407(a) (2000); \textit{Tom}, 151 F.3d at 1293.
\textsuperscript{124} \textit{Crawford v. Gould}, 56 F.3d 1162, 1163–68 (9th Cir. 1995).
\textsuperscript{125} \textit{Id.} at 1163.
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Id.} at 1163–64.
admission to the hospital, patients were required to sign an “Authorization for Deposit and Withdrawal,” that allegedly allowed the hospitals to deposit their assets into a fund.\textsuperscript{128} State and government benefits, including social security payments, were then deposited into these accounts while these patients were institutionalized.\textsuperscript{129} Even if the patients never gave authorization, California psychiatric hospitals still followed the deposit and withdrawal procedures, although they provided the non-consenting patients with a “Notice of Informed Withdrawal.”\textsuperscript{130} As soon as the patients’ personal assets in the funds exceeded $500, the hospitals applied the excess as reimbursement for patient care and maintenance.\textsuperscript{131}

The \textit{Crawford} court relied on the Ninth Circuit’s opinion in \textit{Brinkman v. Rahm}, in which the court held that the procedures at issue were inconsistent with section 207 and were therefore preempted by it.\textsuperscript{132} In \textit{Brinkman}, patients were involuntarily committed to Washington state mental institutions and were liable to the hospitals for the cost of their care.\textsuperscript{133} The \textit{Crawford} court compared the process in Washington with that in California and found that the similarity of the procedures required the court to conclude that California’s process also was inconsistent with section 207, and therefore preempted by it.\textsuperscript{134} Although California urged the court that “other legal processes” as set forth in section 207 should apply only to judicial processes, the court refused this interpretation, citing a Second Circuit opinion on a similar set of facts.\textsuperscript{135} In that opinion, the court indicated that section 207 applied

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Crawford}, 56 F.3d at 1164.
\textsuperscript{130} \textit{Id.} This “Notice of Informed Withdrawal” informed patients of the amount that the hospitals would be withdrawing from their trust accounts. \textit{Id.} Both this notice and the Authorization for Deposit and Withdrawal advise patients that they have the right to appeal the withdrawals from their hospital accounts. \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}; \textit{Brickman v. Rahm}, 878 F.2d 263, 265 (9th Cir. 1989). The Ninth Circuit applied \textit{Bennett} to arrive at its holding. \textit{See Brickman}, 878 F.2d at 265.
\textsuperscript{133} \textit{See Brickman}, 878 F.2d at 264.
\textsuperscript{134} \textit{Crawford}, 56 F.3d at 1166.
\textsuperscript{135} \textit{See id.} The \textit{Crawford} court distinguished the California process from one that was in place in New York. \textit{See id.} In New York, the State Office of Mental Health deducted the cost of care from institutionalized mental patients’ accounts, including accounts containing social security benefits. \textit{See Fetterusso v. New York}, 898 F.2d 322, 328 (2nd Cir. 1990). While the court in \textit{Fetterusso} stated it had no basis for concluding that the patients did voluntarily agree to use their social security benefits to pay care and treatment costs, the plaintiffs in \textit{Crawford} did not consent to apply social security benefits to the cost of their care. \textit{See Crawford}, 56 F.3d at 1166; \textit{Fetterusso}, 898 F.2d at 328.
not only to formal judicial proceedings, but also to express or implied threats or sanctions.\footnote{See Crawford, 56 F.3d at 1166.}

However, in 2002, in \textit{Lopez v. Washington Mutual Bank} the usually plaintiff-friendly Ninth Circuit reversed course and issued an opinion that eroded the protections it had established in \textit{Crawford}.\footnote{See Lopez v. Wash. Mut. Bank, 302 F.3d 900, 900–08 (9th Cir. 2002).} The American Association of Retired Persons criticized the holding in \textit{Lopez} as devastating social security beneficiaries and providing sweeping concessions for the banking industry.\footnote{See Torres-Davis & McNew, \textit{supra} note 111, at 5.} The issue in \textit{Lopez} was whether a bank could collect on overdrafts and overdraft fees without contravening the meaning of section 207.\footnote{See Lopez, 302 F.2d at 900.} The plaintiffs received directly deposited social security funds into their Washington Mutual accounts.\footnote{Id. at 902.} Prior to opening their accounts, plaintiffs executed account agreements.\footnote{Id.} These agreements had provisions for overdraft fees that allowed the bank to set-off any overdrafts and penalties against their accounts, and read that notice only be provided after the set-offs were made.\footnote{Id. at 903.} All plaintiffs had overdrawn on their accounts and the bank used their social security payments to satisfy their debts.\footnote{See \textit{Lopez}, 302 F.3d at 903–04.}

The \textit{Lopez} court acknowledged that it had broadly construed the phrase “other legal processes” in \textit{Crawford}, but it refused to allow that holding to control the “free market banking” arrangement it said was at issue.\footnote{See id.} According to the court, by voluntarily opening an account, signing an agreement that outlined the terms and agreements of the bank’s overdraft policies, and then establishing direct deposit for their benefits, the plaintiffs consented to the bank using each deposit after an overdraft to be treated as a voluntary payment applied against the amount due.\footnote{See id. at 904.} The court distinguished the two cases based on the voluntary nature of the relationship in \textit{Lopez}.\footnote{See id.} The plaintiffs could choose to remove their assets from the bank’s reach by closing their accounts or changing their direct deposit instructions.\footnote{See id. The court noted that the plaintiffs in \textit{Crawford} were involuntarily committed, incompetent to handle their personal affairs, and were required by state law to deposit all of their liquid assets into funds administered by the hospitals. See id.} The court
determined that it “is sufficient and ‘meaningful’ consent for the re-
cipient to have executed the account agreement which notified him of
the bank’s standard practice of using deposits to cure overdrafts and
then to have provided the bank with a deposit to apply in such a fash-
ion.”148

The Lopez court accepted the bank’s argument that the relation-
ships that beneficiaries maintain with banks are similar to the relation-
ships they maintain with other everyday creditors such as grocers and
landlords.149 Precluding beneficiaries from using their direct deposits
to satisfy payments of overdrafts would discourage banks from dealing
with these individuals and would run contrary to the intent of Congress
in encouraging electronic payments of benefits.150

The court in Lopez relied on voluntary consent to legitimize the
seizing of federally-exempt benefits.151 However, the bank agreements
did not have provisions explicitly stating that overdrafts and related fees
would be taken from the plaintiff’s government benefits.152 This logic
leads to the conclusion that beneficiaries who use direct deposit at fi-
nancial institutions have voluntarily waived their rights under section
207.153 In essence, they have consented to have their benefits seized
should the bank maintaining their deposits determine that the individ-
ual owes overdraft fees or NSF fees to the bank. It is unreasonable to
maintain that Congress intended for the elderly and disabled, some of
society’s neediest and most susceptible to fraud and usury, to be able to
waive their rights to statutorily-exempt funds.

B. Miller v. Bank of America

In March 2007, the California Supreme Court granted review in
Miller v. Bank of America, a case emblematic of the controversy surround-
ing the extent of section 207’s protections.154 Although the case was
brought in state court and involved mostly state law claims, the ques-
tions of law implicated are fundamentally similar to those in Lopez and

148 See id. at 905. The court noted that its holding in Lopez would create a tension with
the Tenth Circuit in Tom and attempted to distinguish the two cases on the facts. See id. at
906. In Tom, the social security deposits were used to satisfy separate debts unrelated to the
plaintiff’s deposit account whereas here the court found that the depositor consensually
arranged for an automatic payment of debts owed to the bank. See id.
149 See Lopez, 302 F.3d at 905.
150 See id.
151 See id.
152 See Torres-Davis & McNew, supra note 111, at 5.
153 See Lopez, 302 F.3d at 906.
The case concerned a class of over one million Bank of America customers that maintained checking or savings accounts with the bank into which social security or other government benefits were directly deposited. The facts and supporting testimony given in the case by plaintiffs’ experts illustrates the demographics that are most often injured by current banking practices. Banks know their customers and have tailored account practices so that patrons living paycheck-to-paycheck or whose livelihood solely consists of government benefits are more likely to overdraw their accounts and provide profitable fees for the banks.

1. Background

The plaintiff representing the class, Paul Miller, had been a bank customer since 1978 and began receiving SSI benefits after a head injury in a physical assault in 1989 left him with a permanent mental disability. In 1994, Mr. Miller agreed to have his monthly benefit checks, generally $670.40, electronically deposited into his account after the bank’s staff assured him that his funds would be safe, secure, and accessible. However, in 1998 the bank erroneously credited his account $1799.83 and Mr. Miller, thinking that the money was a retroactive adjustment on his monthly payments, spent the funds. Without giving Mr. Miller prior notice, the bank reversed the credit and because there were insufficient funds in his account to repay the bank, the bank seized his monthly social security deposit and applied it against the outstanding balance.

During trial, counsel for the plaintiff presented the testimony of an expert in social security demographics to illustrate just how necessary federal and state benefits are to recipients’ daily existence. The

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156 See Miller, 2004 WL 3153009, at *1.
157 See id. at *5–6.
158 See id. at *7–10.
159 Id. at *2.
160 See id.
161 See Miller, 2004 WL 3153009, at *3.
162 See id. at *4.
163 Id. at *5–6. In California, approximately one in eight residents receives social security benefits, representing a total payout by the government of approximately $3.6 billion each month. Id. at *5. Out of the 4.3 million individuals that receive social security benefits
expert’s testimony also explained that beneficiaries using direct deposit are a significant source of profit for banks.\textsuperscript{164} Eighty-six percent of those receiving social security benefits in California have the funds directly deposited into their accounts.\textsuperscript{165} Each month, the bank receives $800 million in funds transferred into the 1,079,414 California Bank of America accounts into which benefits are directly deposited\textsuperscript{166} The expert also testified that over fifty percent of class members had a disability and had difficulty understanding quantitative information in printed material.\textsuperscript{167} This suggested to the trial court that most class members had difficulty understanding the terms of their account agreements and their monthly bank statements.\textsuperscript{168}

Even though customers who receive direct deposit benefits are some of society’s neediest, they are a significant source of profit for the bank each month, a reality that the bank has tailored its practices to exploit.\textsuperscript{169} The class members’ checking accounts contribute some $92 million of profit annually to Bank of America, and every month the bank collects $3 to $4 million in penalties from their accounts.\textsuperscript{170} The practice that the bank follows to collect on overdrafts includes a fee for each debit to an overdrawn account, not to exceed $160 per day.\textsuperscript{171} The overdrafts and their resultant fees are assessed against any assets that are later deposited into the account, regardless of their source.\textsuperscript{172} The bank also processes checks, ATM withdrawals, and other debits from largest to smallest so that accounts will be overdrawn more quickly and will incur the maximum penalties allowed.\textsuperscript{173}

in California, 1.1 million receive SSI, those benefits that are reserved for the extremely low-income elderly, blind, or disabled. \textit{Id.}

\textsuperscript{164} \textit{See id. at *5–6.}

\textsuperscript{165} \textit{Id. at *6.} Sixty-nine percent of those receiving SSI have those funds directly deposited into their bank accounts. \textit{See id.}

\textsuperscript{166} \textit{Miller, 2004 WL 3153009, at *6.}

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{See id.}

\textsuperscript{169} \textit{Id. at *8–10.}

\textsuperscript{170} \textit{See id. at *10–11.} Plaintiff’s expert estimated that between August 1994 and December 2003, Bank of America collected $284,385,741 in NSF fees from class members. \textit{Id. at *11.}

\textsuperscript{171} \textit{Miller, 2004 WL 3153009, at *8.} When Bank of America chooses to overdraw an account, it creates a debit in favor of the bank. \textit{See id.} The bank will then try to recover the funds by seizing any incoming deposits regardless of their source. \textit{See id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{See id.} This is because the larger debits are more likely to overdraw an account, thereby rendering the smaller debits more likely to trigger additional NSF fees. \textit{Id.}
2. The Court of Appeals Reverses the Superior Court and Finds Benefits Are Not Protected

The Superior Court held for the plaintiff class, finding that there was sufficient evidence to show that Bank of America violated state law. The court ordered a temporary injunction and allowed a jury award of $284,384,741 in restitution and $1000 in damages for each of the estimated 1.3 million class members. Although this case arose in the Ninth Circuit, because it was brought in state court, the Superior Court determined that *Lopez* did not require a finding of federal pre-emption. The judge also noted that the Ninth and Tenth Circuits were at odds on the issue of whether the seizure of electronically deposited federal benefits was in violation of section 207. Because the *Lopez* court based its holding on voluntary consent, the Superior Court judge made a finding that there was insufficient evidence of an actual agreement between the class members and the bank. In none of the banks’ marketing materials did it state that it would set-off government benefits, nor did it explain that under federal law these benefits are exempt from “other legal processes.”

On appeal, the California Court of Appeals considered only the question of whether a bank acts illegally if it uses electronically deposited benefits to satisfy overdrafts and related debits owed to the bank when balancing a checking account. The Superior Court relied heavily on the California case, *Kruger v. Wells Fargo Bank*, and held that this case could be extended to prohibit a bank from clearing overdrafts and debiting NSF fees from a deposit account into which government benefits are directly deposited. In *Kruger*, the Supreme Court of California found that a bank could not use a customer’s checking account, into which only government benefits were deposited, to satisfy mature debts owed to that same bank due to the customer’s debt on her credit card. Although the statutory exemption at issue did not directly apply to the bank’s right of set-off, the Superior Court in *Miller* court felt

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174 *Id.*

175 Consumer Protection: Court Reaffirms $1 Billion Jury Verdict Against BOA over Social Security Funds, BNA, Oct. 18, 2004. Attorneys’ fees to plaintiffs and pre-judgment interest, estimated at $88,313,386, were also awarded. *Id.*

176 See *Miller*, 2004 WL 3153009, at *29.

177 See id. at *29–30.

178 See id. at *31.

179 See id. at *8.

180 See *Miller*, 51 Cal. Rptr. 3d at 225.

181 See id. at 229.

that public policy required it to extend the right of exemption to the set-off at issue.\textsuperscript{183}

The Court of Appeals, however, found that the bank set-off in \textit{Miller} was not sufficiently like that in \textit{Kruger} because the account being debited was the same on which the debt was incurred.\textsuperscript{184} The practice used by Bank of America, although it implicated the legislative preferences at issue in \textit{Kruger}, did not “present the same risk of circumventing the exemptions of public benefit funds from attachment and execution” as were at issue in \textit{Kruger}.\textsuperscript{185} The court relied on \textit{Lopez} to illustrate that a bank could use customer funds regardless of their source for internal balancing of the account.\textsuperscript{186} An analysis of legislative history in California showed that legislation was passed one year after \textit{Kruger} to impose notice requirements and other conditions on a bank’s right to set-off independent debts.\textsuperscript{187} The court reasoned that the different treatment for overdrafts and bank charges indicated the “Legislature’s view that internal account balancing is different from the practice of setting-off separate debt against a deposit account, does not implicate the same considerations, and does not warrant the same legal treatment.”\textsuperscript{188} The court refused to extend \textit{Kruger}, stating that the task of regulating the banking industry in which so many stakeholders and their practices were implicated was for the legislature, not the court.\textsuperscript{189}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Miller}, 51 Cal. Rptr. 3d at 229–30.
\item See \textit{id.} at 230–32.
\item See \textit{id.} at 230–31. The court acknowledged that the practice used by Bank of America imposed a hardship on low-income clients, but that the propriety and legality of the practice were not issues raised on appeal. See \textit{id.}
\item See \textit{id.} at 231–32. The court highlighted the reasoning that distinguished \textit{Lopez} from \textit{Tom} on the basis that the “loan obligation [in \textit{Tom}] was ‘a separate, pre-existing debt unrelated to the operation of the depositor’s checking account,’ and there was no indication the depositor had ever consented to pay that debt from his independent checking account.” \textit{Id.} The court found this distinction consistent with “the accepted meaning of set-off, which has traditionally been defined to mean a counterdemand ‘growing out of an independent transaction.’” See \textit{id.} at 231–32 (quoting \textit{Black’s Law Dictionary} 1404 (8th ed. 2004)).
\item See \textit{id.} at 232. “Section 864 of the [California] Financial Code requires a bank to give an account holder notice when it exercises any setoff for a debt, and an opportunity for the account holder to claim an exemption if the debt is not owing or the funds are exempt.” \textit{Id.} However, if a bank obtains the customer’s advanced written consent, it does not have to adhere to these restrictions. See \textit{id.}
\item See \textit{Miller}, 51 Cal. Rptr. 3d at 232–33.
\item See \textit{id.} at 233. Several U.S. agencies and interest groups representing the banking industry weighed in on behalf of the defendant with amici curiae briefs. The Supreme Court of California heard oral argument for this case on April 7, 2009.
\end{enumerate}
\end{footnotesize}
III. CLARIFYING THE PROHIBITIONS OF SECTION 207

There are several solutions that agencies, stakeholders, and policymakers have proposed that can help untangle what is an imbroglio of state and federal law, agency inaction, and business interests.190 These solutions must be combined in a cohesive regulatory effort to ensure that the purposes of the Social Security Act and section 207 are realized, uniform regulations are implemented, and that federal benefits will not be threatened by creditors.

A. Congress Must Have Intended for Section 207 to Apply to Garnishment and Bank Set-offs

The SSA and other federal regulatory agencies must recognize that they have an affirmative duty to ensure that banks and other creditors cease satisfying debts with federally-exempt funds.191 Although the legislative history of section 207 is bare, one can infer from the remedial nature of the Social Security Act that its exemptions should be liberally construed and should be interpreted to affect garnishment procedures and bank set-offs.192 During the Senate Finance Committee hearings in 2007, Senator Baucus did not hesitate in expressing his opinion that section 207 trumps state law in order to protect federal benefits.193 The Supremacy Clause of the U.S. Constitution is explicit: where there is a conflict between state and federal law, federal law prevails.194

Under the analysis for conflicts preemption, preemption will be found if compliance with both state and federal law prove impossible.195 If state laws permit banks and other creditors to attach and set-
off the funds that Congress has specifically marked as exempt, a creditor’s action and the court’s compliance with that creditor is inconsistent with the intent of section 207.\textsuperscript{196} Congress added section 207 to provide a minimum level of protection for beneficiaries.\textsuperscript{197} Thus, section 207 sets a baseline; states can only legislate in this area if they are willing to provide more protection.\textsuperscript{198} This encourages states to experiment with different ways of protecting a beneficiary’s exempt assets.\textsuperscript{199} As mentioned, California and Pennsylvania have already taken the lead in fashioning specific protections that ensure some level of relief will be available to their citizens.\textsuperscript{200}

\begin{footnotesize}
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\item \textsuperscript{196} See 42 U.S.C. § 407(a); \textit{Hearings}, supra note 1, at 1–2 (statement of Baucus). The courts and the SSA have carved out specific funds to which the general prohibition against garnishment, attachment and levy do not apply. See 42 U.S.C. § 407(b), (c); id. § 659. The Secretary of the Treasury can make levies for the collection of delinquent federal taxes and, under certain circumstances, garnishment or similar legal process brought by an individual to enforce a child support or alimony obligation can force delinquent child support payments to be made out of monthly benefits payments. See Internal Revenue Code of 1954, 26 U.S.C. §§ 6331, 6305; 42 U.S.C. § 659.
\item \textsuperscript{197} See 42 U.S.C. § 407(a); \textit{Fla. Lime}, 373 U.S. 177–78 (1963) (finding states can set stricter standards where federal regulation is only meant to provide the minimum regulation necessary).
\item \textsuperscript{198} See 42 U.S.C. § 407(a); \textit{Fla. Lime}, 373 U.S. at 142 (1963); \textit{Hearings}, supra note 1, at 1–2 (statement of Baucus).
\item \textsuperscript{199} See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that, with the consent of its citizens, states can act as laboratories of democracy, and test new ideas implementing innovative policies); \textit{Hearings}, supra note 1, at 3 (statement of Williams).
\item \textsuperscript{200} See \textit{Hearings}, supra note 1, at 3 (statement of Williams).
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The FDIC expressed a preference at Senate Finance Committee hearings that language be inserted into section 207 making preemption explicit before they take action and regulate.\textsuperscript{201} The FDIC recommended that Congress amend section 207 and clarify the specific protections that are provided by adding language that the section is intended as an absolute bar against attachment, levy, or other legal processes.\textsuperscript{202} The FDIC has also suggested that Congress require specific accounting practices for accounts into which federally-exempt funds are directly deposited on a regular basis and that it cap the fees banks charge beneficiaries in the legislation itself.\textsuperscript{203}

Certainly Congress could make its intent more explicit in the legislation, but this should not be a prerequisite to action by the federal agencies.\textsuperscript{204} This cautious approach ignores the realities of legislative inaction and the need for those agencies with the most information and expertise—the SSA and the federal banking regulators—to provide necessary guidance.\textsuperscript{205} Asking Congress to go through the political process necessary to amend section 207 would be politically arduous and could limit the scope of section 207 if additional language narrowing the exemption was inserted into the bill in order to reach political compromise.\textsuperscript{206} The specific changes originally advocated by the FDIC are not the material of legislative amendments, but are best left to the

\textsuperscript{201} See \textit{id.} at 10 (statement of Kelsey). The FDIC now favors rulemaking by the SSA and the Treasury Department as the best solution. \textit{Hearings II, supra} note 1 (statement of Steve Fritts, Assoc. Dir., Risk Mgmt. Policy and Examination Support Branch, Div. of Supervision and Consumer Prot., Fed. Deposit Insurance Corp.).

\textsuperscript{202} \textit{Hearings}, \textit{supra} note 1, at 10 (statement of Kelsey).

\textsuperscript{203} See \textit{id.}

\textsuperscript{204} See \textit{id.} Language narrowing the scope of the provision is best provided by the agencies charged with implementation and oversight of the legislation. See \textit{Chevron U.S.A. v. Natural Res. Def. Counsel, Inc.}, 467 U.S. 837, 842–43 (1984).

\textsuperscript{205} See \textit{Gonzaga Univ. v. Doe}, 536 U.S. 273, 292 (2002) (agency decision-making is product of expertise, uniformity, and wide-spread consultation); \textit{United States v. Craft}, 535 U.S. 274, 287 (2002) (Legislative “inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change”) (quoting \textit{Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.}, 511 U.S. 164, 187 (1994)); \textit{cf. Commodity Futures Trading Comm’n v. Schor}, 478 U.S. 833, 845 (1986) (“An agency’s expertise is superior to that of a court when a dispute centers on whether a particular regulation is ‘reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes’ of the Act the agency is charged with enforcing; the agency’s position, in such circumstances, is therefore due substantial deference.”).

agencies that are responsible for the day-to-day oversight of the federal exemption.207

B. The Social Security Administration Must Clarify Congressional Intent Through Regulation

As the agency responsible for oversight of the Social Security Act, the SSA has the statutory authority and expertise to promulgate rules that clarify the rights of beneficiaries and the intent of Congress.208 The SSA is responsible for the implementation, oversight, and enforcement of its regulations promulgated under the Act and must effectively issue guidance for banks, creditors, and courts to follow.209 At a minimum, the SSA must revise the current regulations that imply that section 207 is to be raised as an affirmative defense.210 Raising the federal exemption as an affirmative defense harms beneficiaries and necessitates the need for social resources and legal advice that is not always readily available to indigent clients.211 Section 207 was clearly intended to bar action by banks and creditors in the first instance, without forcing beneficiaries to rely on it as an affirmative defense.212

C. Federal Banking Agencies Must Take Action

Federal banking agencies must act to promulgate regulations that protect federally-exempt funds from garnishment and set-off.213 When

207 Hearings II, supra note 1 (statement of Fritts); see Hearings, supra note 1, at 7–8 (statement of Saunders).
209 See Hearings, supra note 1, at 11 (statement of Williams).
210 See id. at 4 (statement of Kelsey ) and 6–7 (statement of Williams).
211 See Dennis W. Archer, Op-Ed., Legal System That Aids Society’s Poor in Need Itself, San Antonio Express-News, Jan. 31, 2004, at 11B (discussing how politicians fail to provide adequate resources for legal services); Henry Weinstein, Legal Aid to the Poor Falls Short, L.A. Times, Nov. 21, 2002, at A1 (discussing how the number of lawyers providing services for the poor is declining as need for them grows). Studies have shown that seventy to eighty percent of the legal needs of the indigent are not met. See Archer, supra.
212 See 42 U.S.C. § 407(a). According to the FDIC, this formal rulemaking by the SSA would give banks the legal authority necessary to interpret the guidelines. Hearings, supra note 1, at 11 (statement of Williams).
213 See Hearings, supra note 1, at 7–9 (statement of Saunders). The agencies that must cooperate to ensure that uniform guidelines are issued include the FDIC, OCC, Treasury
federal agencies act within the scope of their congressionally delegated authority, state law is effectively preempted to the extent that it is incompatible with federal regulations.\textsuperscript{214} When analyzing the preemptive effect of federal agency action, a narrow focus on intent is inappropriate.\textsuperscript{215} Federal agencies have considerable latitude to promulgate rules so long as their actions are not arbitrary or capricious.\textsuperscript{216}

To the extent that there is any uncertainty among financial institutions and courts surrounding the scope of section 207, the banking agencies must offer guidance prohibiting the attachment or set-off of federally-exempt benefits.\textsuperscript{217} As counsel for NCLS explained during the 2007 Senate Finance Committee hearings, the federal banking agencies already provide guidance preemption and interpreting state law for their regulated institutions.\textsuperscript{218} The OCC and the OTS have issued directives preempts state laws in the areas of predatory mortgage lending, electronic deposits, and foreclosures.\textsuperscript{219} In fact, according to testimony at the hearing, the five agencies responsible for banking regulations recently offered guidance on predatory mortgage lending that was not grounded in any particular federal law, but was considered by these agencies as a necessary means of protecting consumers.\textsuperscript{220}

\textsuperscript{214} See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 694–709 (1984) (finding application of a state’s advertising ban preempted by Federal Communications Commission regulations); Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141, 154 (1982) (stating that courts will not disturb an agency’s regulations if the “choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute”). In fact, even agency orders and letters have been found to preempt state law in narrow circumstances. See Fidelity, 458 U.S. at 154.

\textsuperscript{215} See Hearings, supra note 1, at 8 (statement of Saunders)

\textsuperscript{216} See Chevron, 467 U.S. at 842–43. If a federal statute is silent or ambiguous, the court must determine whether the agency’s interpretation is based upon a permissible construction of the statute. See id. at 843. Where “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” Id. at 843–44. These agency regulations are given “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” Id. at 844. If the legislative delegation to an agency on a particular question is implicit, a court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Id.

\textsuperscript{217} See Hearings, supra note 1, at 8 (statement of Saunders). The FDIC has stated that the SSA and Treasury Department, “as the agencies responsible for implementation and interpretation of these benefits program, . . . are in the best position to address the garnishment exemption issue.” See Hearings II, supra note 1 (statement of Fritts).

\textsuperscript{218} See Hearings, supra note 1, at 7 (statement of Saunders).

\textsuperscript{219} See id.

\textsuperscript{220} Id.
At the hearing, the FDIC and OCC indicated their willingness to work together with Congress and the other federal banking regulators to explore possible solutions to the problem. In November 2007, the five agencies overseeing banking regulations requested public comment on best practices for handling garnishment orders and set-offs where federally-exempt funds are affected. At a later hearing in June 2008, the Treasury Department expressed its willingness to lead a joint inter-agency effort to find a regulatory solution to the problem. While it appears that these agencies are taking a first step, they must actively consider creative ways to ensure that beneficiaries are no longer the victim of creditors. The ultimate regulation must require that one of three alternatives be implemented. The agencies could mandate that federally-exempt funds be deposited into a separate account that only holds exempt funds. These could be offered at no cost to the account holder so long as he or she maintains an additional checking account with that financial institution. These accounts could easily be flagged as only containing exempt funds so that, upon the receipt of court orders, bank employees would know that these funds could not be attached or set-off. An alternative would be to set a minimum amount in the customer’s account that could not be set-off or garnished while the customer’s legal rights were being resolved, as in California. Finally, the banking regulators could require that all banks

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221 See id. at 12 (statement of Kelsey) and 8–9 (statement of Williams). In 2007, the FDIC formed an interagency working group that issued proposed guidance for banks to use when faced with garnishment orders. See Hearings II, supra note 1 (statement of Fritts).


223 See Hearings II, supra note 1 (statement of Gary Grippo, Deputy Assistant Sec’y for Fiscal Operations, U.S. Dep’t of the Treasury). Mr. Grippo, said that the interagency solution could include “provid[ing] guidance to financial institutions that follow the guidance and allow recipients access to funds.” Id.

224 At the June 2008 hearing, Mr. Grippo expressed that any solution must ensure that recipients of federal benefits have access to at least some of their funds while the garnishment order is being adjudicated and the value of exempt and non-exempt funds are determined. See Hearings II, supra note 1 (statement of Grippo). Mr. Grippo explained that “[t]he model used to establish the appropriate amount of funds excluded from an account freeze would need to be developed based on an analysis of benefit payment amounts and the ability of financial institutions to implement it without complex accounting or re-search.” Id.

225 See Hearings, supra note 1, at 10 (statement of Kelsey).

226 See id. at 10 (statement of Kelsey) and 5 (statement of Saunders).

227 See id. at 5 (statement of Saunders).

228 See id. at 10 (statement of Kelsey) and 6 (statement of Saunders). According to testimony at the April 2008 hearing, a compromise regulation is forthcoming that proposes a similar solution. See Hearings II, supra note 1, at 14–15 (statement of Margot Saunders,
accepting direct deposits of federally-exempt funds apply a simple “First In Last Out” accounting system. In this system, exempt funds would be considered to be both the first deposited and the last withdrawn on any given day.

The banking regulators must also cap overdraft and NSF fees that banks charge so that they reflect the actual costs of doing business. The fees that the banks assess against frozen accounts are not based on the actual costs to the bank of doing business and result in a windfall to the banking industry. Otherwise, banks are effectively making money off of the taxpayers that provide a portion of their earnings to help needy individuals like Mr. Taliaferro avoid destitution.

**Conclusion**

Millions of Americans rely on direct deposit for receipt of their monthly federal benefits. Many of these individuals will find themselves the victim of a bank set-off or attachment at some point. Each day, individuals like Mr. Taliaferro and Mr. Miller are forced to fight creditors with far greater resources. Congress never intended for these individuals to be deprived of the subsistence funds that our country has prom-

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Counsel, Nat’l Consumer Law Ctr.). This regulation would ensure that once receiving an order to freeze an account, a bank would:

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

*Id.* at 15.

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229 See id. at 5 (statement of Saunders).
230 See Hearings, supra note 1, at 5 (statement of Saunders).
231 See id. at 7.
232 See id; Miller, 2004 WL 3153009, at *6–11.
233 See Miller, 2004 WL 3153009, at *6–11; Hearings, supra note 1, at 7 (statement of Saunders).
ised them, and it certainly could not have foreseen the opprobrious debt collection practices and inequitable fees of creditors and banks when it enacted section 207. As the testimonies at the 2007 Senate Finance Committee hearings and the Miller decision make certain, the magnitude of the problem requires that the federal government take immediate action to ensure that those most in need of protection have access to their federal benefits in order to honor the purpose of section 207.²³⁴

²³⁴ See Hearings, supra note 1, at 1–2 (statement of Baucus), and 7–9 (statement of Saunders).