



Fall 9-1-1984

Bank's Right of Setoff in Virginia

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Banking and Finance Law Commons](#)

Recommended Citation

Bank's Right of Setoff in Virginia, 41 Wash. & Lee L. Rev. 1603 (1984).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol41/iss4/15>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

BANK'S RIGHT OF SETOFF IN VIRGINIA

A bank setoff occurs when a bank satisfies a debt that a depositor owes to the bank by transferring funds out of the depositor's account.¹ The theory underlying a bank's right to setoff is that depositing funds in a bank account creates a debtor-creditor relationship between the bank and the depositor.² The deposited funds become the property of the bank, and the depositor becomes a creditor of the bank.³ The bank may setoff deposited funds to satisfy any obligation that the depositor owes to the bank.⁴ A typical setoff occurs when a bank withdraws funds from a depositor's account and applies those funds to a loan that the depositor has not repaid.⁵

A bank may exercise the right to setoff when the proposed setoff transaction meets certain conditions.⁶ First, a bank may exercise its right of setoff only if the depositor's debt to the bank has matured.⁷ More specifically, a

1. See *Sears v. Continental Bank & Trust Co.*, 562 S.W.2d 843, 846 (Tex. 1977) (bank may setoff deposits equal to amount of debt that depositor owes to bank); *Reserve Bank v. State Bank*, 150 Va. 423, 430-31, 143 S.E. 697, 700 (1928) (bank may apply general deposits of depositor to any debt that depositor owes to bank); see also Clark, *Bank Exercise of Setoff: Avoiding the Pitfalls*, 98 BANKING L.J. 196, 196-97 (1981) (setoff occurs when bank satisfies debt that depositor owes to bank by transferring funds out of depositor's account); TeSelle, *Banker's Right of Setoff, Banker Beware*, 34 OKLA. L. REV. 40, 40 (1981) (bank may setoff funds in depositor's account to satisfy debt depositor owes to bank). See generally Note, *Automatic Extinction of Cross-Demands: Compensatio From Rome to California*, 53 CALIF. L. REV. 224 (1965) (discussion of origins of bank's right to setoff funds).

2. See *Reserve Bank v. State Bank*, 150 Va. 423, 430-31, 143 S.E. 697, 699-700 (1928). In *Reserve Bank v. State Bank*, the Virginia Supreme Court noted that the general rule concerning bank deposits is that upon deposit, the funds become property of the bank. *Id.* The *Reserve Bank* court stated that since funds on deposit are property of the bank, the depositor is the bank's creditor. *Id.* at 430, 143 S.E. at 699. Since the bank is the debtor of the depositor and a depositor taking out a bank loan is the debtor of the bank, the *Reserve Bank* court held that a bank could setoff the depositor's account in satisfaction of a loan debt that the depositor owes to the bank. *Id.* Setoff is proper because setoff only cancels the debt that each party owes to the other. *Id.* at 433, 143 S.E. at 700.

3. See *id.* (setoff occurs because depositor who owes money to a bank is both creditor and debtor of bank).

4. See *id.* (since bank holds deposited funds in credit for depositor, bank may use those funds to satisfy debt that depositor owes bank).

5. See *supra* note 1 and accompanying text (bank uses right of setoff to satisfy obligations depositor owes to bank); *infra* note 99 (Virginia banks do not use remedy of setoff often since most depositors who owe bank money are in financial difficulty and have no funds in their accounts).

6. See *FDIC v. Pioneer State Bank*, 155 N.J. Super. 381, 386, 382 A.2d 958, 962 (1977) (list of conditions that bank must satisfy before exercising right of setoff against depositor's account); TeSelle, *supra* note 1, at 42 (conditions of setoff are that funds on deposit must be property of depositor-debtor, depositor-debtor must have deposited funds in general account with no restrictions, and depositor-debtor must owe bank money).

7. See *Crocker Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977) (bank may setoff funds in depositor's account only after debt depositor owes to bank has matured); *Kane v. First Nat'l Bank*, 56 F.2d 534, 537-38 (5th Cir.) (debt depositor owes to bank must have matured before bank can setoff funds in depositor's account to satisfy debt), *cert.*

bank may not setoff deposited funds to satisfy prospective debts⁸ even if the prospective debt is certain to mature shortly.⁹ Additionally, the funds subject to setoff must be the property of the depositor instead of property belonging to a third party.¹⁰ Moreover, a bank may setoff a depositor's funds provided the depositor has placed no restrictions on the use of the deposited funds.¹¹ Even though a depositor may deposit funds for a restricted special purpose such as payroll accounts,¹² escrow accounts,¹³ and trust accounts,¹⁴ a bank

denied, 287 U.S. 603 (1932); *Walter v. National City Bank*, 330 N.E.2d 425, 427 (Ohio 1975) (bank may setoff funds in depositor's account if debt depositor owes bank has matured). A bank considers a debt mature when, in the case of a demand note or loan, the bank calls the note, or in the case of a debt that carries a specific maturity date, that date passes. *Clark, supra* note 1, at 206. Once a debt is mature, the bank will consider it safe to setoff the depositor's account to satisfy the debt. *Id.*

8. *See Clark, supra* note 1, at 206 (banks must be careful not to exercise right of setoff until depositor's debt actually matures).

9. *See Prince v. West End Installation Serv. Inc.*, 575 S.W.2d 831, 833 (Mo. App. 1978) (bank cannot defeat third party creditor's garnishment of bank account by asserting that depositor owes money to bank on note not yet due).

10. *See FDIC v. Pioneer State Bank*, 155 N.J. Super. 381, 386, 382 A.2d 958, 962 (1977) (one condition of bank's right to setoff is that setoff funds must be property of debtor); *First Nat'l Bank v. DeMorse*, 26 S.W. 417, 419 (Tex. Civ. App. 1894) (bank's right of setoff extends to all funds on deposit that depositor owns and which bank holds for general credit of depositor); *TeSelle, supra* note 1, at 43 (bank's depositor-debtor must be owner, both legally and equitably, of deposited funds before bank can setoff those funds); *see also South Cent. Livestock Dealers, Inc. v. Security State Bank of Dedley*, 614 F.2d 1056, 1062 (5th Cir. 1980) (court assessed compensatory and punitive damages against bank exercising right of setoff against account that bank knew contained funds not belonging to depositor-debtor).

11. *See FDIC v. Pioneer State Bank*, 155 N.J. Super. 381, 386, 382 A.2d 958, 962 (1977) (restrictions before bank can exercise right of setoff); *infra* notes 12-14 and accompanying text (examples of types of accounts that bank cannot setoff because of restrictions on those accounts). Courts will not allow a bank to exercise setoff against restricted or special purpose accounts because a third party not owing money to the bank has an interest in the account. *See, e.g., Glenn Justice Mortgage Co. v. First Nat'l Bank of Fort Collins*, 592 F.2d 567, 570 (10th Cir. 1979) (bank cannot setoff against special purpose accounts containing funds in which third party has interest); *United States v. Carlow*, 323 F. Supp. 1310, 1316 (N.D. Pa. 1971) (bank could not setoff funds that depositor deposited for special purpose to satisfy unrelated debt depositor owed to bank); *Citizens & Southern Nat'l Bank v. Avco Fin. Serv., Inc.*, 129 Ga. App. 605, 611, 200 S.E.2d 309, 313-14 (1973) (bank could not enforce right to setoff funds in special escrow account against true owners of funds contained in account because true owners owed no debt to bank). *But see In re Interborough Consol. Corp.*, 288 F. 334, 347 (2d Cir. 1923) (bank could setoff funds depositor had deposited for specific purpose that remained subject to depositor's check).

12. *See In re Saugus Gen. Hosp., Inc.*, 7 Bankr. 347, 353 (Bankr. D. Mass. 1980) (bank could not setoff funds in payroll account that bank knew contained funds dedicated solely to meeting depositor's payroll), *rev'd on other grounds*, 698 F.2d 42 (1st Cir. 1983).

13. *See Filosa v. Pecora*, 44 Ill. App. 3d 912, 918, 358 N.E.2d 1213, 1217 (1976) (funds depositor deposited in escrow account were not subject to setoff by bank on unrelated claim); *First Nat'l Bank & Trust Co. v. Osage Supply Co.*, 186 Okla. 259, 261, 97 P.2d 3, 5 (1939) (escrow account is special purpose account that is not subject to bank's right of setoff).

14. *See Northern Ins. Co. v. Trader's Gate City Nat'l Bank*, 239 Mo. App. 132, 139, 186 S.W.2d 491, 496-97 (1945) (although trust fund accounts are normally special accounts that banks cannot setoff, bank having no knowledge of trust character of deposit may setoff trust account funds).

may setoff those funds provided the bank has no knowledge of the restricted nature of the deposit.¹⁵ No condition of setoff exists requiring a bank to give a depositor any notice before exercising the setoff against the funds in the depositor's account.¹⁶ Whether a bank's right of setoff extends to bank accounts containing funds exempt from creditor action is open to dispute.¹⁷

In *Bernardini v. Central National Bank of Richmond*,¹⁸ the Virginia Supreme Court discussed the extent of a bank's right to setoff funds in a depositor's account.¹⁹ In *Bernardini*, the Virginia Supreme Court held that a bank may setoff funds in a depositor's account to satisfy the depositor's debt to the bank even though the funds in the account are statutorily exempt from the reach of other creditors.²⁰ In *Bernardini*, the Central National Bank of Richmond (Bank) attempted to setoff the funds in a debtor-depositor's account that included Social Security and Workmen's Compensation payments.²¹ Social Security payments are exempt from the reach of creditors under federal statute,²² while Workmen's Compensation payments are exempt

15. See *In re Goodson Steel Corp.*, 488 F.2d 776, 779-80 (5th Cir. 1974). In *In re Goodson Steel Corp.*, a bankrupt depositor set up a special account that the depositor had designed to pay his payroll. *Id.* The bank, however, had not entered into an agreement with the depositor concerning the special account. *Id.* No agreement existed that the bank should keep the special payroll account separate and isolated from the depositor's other accounts. *Id.* at 780-81. The Fifth Circuit held that the bank could setoff the funds in the payroll account since the depositor could use the funds on deposit in any way he wished. *Id.* In the earlier Fifth Circuit case of *Ribaud v. Citizens Nat'l Bank*, a depositor similarly contended that a bank illegally setoff funds in the depositor's payroll account. 261 F.2d 929, 933 (5th Cir. 1958). The *Ribaud* court held that the bank's setoff was proper since the payroll account was special in name only, and the funds in the account were subject to the unlimited dominion of the depositor. *Id.* A special account is an account in which a third party, not the depositor, has an interest in the funds in the account. TeSelle, *supra* note 1, at 43-4.

16. See *FDIC v. First Mortgage Investors*, 485 F. Supp. 445, 455 (E.D. Wis. 1980) (bank can setoff matured debt without any notice to depositor-debtor); see also *infra* notes 78-86 (discussing effect that lack of notice to depositor by bank exercising setoff has on depositor-debtor's chances of asserting possible exemptions or defenses).

17. See *infra* notes 59-72 and accompanying text (discussing whether bank can exercise right of setoff against accounts containing exempt funds).

18. 223 Va. 519, 290 S.E.2d 863 (1982).

19. *Id.* at 522, 290 S.E.2d at 865.

20. *Id.* at 521-22, 290 S.E.2d at 864-65. In *Bernardini v. Central Nat'l Bank of Richmond*, Michael and Doris Bernardini deposited checks totaling \$2,400.08 in a checking account at the Central National Bank of Richmond (Bank). *Id.* at 521, 290 S.E.2d at 864. The deposit included \$1,780.36 in Social Security disability benefits, \$386.00 in Workmen's Compensation benefits, and \$233.72 in wages. *Id.* Without giving notice to the Bernardinis, the Bank setoff all of the funds in the Bernardinis checking account to satisfy a business debt Mr. Bernardini owed the Bank. *Id.* After the setoff, the Bernardinis wrote 27 checks paying personal bills which the Bank subsequently dishonored because of insufficient funds. *Id.* Thereafter, the Bernardinis sued the Bank seeking a return of the funds the Bank previously had setoff. *Id.*

21. *Id.* In *Bernardini*, the depositors contended that the Social Security and Workmen's Compensation benefits that they had received were totally exempt from the reach of creditors under federal and state law. *Id.*; see *infra* notes 22 & 23 (text of exemption statutes at issue in *Bernardini*).

22. 42 U.S.C. § 407 (1982). 42 U.S.C. § 407 provides that Social Security benefits shall

from the reach of creditors under a Virginia statute.²³ Neither the Social Security statute nor the Virginia Workmen's Compensation Act expressly exempts its benefits from a bank's right to setoff.²⁴ The circuit court for the city of Richmond in *Bernardini* held that the statutes in question were broad enough to prohibit a bank's right to setoff and, therefore, governed the Bank's right of setoff.²⁵ The Virginia Supreme Court did not decide whether the Social Security or Workmen's Compensation statutes covered a bank's right to setoff since the Bank did not appeal the trial court's ruling.²⁶ The Bank conceded that the statutes were broad enough to cover its right to setoff and, therefore, the Virginia Supreme Court assumed that the two statutes covered the Bank's right of setoff without deciding whether the trial court's decision was correct.²⁷ The Virginia Supreme Court held that when the Bernardinis deposited the funds in a bank account and commingled those funds with nonexempt funds, the funds lost their statutory exemptions.²⁸ The *Bernardini* court concluded that since the funds lost exempt status when the Bernardinis deposited and commingled the funds with nonexempt funds in the account, the Bank could setoff the funds in the depositor's account in partial satisfaction of a defaulted loan.²⁹

The *Bernardini* court gave three rationales for holding that the bank could setoff the funds in an account containing Workmen's Compensation benefits and Social Security payments.³⁰ Initially, the court held that the funds lost their exempt status after the depositor commingled the exempt funds in a bank account containing nonexempt funds.³¹ Secondly, the court found that the

not be subject to execution, levy, attachment, garnishment, or any other legal process. *Id.*; see *infra* notes 67-69 (United States Supreme Court's interpretation of 42 U.S.C. § 407).

23. Va. Code § 65.1-82 (1950 & repl. vol. 1982). Section 65.1-82 of the Virginia Workmen's Compensation Act provides that all compensation recipients receive pursuant to the Act shall be exempt from all claims of creditors. *Id.*

24. See *supra* notes 22-23 (text of statutes specifically does not exempt Social Security benefits or Workmen's Compensation benefits from bank's right of setoff).

25. 223 Va. at 519, 290 S.E.2d at 864 n. 4. The trial court in *Bernardini* found that although the prohibitions against creditor action in the Social Security and Workmen's Compensation statutes would cover a bank's right of setoff, the funds the Bernardinis received lost their statutory exemption when the Bernardinis deposited and commingled the funds in a general account at the Bank. *Id.* at 519, 290 S.E.2d at 864. Since the funds the Bernardinis deposited lost exempt status, the trial court ruled that the Bank could setoff the funds on deposit in satisfaction of the debt Mr. Bernardini owed to the Bank. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 522, 290 S.E.2d at 865; see *infra* notes 53-72 (exempt funds do not lose exempt status upon deposit in a bank account); *infra* notes 47-53 (commingling exempt funds with nonexempt funds should not matter so long as depositor can trace funds to exempt source).

29. 223 Va. at 522, 290 S.E.2d at 865.

30. *Id.* at 521-22, 290 S.E.2d at 864-65; see *infra* notes 31-34 and accompanying text (rationales *Bernardini* court gave in holding that Bank could exercise right of setoff).

31. 223 Va. at 521-22, 290 S.E.2d at 864-65. The *Bernardini* court held that the exempt Social Security and Workmen's Compensation funds lost exempt status because the depositors deposited the funds in a general checking account and commingled the exempt funds with nonexempt funds in a general checking account. *Id.* But cf. *infra* notes 50 & 53 (exempt benefits that recipient deposits in bank account retain exemption so long as recipient can trace funds back to source from which recipient derives exemption).

funds would have retained their statutory exemptions if the depositors had deposited the funds in a special account.³² Finally, the *Bernardini* court, relying on banking policy, determined that the court should not allow the depositor to claim an exemption defeating a bank's right to setoff because such an exemption would place an "impossible burden" on the banking system by requiring banks to determine the source of deposited funds before exercising a setoff.³³ The court reasoned that depositors could not expect a bank to inquire into the sources of funds in every account the bank was going to setoff.³⁴

The *Bernardini* court's decision is suspect because the decision expanded a bank's right of setoff far beyond the accepted scope of the right.³⁵ The *Bernardini* decision is faulty for three reasons. First, the court improperly held that exempt funds lose exempt status when the recipient has deposited the funds in a bank account and has commingled the exempt funds with nonexempt funds.³⁶ Secondly, the *Bernardini* court based its holding on the mistaken

32. 223 Va. at 552, 290 S.E.2d at 865. The *Bernardini* court stated that a depositor should deposit exempt funds in a special account and keep those funds separate from nonexempt funds. *Id.* Keeping the funds separate would enable the depositor to enjoy the "conveniences of modern banking" by allowing the depositor to use the exempt funds without fear that creditors would try to reach those funds. *Id.* But cf. *infra* notes 97-100 and accompanying text (some Virginia banks will not open special accounts for depositors that contain only exempt funds).

33. 223 Va. at 521, 290 S.E.2d at 864. The *Bernardini* court held that requiring banks to determine whether funds in an account were exempt before exercising the bank's right of setoff would place an "impossible burden" on the bank. *Id.* In support of the impossible burden rationale, the *Bernardini* court cited *Cocke's Adm'r. v. Loyall, Id.*; see 150 Va. 336, 143 S.E. 881 (1928). In *Cocke's*, the administrator of an estate embezzled money from the estate by cashing a check at the bank which was holding the funds of the estate in a trust account for the beneficiaries of the estate. *Id.* at 337, 143 S.E. at 881. The estate sued the bank on the theory that the bank had honored the check without inquiring into who had a right to the funds in the trust account. *Id.* The *Cocke's* court rejected the theory, holding that banks do not have a duty to inquire into private affairs of a trust to find out to whom the money belongs. *Id.* at 339, 143 S.E. at 882. The *Cocke's* court refused to place the burden on a bank of determining who the beneficiaries are under a complicated trust arrangement. *Id.* In *Bernardini*, the Bank would not have had to inquire into a complicated trust arrangement, but merely contact the depositor in an effort to ascertain the sources of the funds in the account the Bank wanted to setoff. See 223 Va. at 521-22, 290 S.E.2d at 864-65. See also Clark, *supra* note 1, at 206. One commentator has suggested a method for dealing with the problem of banks having to ascertain the source of funds in accounts before exercising setoff. *Id.* Specifically, the deposit agreement between a bank and its depositor may contain a provision permitting the bank to setoff funds irrespective of their source. *Id.* Presumably, if a depositor agrees that a bank may setoff funds irrespective of the funds' source, the depositor effectively will waive the statutory exemption that applies to certain benefits. See *id.* Whether a benefit recipient may waive a statutory exemption necessarily would depend on the statutory language and a court's interpretation of the statute's language. See VA. CODE § 65.1-82 (1950 & repl. vol. 1982) (since Workmen's Compensation exemption statute does not state whether benefit recipient can waive exemption, courts interpreting statute would decide whether recipient could waive exemption).

34. 223 Va. at 521-22, 290 S.E.2d at 864-65.

35. See *infra* notes 40-117 and accompanying text (reasons why *Bernardini* decision is suspect); see also *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 356, 521 P.2d 441, 442, 113 Cal. Rptr. 449, 451 (1974) (bank exceeds scope of setoff when bank exercises setoff against account containing funds that depositor received from sources that are statutorily exempt from creditors).

36. See *infra* notes 53-72 and accompanying text (exempt funds retain exemption upon deposit in bank account); *infra* notes 47-53 and accompanying text (commingling exempt and nonexempt

assumption that a depositor could set up a special account that would keep funds derived from exempt sources out of the reach of creditors.³⁷ Thirdly, the court improperly characterized the account at issue in the case as a special account and held that the Bank could setoff exempt funds since the Bank had no knowledge of the special exempt nature of the funds in the account.³⁸ The *Bernardini* court improperly characterized the issue by discussing the theory underlying a bank's right to setoff special purpose accounts instead of examining whether a bank can setoff an account containing statutorily exempt funds.³⁹

The *Bernardini* court's assertion that statutorily exempt funds lose exempt status when a recipient deposits the funds in a bank account and commingles the funds with nonexempt funds lacks support of Virginia precedent. Exempt funds do not lose the statutory exemption that keeps creditors from reaching those funds simply upon deposit in a bank account.⁴⁰ While no

funds in bank account does not destroy exemption if depositor can trace funds to exempt source). In *Wilson v. Virginia Nat'l Bank*, the Virginia Supreme Court discussed an issue analogous to whether exempt funds retain their exemption upon deposit in a bank account. 214 Va. 14, 15, 196 S.E.2d 920, 921 (1973). In *Wilson*, the plaintiff was trying to protect money in her bank accounts from a judgment creditor by asserting her homestead exemption. *Id.* The money in the bank accounts was life insurance proceeds. *Id.* The *Wilson* court construed the Virginia homestead exemption liberally and held that the fact that the insurance proceeds protected by the homestead exemption were in a bank account made no difference. *Id.* Although the Virginia homestead exemption did not specifically protect funds in a bank account, the court allowed the plaintiff-debtor to retain the funds. *Id.*

37. See *infra* notes 97-100 and accompanying text (some Virginia banks will not open special account that would prevent creditors from reaching exempt funds).

38. 223 Va. at 521-22, 290 S.E.2d at 864-65; see *infra* notes 101-117 and accompanying text (*Bernardini* court confused issue in case by discussing whether Bank had knowledge of exempt funds instead of discussing whether exempt funds lose exempt status upon deposit).

39. See *infra* notes 110-114 and accompanying text (*Bernardini* court confused special purpose account with account containing funds that are exempt from creditors).

40. See *Matthews v. Lewis*, 617 S.W.2d 43, 44-45 (Ky. 1981). In *Matthews v. Lewis*, a bank garnished the account of a depositor in response to a creditor's judgment against the depositor. *Id.* at 43. The funds in the garnished account were the depositor's Workmen's Compensation benefits. *Id.* The recipient deposited the exempt funds in a general checking account that also contained nonexempt funds. *Id.* The depositor contended that the benefits did not lose their statutory exemption from creditors simply because of deposit in the checking account. *Id.* The *Matthews* court stated that checking account deposits do not change identity, but rather, retain the same form as if the depositor had not deposited the funds but had received cash. *Id.* The court, therefore, held that since the exempt funds on deposit did not change form, the exempt funds would remain exempt until the recipient spent or invested the funds. *Id.* The court further stated that since depositing funds in a checking account does not change the form of those funds, it was "sheer intellectual folly" to argue that the Workmen's Compensation benefits were exempt until deposited and that upon deposit the benefits lost exempt status and became completely available to creditors. *Id.* at 45. Additionally, the *Matthews* court stated that a bank's right of setoff should be no greater than a general creditor's rights. *Id.* Finally, the court rejected the argument that allowing the exemption to remain in force after a depositor had deposited the funds would place the banks in a difficult position and would subject the banks to possible liability. *Id.*; see *infra* notes 62-73 and accompanying text (United States Supreme Court cases holding that benefits from exempt sources do not lose exemption upon deposit in bank account).

Virginia case expressly discusses a bank's right to setoff an account containing statutorily exempt funds, the Virginia Supreme Court discussed the relationship of setoffs and exempt funds in *Atlantic Life Ins. Co. v. Ring*.⁴¹ The *Ring* court held that even though a Virginia exemption statute did not protect funds expressly from setoff, courts should construe exemption statutes liberally to protect exempt benefits from the reach of all creditors.⁴² The *Ring* court stated that since the spirit of exemption statutes is to protect exempt property from all creditors, statutorily exempt funds should be free from setoffs.⁴³ Although the *Ring* court did not discuss whether deposited funds retain exempt status, the court did cite a case that held statutorily exempt funds do not lose exempt status simply upon deposit in a bank account.⁴⁴ Even though the appellants in *Bernardini* contended that the *Ring* ruling should control the decision,⁴⁵ the *Bernardini* court, without even mentioning the *Ring* decision, decided that statutorily exempt funds lose exempt status when a bank depositor deposits exempt funds in a bank account and commingles those funds with nonexempt funds.⁴⁶ Other cases considering whether exempt funds lose exempt status upon commingling with nonexempt funds in a bank account have discussed the concept of "tracing."⁴⁷ Generally, tracing involves the problem of identifying the source of funds that a recipient claims are exempt from creditors.⁴⁸ For example, the tracing issue would arise if a recipient of exempt funds attempted to prevent a creditor from reaching the funds the recipient

41. 167 Va. 121, 187 S.E. 449 (1936). In *Atlantic Life Ins. Co. v. Ring*, an insurance beneficiary owed his insurance company \$9,000 pursuant to a loan. *Id.* at 123, 187 S.E. at 450. The insurance company owed the beneficiary \$3,800 in disability benefits. *Id.* The insurance company setoff the benefits owed to the beneficiary against the debt the beneficiary owed to the insurance company. *Id.* The beneficiary argued that the setoff was illegal because the disability benefits were exempt from the claims of creditors. *Id.* The insurance company contended that the statute did not prohibit setoff expressly. *Id.* at 124, 187 S.E. at 451. The *Ring* court construed the exemption statute liberally and held that the insurance company could not setoff the debt that the beneficiary owed against the benefits the insurance company owed the beneficiary. *Id.*

42. *Id.* The *Ring* court noted that strong support from cases, treatises, and textbooks existed for the proposition that exemption statutes should preclude setoffs. *Id.* The court further cited many cases and found a widely accepted doctrine that courts should construe exemption statutes that do not mention setoff to preclude setoff. *Id.*

43. *Id.* at 125, 187 S.E. at 452. The *Ring* court stated that the spirit of exemption statutes is to protect exempted property from all creditors and not just from creditor's remedies expressly enumerated in an exemption statute. *Id.*

44. *Id.* at 127, 187 S.E. at 453; see *First Nat'l of Cushing v. Funnell*, 144 Okla. 188, 190, 290 P. 177, 178 (1930) (bank could not setoff funds in general account because funds were exempt and retained exemption after deposit in bank account even though exemption statute did not mention setoff specifically).

45. Brief for Appellant at 7-9, *Bernardini v. Central Nat'l Bank of Richmond*, 223 Va. 519, 290 S.E.2d 463 (1982).

46. See 223 Va. at 521-22, 290 S.E.2d at 464-65.

47. See *General Motors Acceptance Corp. v. Falcone*, 130 N.J. Super. 517, 518, 327 A.2d 699, 700 (1974) (statutory exemption protecting Social Security and Workmen's Compensation benefits applies to funds recipient has deposited in bank account so long as funds are traceable to exempt source).

48. See *In re Estate of Vary*, 65 Mich. App. 447, 449, 237 N.W.2d 498, 499 (1976), *aff'd*

had deposited in a bank account.⁴⁹ The recipient would have to demonstrate that the funds came from exempt sources instead of nonexempt sources.⁵⁰ In *Bernardini*, the issue of tracing the source of the funds was not before the court.⁵¹ The fact that the *Bernardini* court did not discuss directly the tracing issue is important because the court held that the deposited funds lost exempt status when the depositor commingled the funds with nonexempt funds.⁵² Commingling exempt funds with nonexempt funds in a bank account will only

401 Mich. 340, 258 N.W.2d 11 (1977). In *In re Estate of Vary*, the state of Michigan filed a claim against an estate for delinquent hospital bills. *Id.* at 449, 237 N.W.2d at 499. The state attempted to reach a bank account containing exempt Social Security benefits to satisfy the debt. *Id.* The *Vary* court noted that since the underlying purpose of the Social Security system is to protect beneficiaries from financial difficulties, Social Security benefits remain exempt after deposit in a bank account as long as the deposits are traceable to an exempt source. *Id.* at 450, 237 N.W.2d at 501. The *Vary* court did not give any guidelines on the tracing issue. *See id.* In *Michigan Nat'l Bank v. Flowers Mobile Homes Sales, Inc.*, the North Carolina Court of Appeals discussed tracing deposits in a bank account to the source of the deposits. 26 N.C. App. 690, 694, 217 S.E.2d 108, 111 (1975). In *Flowers*, a third party obtained a judgment against Flowers Mobile Homes and levied Flowers' bank account to satisfy the judgment. *Id.* at 693, 217 S.E.2d at 110. Flowers' bank had a security interest on the proceeds from the sale of mobile homes that Flowers deposited in the bank account. *Id.* Flowers' bank, therefore, objected to the third party's levy on the ground that the bank was entitled to the funds in the account. *Id.* The statute controlling the situation stated that the bank's security interest applied to the "identifiable proceeds" of the mobile home sales. *Id.* After stating that no definition of identifiable proceeds existed, the *Flowers* court applied the general rule concerning commingling trust funds with nontrust funds in a bank account. *Id.* at 694, 217 S.E.2d at 111. The rule the *Flowers* court applied stated that commingling trust funds with nontrust funds in a mixed account will not destroy the identity of the trust funds if the trust funds are traceable to a separate source. *Id.* The *Flowers* court then stated that the rule on the tracing of trust funds is that courts presume the deposited trust funds remain idle in the account. *Id.* For example, if a bank trustee deposited \$5,000 in trust funds in a bank account already containing \$2,000 in nontrust funds and later withdrew \$2,500, courts presume the remaining \$4,500 to be trust funds. *See id.* Under the rule, therefore, any funds in a bank account the depositor claims are exempt would be exempt if the depositor could show that he had made a large enough deposit of exempt funds to cover the amount of funds in the account. *See id.*; *see also* Robert P. Butts & Co. v. Estate of Butts, 119 Ill. App. 2d 242, 248, 255 N.E.2d 622, 626 (1970) (person commingling trust with nontrust funds bears burden of identifying source of funds in commingled account).

49. *See* General Motors Acceptance Corp. v. Falcone, 130 N.J. Super. 517, 518, 327 A.2d 699, 700 (1974) (if debtor can identify source of funds in bank account as exempt from creditors, creditor cannot reach funds in bank account).

50. *See* First Nat'l Master Charge v. Gilardi, 44 Ohio App. 2d 383, 324 N.E.2d 576 (1975). In *First Nat'l Master Charge v. Gilardi*, the Ohio Appellate Court held that welfare funds a recipient had deposited in a bank account retained exempt status, thereby preventing a judgment creditor from garnishing the bank account. *Id.* at 386, 324 N.E.2d at 578. The *Gilardi* court noted that the holding required, as most cases involving a similar issue also would require, the tracing of funds on deposit to determine the amount attributable to exempt sources. *Id.* The court did not state which party would have to identify the source of the funds, or give any guidelines for accomplishing the tracing. *See id.*; *see also* Stahl v. Stahl, 91 Idaho 794, ___, 430 P.2d 685, 689 (1967) (in divorce case, commingling of separate property with community property in bank account does not convert separate property into community property so long as separate property is identifiable and traceable).

51. *See* 223 Va. at 519-522, 290 S.E.2d at 863-865.

52. *See id.*; *infra* notes 53-54 and accompanying text (commingling exempt funds with nonex-

destroy the exempt status if the depositor cannot identify or trace the source of the funds.⁵³ The *Bernardini* court, therefore, should have discussed the tracing issue before holding that commingling exempt and nonexempt funds destroys the exemption.⁵⁴ The *Bernardini* court did state that requiring banks to determine the source of funds in an account before exercising setoff would place an "impossible burden" on the bank.⁵⁵ Tracing, however, would place the burden on the depositor, not the bank, of proving that the funds in the account were exempt.⁵⁶ In *Bernardini*, no problem existed with tracing the funds in the account to an exempt source since in stating the facts of the case, the court expressly identified the amount of the funds that came from exempt sources.⁵⁷ Since the Virginia Supreme Court did identify which funds in the account were from exempt sources, commingling the exempt funds with nonexempt funds in the bank account should have made no difference in the outcome of the case.⁵⁸

empt funds in bank account will not destroy exempt status if depositor can trace deposits to exempt source).

53. See *In re Klein*, 10 Bankr. 356, 357 (Bankr. 9th Cir. 1981) (bank could not setoff exempt funds in bank account even though depositor had commingled exempt funds with nonexempt funds in bank account). An analogous issue to commingling exempt and nonexempt funds in a bank account is the commingling, in divorce situations, of separate and community property in a bank account. Courts addressing the commingling issue in divorce situations uniformly hold that separate property commingled with community property in a bank account will retain its separate identity if the owner can trace the property to a separate source. See, e.g., *Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 122, 264 P.2d 626, 631 (1953) (separate property commingled with community property in bank account remains separate if traceable to separate source); *Stahl v. Stahl*, 91 Idaho 794, —, 430 P.2d 685, 689 (1967) (commingling community and separate property does not convert separate property into community property if separate property is traceable); *Graves v. United States Rubber Co.*, 237 La. 505, 509, 111 So. 2d 752, 755 (1959) (mere mixing of separate and community funds in same bank account does not convert entire account into community property if separate funds are traceable with sufficient certainty to establish separate ownership); see also *Huie, Separate Claims to Reimbursement From Community Property in Louisiana*, 27 *TUL. L. REV.* 143 (1953). *Huie* argues that the mere mixing of separate and community funds in the same bank account automatically does not convert the entire account into community property since tracing of separate funds may be feasible. *Id.* at 175. *Huie* states that while the commingled account does not become community property immediately, in the usual case of many withdrawals and deposits involving the account, it may be impossible to identify the source of the funds in the account. *Id.* at 175, 206.

54. See *supra* note 53 (commingling exempt and nonexempt funds in bank account is only important if funds are not traceable to exempt source).

55. 223 Va. at 521, 290 S.E.2d at 864; see *supra* note 33 (analyzing impossible burden rationale *Bernardini* court asserted in support of its holding).

56. See *Robert P. Butts & Co. v. Estate of Butts*, 119 Ill. App. 2d 242, 248, 255 N.E.2d 622, 626 (1970) (person commingling trust with nontrust funds bears burden of identifying source of funds in commingled bank account).

57. 223 Va. at 521-22, 290 S.E.2d at 864-65. In *Bernardini*, the Virginia Supreme Court specifically stated that \$1,780.36 of the amount on deposit in the bank account was exempt Social Security benefits and \$386.00 of the amount on deposit in the account was exempt Workmen's Compensation benefits. *Id.*

58. See *supra* notes 47, 50 & 52-53 and accompanying text (if depositor can trace funds in bank account to exempt source, exemption statute applies and prevents creditors from reaching exempt funds).

The *Bernardini* decision is also incorrect to the extent that the court based its decision on the ground that exempt funds lose exempt status upon deposit in a bank account.⁵⁹ Most courts have held that statutorily exempt funds remain exempt even after deposit in a bank account.⁶⁰ Moreover, the United States Supreme Court has decided a line of cases holding that exempt funds remain exempt after deposit in a bank account.⁶¹ For example, in *Lawrence v. Shaw*,⁶² the Supreme Court held that money from veterans' benefits that was exempt from creditors under a federal statute remained exempt even after the recipient had deposited the money in a bank account.⁶³ The *Shaw* Court held that the funds would retain exempt status until the beneficiary either spends or permanently invests the money.⁶⁴ The *Shaw* Court further held that the exemption would remain in force even after a beneficiary had deposited the funds in a bank account so that the deposits would be subject to the depositor's

59. See *Colton v. Martell*, 79 Misc. 2d 190, 191, 359 N.Y.S.2d 632, 633 (1974) (Social Security benefits do not lose exemption merely because of deposit in recipient's bank account).

60. See *In re Klein*, 10 Bankr. 356, 358 (Bankr. 9th Cir. 1981). In *In re Klein*, a recipient of retirement benefits deposited the benefits in a credit union account. *Id.* at 357. The credit union setoff the funds in the recipient's account in satisfaction of a debt the recipient owed to the credit union. *Id.* The *Klein* court stated that since the recipient's retirement benefits were exempt from creditors, the credit union could not exercise setoff because the retirement benefits retained exempt status even after the recipient had deposited the benefits in the credit union account. *Id.* The *Klein* court further held that commingling the funds in the credit union account with nonexempt funds made no difference in deciding that exempt funds retain exempt status after deposit in a bank account. *Id.* at 358; see *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 371-72, 521 P.2d 441, 453, 113 Cal. Rptr. 449, 463 (1974) (bank may not setoff funds on deposit depositor received from disability benefits since disability benefits are exempt from creditors); *First Nat'l Master Charge v. Gilardi*, 44 Ohio App. 2d 383, 387, 324 N.E.2d 576, 578 (1975) (depositor does not lose statutory exemption merely by depositing funds in checking account). *But see McCabe v. Fee*, 279 Or. 437, 439, 568 P.2d 661, 662 (1977) (Workmen's Compensation benefits deposited in bank account lost exemption upon deposit because exemption statute clearly stated benefits are exempt only prior to receipt by beneficiary). Funds retaining exempt status after deposit in a bank account are not subject to a bank's right of setoff. See *Finance Acceptance Co. v. Breaux*, 160 Colo. 510, ___, 419 P.2d 955, 958 (1966) (obvious legislative intent of exemption statute is to protect benefit recipients from all creditors including bank's right to setoff).

61. See *infra* notes 62-74 and accompanying text (Supreme Court cases holding statutorily exempt funds do not lose exemption upon deposit).

62. 300 U.S. 245 (1937). In *Lawrence v. Shaw*, a recipient of veterans' benefits owed the state of North Carolina property tax. *Id.* at 246. The recipient had deposited the benefits in a bank account with no special designation. *Id.* at 247. Under a federal statute, the benefits were exempt from all creditors. *Id.* at 245. The local authorities garnished the bank account in partial satisfaction of the property taxes the recipient owed. *Id.* at 247. The state of North Carolina contended that the deposits lost their exemption upon deposit in the bank account. *Id.* The *Shaw* Court disagreed, holding that the funds retained exempt status even after deposit in a bank account. *Id.* at 249-50.

63. *Id.* The *Shaw* Court stated Congress did not intend veterans' benefits that Congress had exempted from creditors while in the hands of the recipients to lose exempt status simply upon deposit in a bank where the depositor could draw checks on the funds in the usual manner. *Id.*

64. *Id.* at 250. In stating that exempt veterans' benefits remain exempt until the recipient spends or invests the benefits, the *Shaw* Court did not attempt to define how a court could determine whether a benefit recipient had spent or permanently invested the benefits. See *id.*

draft upon demand.⁶⁵ In *Porter v. Aetna Casualty Co.*,⁶⁶ the Supreme Court affirmed the *Shaw* decision by holding that certain benefits the government paid pursuant to, and exempt under, a federal statute⁶⁷ remained exempt notwithstanding deposit in a bank account.⁶⁸ Reasoning that courts should construe exemption statutes liberally, the *Porter* Court determined that funds which a recipient has not converted into permanent investments should retain exempt status.⁶⁹ In *Philpott v. Essex County Welfare Board*,⁷⁰ the Supreme Court interpreted the statutory exemption applicable to Social Security benefits and held that creditors could not reach exempt Social Security benefits under any circumstances.⁷¹ The *Philpott* Court further held that Social Security benefits retained their exemption after a recipient had deposited the benefits in a bank account.⁷² The *Bernardini* decision, like the *Philpott* decision, dealt with Social Security benefits that are exempt from creditors, yet held that the deposited funds lost their exemption upon the depositor's commingling of the exempt funds with nonexemption funds.⁷³ The *Bernardini* court dismissed the *Philpott* holding in a footnote by stating that the cases were factually distinguishable since the only funds in the bank account in *Philpott* came from Social Security benefits while the exempt funds in *Bernardini* were in an account contain-

65. *Id.*

66. 370 U.S. 159 (1962). In *Porter v. Aetna Casualty Co.*, a veteran was receiving federal disability benefits. *Id.* at 159. The issue before the Supreme Court was whether Veterans Administration benefits remained exempt after the recipient had deposited the benefits in a bank account. *Id.* at 159-60. A creditor of the veteran had recovered a judgment against the veteran and the creditor had attached the benefits in the bank account to satisfy the judgment. *Id.* at 160. The Supreme Court held the attachment invalid because the benefits retained exempt status even after the veteran had deposited the benefits in a bank account. *Id.* at 162.

67. 38 U.S.C. § 3101 (1982). The exemption portion of the Veterans Disability Benefits statute states that benefits paid to veterans under the act are exempt from the claims of all creditors, and are not subject to attachment, levy, seizure, or any other legal process. *Id.*; *cf. supra* note 22 (text of Social Security exemption).

68. *Porter v. Aetna Casualty Co.*, 370 U.S. 159, 161-62 (1962). The *Porter* Court stated that if funds a veteran received from veterans' benefits were available for a veteran's support and maintenance, the funds would remain statutorily exempt. *Id.* at 161.

69. *Id.* at 162.

70. 409 U.S. 413 (1973). In *Philpott v. Essex County Welfare Bd.*, a trustee of a recipient of Social Security disability benefits had deposited the benefits in a bank account for the recipient. *Id.* at 414. A state welfare board attempted to attach the funds in the bank account to satisfy a claim that the board asserted the recipient owed. *Id.* The Supreme Court held that the benefits retained exempt status in the recipient's bank account and that the welfare board could not reach the benefits. *Id.* at 417.

71. *Id.* The Supreme Court in *Philpott* stated that the Social Security benefits exemption statute in 42 U.S.C. § 407 creates a broad bar preventing all claimants or creditors from reaching Social Security benefits. *Id.*; *see supra* note 22 (text of Social Security exemption statute).

72. 409 U.S. at 416. The *Philpott* Court cited the *Porter* case for the proposition that Social Security benefits, which are analogous to the veteran's benefits involved in *Porter*, retain exempt status from creditors even after the recipient has deposited the benefits in a bank account. *Id.*; *see supra* notes 66-69 and accompanying text (discussing *Porter*).

73. 223 Va. at 521, 290 S.E.2d at 464.

ing nonexempt funds.⁷⁴ In essence, the *Bernardini* decision emphasized the commingling issue.⁷⁵ By holding that exempt funds lose exempt status upon deposit in a bank account, the *Bernardini* decision is unreasonable in light of the Supreme Court's contrary position in *Shaw*, *Porter*, and *Philpott*, which established that the deposit of exempt funds in a bank account will not destroy the exemption allowing creditors to reach exempt funds.⁷⁶

Notwithstanding the Virginia Supreme Court's misinterpretation of the Supreme Court precedent, the *Bernardini* decision unnecessarily places banks in a better position than garnishing creditors who are exercising an analogous right.⁷⁷ The issue of whether a bank can setoff an account containing exempt funds is analogous to whether a creditor can garnish an account containing exempt funds because a garnishing creditor is in the same position as the bank in that each is trying to reach funds which the debtor may claim are exempt from creditors.⁷⁸ While complete uniformity does not exist among courts concerning whether a nonbank creditor can garnish accounts containing statutorily exempt funds, the majority of courts have held statutorily exempt funds remain exempt after deposit in a bank account.⁷⁹ Most of the courts do not

74. *Id.* at 521, 290 S.E.2d at 464 n. 4. The *Bernardini* court distinguished *Philpott* on the grounds that the benefit recipients in *Bernardini* had commingled the exempt funds with nonexempt funds while the funds on deposit in *Philpott* were all exempt funds. *Id.* Few cases exist discussing whether commingling exempt funds with nonexempt funds destroys the exemption. See *In re Klein*, 10 Bankr. 356, 358 (Bankr. 9th Cir. 1981) (bank could not setoff statutorily exempt funds recipient had deposited in bank account even though recipient had commingled funds with other nonexempt funds); *Matthews v. Lewis*, 617 S.W.2d 43, 43 (Ky. 1981) (even though benefit recipient commingled exempt funds with nonexempt funds in recipient's bank account, benefits remained exempt from creditors). The United States Supreme Court impliedly discussed the commingling issue in *Lawrence v. Shaw*, 300 U.S. 245, 249 (1945). In *Shaw*, the Supreme Court noted that exempt funds a recipient deposits in a bank account would retain exempt status so long as any person could show that the funds in the bank account came from exempt sources. *Id.* at 247-48. In effect, *Shaw* implies that commingling is not an issue as long as tracing or identifying the exempt source of the funds is not a problem. See *id.*; accord *General Motors Acceptance Corp. v. Falcone*, 130 N.J. Super. 517, 518, 327 A.2d 699, 700 (1974) (exemption applies to benefits recipient deposited in bank account so long as court can identify exempt source of benefits); *supra* notes 51-56 (commingling exempt funds with nonexempt funds does not destroy funds' exempt status if recipient can trace funds to exempt source).

76. See *supra* notes 59-75 and accompanying text (statutorily exempt funds retain exemption upon deposit in bank account).

77. See *infra* note 78 and accompanying text (garnishing creditor and bank exercising right to setoff occupy similar positions when bank and creditor are trying to satisfy debt from funds in debtor's bank accounts).

78. See *Havelock Bank of Lincoln v. Hog Confinement Sys., Inc.*, 214 Neb. 783, 335 N.W.2d 765 (1983). In *Havelock Bank of Lincoln v. Hog Confinement Sys., Inc.*, a judgment creditor attempted to garnish funds in a debtor's bank account. *Id.* at 784, 335 N.W.2d at 766. The debtor contended that the funds on deposit were exempt because the funds were Social Security benefits. *Id.* The Nebraska Supreme Court held that Social Security benefits a recipient deposited in a bank account were exempt from state garnishment proceedings. *Id.* *Havelock* and *Bernardini* are similar because the Bank in *Bernardini* and the garnishing creditor in *Havelock* attempted to reach funds in a bank account that the depositor claimed were exempt from creditors.

79. See, e.g., *Anderson v. First Nat'l Bank of Atlanta*, 151 Ga. App. 573, 574, 260 S.E.2d 501, 502 (1979) (garnishing creditor cannot reach exempt funds in bank account because exempt

allow the garnishing creditor to reach exempt funds since allowing the creditor to garnish the funds once the recipient has deposited the funds in a bank account would defeat the purpose of providing for the recipient's basic needs that the exemption statute protects.⁸⁰

A garnishing creditor normally has to give notice to a debtor before garnishing the debtor's property.⁸¹ The Virginia garnishment statute requires a creditor to prove the existence of his claim against the debtor before the creditor may garnish the debtor's property.⁸² The Virginia garnishment statute also requires that the court clerk or creditor give the debtor notice of the garnishment.⁸³ Notice of garnishment enables the debtor to protest a garnishment by asserting any exemptions that the debtor may possess.⁸⁴ For example, a debtor in Virginia could assert that funds in a bank account were Social Security benefits exempt pursuant to federal statute from creditors and, therefore, that those funds were not subject to a creditor's attempted garnishment.⁸⁵ The *Bernardini* decision also expressly allows banks, and implicitly allows other creditors, to reach funds that federal statutes exempt from

funds recipient deposited in bank account do not lose exempt status); *Pease v. North Am. Fin. Corp.*, 69 Mich. App. 165, 166, 244 N.W.2d 400, 401 n. 1 (1976) (creditor could not garnish exempt welfare funds in debtor's bank account because funds retained exemption after recipient deposited benefits in bank account); *Dancer v. Chenault*, 527 S.W.2d 714, 717 (Mo. App. 1975) (state law exemption protected funds in bank account judgment creditor attempted to garnish); *Havelock Bank of Lincoln v. Hog Confinement Sys., Inc.*, 214 Neb. 783, 784, 335 N.W.2d 765, 766 (1983) (creditor cannot garnish Social Security benefits recipient deposited in bank account because exemption still applies after recipient deposited funds). *But see* *John O. Melby & Co. Bank v. Anderson*, 88 Wis. 2d 254, 259, 276 N.W.2d 274, 278 (1978) (even though deposited funds were wholly traceable to statutorily exempt payroll earnings, court interpreted statute to hold that creditor could garnish funds in bank account because exemption does not apply after deposit).

80. *See* *Anderson v. First Nat'l Bank of Atlanta*, 151 Ga. App. 573, 574, 260 S.E.2d 501, 502 (1979) (allowing garnishing creditor to reach exempt Social Security funds recipient deposited in bank account would defeat purpose underlying Social Security exemption).

81. *See* *Havelock Bank of Lincoln v. Hog Confinement Sys., Inc.*, 214 Neb. 783, 784, 335 N.W.2d 765, 766 (1983) (judgment debtor received notice of creditor's attempted garnishment of debtor's bank account); VA. CODE § 8.01-511 (1950 & repl. vol. 1983) (Virginia garnishment statute requires garnishing creditor to serve summons of garnishment on debtor).

82. *See* VA. CODE § 8.01-511 (1950 & repl. vol. 1983) (Virginia garnishment statute requires judgment creditor to prove his claim before availing himself of garnishment remedy). Section 8.01-537 of the Virginia Code is the Virginia attachment statute. *Id.* § 8.01-537. A creditor seeking attachment must petition the clerk of the court to obtain a writ of attachment. *Id.* The creditor seeking attachment must allege particular grounds for the attachment. *Id.*; *id.* § 8.01-534.

83. *Id.* § 8.01-511.

84. *See* *infra* note 85 (example of how notice given to debtor allows debtor to assert possible defenses).

85. *See* *Harris v. Bailey*, 675 F.2d 614, 615 (4th Cir. 1982). In *Harris v. Bailey*, the plaintiff-debtor owed money to a hospital. Brief for Appellee at 1, *Harris v. Bailey*, 675 F.2d 614 (4th Cir. 1982). The hospital obtained a judgment against the debtor and collected the judgment by garnishing the debtor's checking account. *Id.* The funds in the garnished bank account were Social Security benefits. *Id.* Because the creditor gave the notice required by the Virginia garnishment statute, the debtor had the opportunity to challenge the garnishment on the ground that the funds in the checking account were exempt under federal law. *Id.* at 1-2. The plaintiff's counsel and

creditors simply because the beneficiary deposited the funds in a bank account and commingled the funds with nonexempt funds.⁸⁶ The *Bernardini* decision implicitly allows other creditors to reach exempt funds in a bank account by holding that such funds lose exempt status upon deposit and commingling.⁸⁷ The *Bernardini* decision contradicts court decisions construing federal exemption statutes that hold exempt funds do not lose exempt status merely by deposit in a bank account.⁸⁸ *Bernardini*, therefore, allows all creditors to reach exempt Social Security benefits a beneficiary deposited in a Virginia bank that creditors presumably could not reach if the benefits were in a bank in another state.⁸⁹

Another example of how the *Bernardini* decision allows Virginia creditors an unfair advantage over other creditors is evident in comparing the *Bernardini* holding and its implications with the federal tax lien.⁹⁰ The federal tax lien is a powerful remedy that the federal government can use to collect delinquent taxes.⁹¹ A tax lien can reach property that other creditors normally cannot reach.⁹² The federal tax lien also grants the federal government priority

counsel for the hospital subsequently agreed that the funds retained their exempt status even after the plaintiff had deposited the funds in the bank account. *Id.* Accordingly, the hospital returned the funds to the plaintiff. *Id.* at 2; see *Finberg v. Sullivan*, 634 F.2d 50, 56 (3d Cir. 1980) (without notice of garnishment, judgment debtor was not able to assert possible claims of exemption).

86. See 223 Va. at 521-22, 290 S.E.2d at 464-65 (by holding that Social Security benefits lose their statutory exemption upon deposit in bank account, *Bernardini* allows creditors to reach funds expressly protected from creditors). In *Finberg v. Sullivan*, a bank obtained a judgment against a Social Security recipient. 634 F.2d 50, 52 (3d Cir. 1980). The bank attempted to satisfy its judgment by garnishing the Social Security recipient's bank account. *Id.* The only funds in the bank account were Social Security benefits that a recipient previously had deposited. *Id.* The Third Circuit held that Social Security benefits are exempt entirely from all creditors even after a recipient has deposited the benefits in a bank account. *Id.* at 52. The *Finberg* court reasoned that exempting Social Security benefits from legal process has the apparent purpose of furthering the exemption statute's purpose of protecting benefits from creditors by ensuring that a beneficiary has interrupted use of funds he receives as benefits. *Id.* at 63.

87. See 223 Va. at 521-22, 290 S.E.2d at 464-65 (since *Bernardini* decision holds that exempt funds lose their exempt status upon deposit and commingling, creditors could reach funds normally unattainable).

88. See *supra* notes 51-76 and accompanying text (demonstrating *Bernardini* court incorrectly held exempt funds lose exemption when recipient deposits and commingles exempt funds with nonexempt funds in bank account).

89. Compare *Bernardini*, 223 Va. at 521-22, 290 S.E.2d at 364-65 (Virginia banks and creditors can reach exempt Social Security benefits recipient has deposited in bank account because *Bernardini* holds exempt benefits lose exemption upon deposit and commingling) with *Matthews v. Lewis*, 617 S.W.2d 43, 44-45 (Ky. 1981) (Kentucky banks and creditors cannot reach exempt benefits recipient has deposited in bank account because exempt funds retain exemption even after deposit and commingling) and *Colton v. Martell*, 79 Misc. 2d 190, 191, 359 N.Y.S.2d 632, 633 (1974) (New York banks and creditors cannot reach exempt Social Security benefits recipient has deposited in bank account because exempt benefits remain exempt even after deposit).

90. I.R.C. §§ 6321-6326 (1982).

91. See *id.* § 6321 (tax lien reaches all real or personal property belonging to delinquent taxpayer); see also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 736 (1980) (Congress granted tax lien extraordinary reach superior to other liens); *Rice Inv. Co. v. United States*, 625 F.2d 565, 568 (5th Cir. 1980) (few liens can prevail against federal tax lien).

92. See D. EPSTEIN & J. LANDERS, *DEBTORS AND CREDITORS* 326 (2d ed. 1982) (tax lien

over certain creditors.⁹³ As powerful as the federal tax lien is, however, it cannot reach funds that are exempt under state Workmen's Compensation statutes.⁹⁴ By holding that Workmen's Compensation funds lose exempt status upon deposit in a bank account, the *Bernardini* decision allows a bank to reach funds that the federal tax lien could not reach.⁹⁵

In addition to basing its decision on the ground that the depositor destroyed the exempt status of the funds by depositing and commingling the exempt funds with nonexempt funds in a bank account, the *Bernardini* court also based its decision on the ground that a depositor easily could ensure that funds remain exempt by depositing those funds in a special bank account.⁹⁶ The idea that depositors could ensure that funds would retain exempt status upon deposit in a special account may be unfounded because in Virginia, some banks will not open an account in which deposits automatically are exempt from creditors.⁹⁷ Some Virginia bankers have stated that a bank would have no

reaches property other creditors could not reach); see also I.R.C. § 6334(a)(1)-(a)(10) (1982) (since tax lien specifically does not exempt Social Security benefits, federal government using tax lien is one of few creditors able to penetrate broad Social Security benefit exemption).

93. I.R.C. § 6323 (1982). The federal tax lien has priority over all creditors except purchasers, holders of security interests, mechanic's lienors, or judgment lien creditors even if the Internal Revenue Service has not filed notice of the tax lien. *Id.*

94. *Id.* § 6334(a)(7).

95. See 223 Va. at 521, 290 S.E.2d at 464 (*Bernardini* decision allows creditors to reach exempt Workmen's Compensation benefits once recipient has deposited benefits in bank account); *infra* text accompanying note 97 (*Bernardini* decision allows Virginia banks and creditors to reach exempt Workmen's Compensation benefits that federal government using federal tax lien could not reach).

96. 223 Va. at 522, 290 S.E.2d at 465; see *infra* notes 97-100 and accompanying text (interviews with Virginia bankers concerning whether depositors could set up special accounts containing funds exempt from creditor action).

97. See Interview with John Mapp, Executive Vice President of First American Bank, Lexington, Virginia in Lexington, Virginia (Jan. 17, 1984) (hereinafter cited as Mapp Interview). Mapp stated that his bank will not set up special accounts containing only exempt funds that would prevent all creditors from reaching those funds. *Id.* Mapp said that a bank would not set up a special exempt account because the bank would have no way of determining if the funds the depositor deposited in the account were actually from exempt sources. *Id.*; see Interview with Ed McCall, Vice President of United Virginia Bank, Lexington, Virginia, in Lexington, Virginia (Jan. 17, 1984) (hereinafter cited as McCall Interview). McCall stated that his bank has no method for allowing a depositor to establish a special account containing exempt funds which would be beyond the reach of creditors. *Id.*; see Interview with Curtiss E. Cook, Vice President of Dominion Bank, Lexington, Virginia, in Lexington, Virginia (Jan. 17, 1984) (hereinafter cited as Cook Interview). Cook said that his bank does not open accounts specifically designated as containing only exempt funds that would keep creditors from reaching those funds. *Id.* Cook explained that a bank could not take responsibility for denying a creditor access to a specific account simply because the depositor claimed that the funds were exempt from creditors. *Id.*; see also Letter from John B. Bowers, Vice President of the Virginia Bankers Association to Samuel P. Thomas, Jr., April 2, 1984 (hereinafter cited as Bowers Letter). Bowers, in response to the question of whether Virginia banks will open special accounts exempt from creditors, said Virginia banks generally will open accounts for any "legitimate reason." *Id.* Bowers did not explain whether a legitimate reason included a special account containing funds exempt from creditors. See *id.* Bowers also said banks would have no way of determining the source of funds in a particular account. *Id.* While never specifically discussing accounts containing exempt funds, Bowers did

way of policing or regulating a special account containing funds supposedly exempt from creditors⁹⁸ since a bank would have no way of knowing if the deposits in a special account actually came from exempt funds.⁹⁹ Some Virginia bankers also stated that banks do not inquire into whether depositors realize that certain funds are exempt from creditors when a depositor is opening a new account.¹⁰⁰

In addition to the unfounded rationale that depositors could establish special accounts containing exempt funds, a third reason the *Bernardini* decision is suspect is that the court characterized the issue as whether the Bank had knowledge of the special account instead of examining whether the funds in the account retained exempt status.¹⁰¹ Normally, a bank may not setoff funds in a special purpose account if the bank has knowledge of the special purposes of the account.¹⁰² Special purpose accounts are accounts over which the depositor has only limited control.¹⁰³ For example, one type of special

mention that a trust account is one method by which a depositor could protect deposits from creditor action. *Id.*

98. Cook Interview, *supra* note 97. Cook stated that a bank could not regulate or ascertain the source of funds in an allegedly exempt account. *Id.* Similarly, Mapp explained that his bank would not set up a special account containing only exempt funds because such an account would be too expensive for the bank to police. Mapp Interview, *supra* note 97.

99. Cook Interview, *supra* note 97. Cook stated a bank could not tell whether the funds in a special account exempt from creditors came from exempt sources such as Social Security or from nonexempt sources such as rental income from a farm. *Id.* Cook said that it would be expensive for his bank to determine whether funds in an account are exempt or nonexempt. *Id.* Cook also stated that setoff is a remedy that his bank rarely uses because a depositor in financial trouble with the bank is unlikely to have any money in his account that the bank could setoff. *Id.*; see McCall Interview, *supra* note 97. McCall stated that it would be expensive for a bank to notify depositors about a possible setoff or to ascertain the source of funds in a particular account. *Id.* McCall did state, however, that his bank seldom exercised its right of setoff. *Id.*

100. McCall Interview, *supra* note 97. McCall said that his bank did not ask a new depositor if the depositor realized that certain sources of funds are exempt from creditors. *Id.* Similarly, Bowers, who is Vice President of the Virginia Bankers Association, said that Virginia banks do not ask a depositor opening a new account if the depositor would like to open a special account exempt from creditors. Bowers Letter, *supra* note 97. Bowers explained that banks set up special purpose accounts in response to customer inquiry. *See id.* Bowers further explained, however, that he doubted if customers would open accounts with the purpose of preventing creditors from reaching the funds in the account. *See id.* Bowers concluded that customers probably are not thinking about preventing creditors from reaching funds in a bank account when the customer opens a new account. *Id.*

101. *See infra* notes 102-118 and accompanying text (*Bernardini* court mischaracterized issue in case as whether depositor's account was special purpose account instead of examining whether Bank could setoff account containing exempt funds).

102. *See Sun Bank of Miami v. E.C. Ernst, Inc.*, 395 So. 2d 282, 283 (Fla. 1981) (bank could not setoff special account depositor set up for special purpose); *supra* notes 10-15 and accompanying text (bank cannot setoff special purpose accounts).

103. *See TeSelle*, *supra* note 1, at 46 (special purpose account is account in which depositor only has limited control since third party also had control over account); *infra* notes 104-105 and accompanying text (example of special purpose account over which party depositing funds in account has limited control because third party also has interest in account); *see also In re Saugus Gen. Hosp., Inc.*, 7 Bankr. 347, 352-53 (Bankr. D. Mass. 1980), *rev'd on other grounds*,

purpose account is an escrow account, which is generally held in the name of the depositor and a real estate broker, that contains funds a bank holds for a specific purpose and releases to a third party when a specific event occurs.¹⁰⁴ The real estate broker cannot use the funds in the account and the bank cannot setoff the funds to satisfy debts the broker owes since the funds actually belong to the broker's customer.¹⁰⁵ A bank has knowledge of a special purpose account if the depositor labels the account in such a way that it is clear that the account is a special account.¹⁰⁶ The bank also has knowledge of a special purpose account if the depositor and the bank have entered into an agreement giving the bank notice of the special purpose of the account.¹⁰⁷ A special purpose account defeats a bank's right to setoff because a third party who is not a debtor of the bank has an interest in the account.¹⁰⁸ Since a party other than the bank's debtor has an interest in the funds on deposit in a special account, the bank may not exercise its right to setoff the property not belonging to the debtor.¹⁰⁹ The *Bernardini* court mistakenly based its ruling on the analysis of whether the bank had knowledge of the special purpose account instead of determining whether a bank can setoff an account containing statutorily exempt funds.¹¹⁰ The Bank's knowledge of the nature of the

698 F.2d 42 (1st Cir. 1983) (payroll account is special account because depositor's employees have specific interest in funds employer has deposited in account).

104. See *Stoddard v. Gookin*, ___ Mont. ___, ___, 625 P.2d 529, 534 (1981) (third party has interest in escrow account since bank will release funds to third party when specific event occurs).

105. See *First Nat'l Bank & Trust Co. v. Osage Supply Co.*, 186 Okla. 259, 261, 97 P.2d 3, 5 (1939) (since third party not owing money to bank has interest in escrow account, bank cannot setoff escrow account).

106. See *TeSelle*, *supra* note 1, at 46-47 (bank knows of special purpose account when bank or depositor has labeled account in such manner that account is clearly special purpose account).

107. See *First Nat'l Bank v. Barger*, 115 S.W. 726, 728 (Ky. 1909) (agreement between bank and depositor establishing special account provides notice to bank of special purposes for account use); *Hudson United Bank v. House of Supreme, Inc.*, 149 N.J. Super. 153, 158, 337 A.2d 438, 440-41 (1975) (bank could not setoff special purpose account bank established pursuant to agreement between bank and depositor); see also *First City Nat'l Bank of Oxford v. Long-Lewis Hardware Co.*, 363 So. 2d 770, 773 (Ala. 1978) (bank cannot setoff against special purpose account when bank has knowledge of special purpose).

108. See *TeSelle*, *supra* note 1, at 46. By definition, a third party has an interest in a special purpose account because the depositor opening the account does not completely control the account. *Id.* Since a third party has an interest in the account, such as the employee's interest in a payroll account or the trust beneficiaries' interest in a trust account, the third party has some control over the account. *Id.* at 46-47. Because more than one person has an interest in a special purpose account, the bank cannot exercise setoff against the special purpose account when satisfying a debt unless all the persons having an interest in the account owe the bank. *Id.*

109. See *Clark*, *supra* note 1, at 214-15 (funds on deposit are not sole property of debtor or property of bank when funds are in special purpose account).

110. See 223 Va. at 521, 290 S.E.2d at 464. In *Bernardini*, the court characterized one of the main issues in the case as the fact that the Bernardinis deposited exempt funds in an account without telling the bank of the special nature of the funds. See *id.* The *Bernardini* court, therefore, considered the issue in the case as whether the Bank had knowledge of the special purpose account. *Id.* Analyzing the issue in *Bernardini* as whether the account was a special purpose account was wrong since the depositor had complete control over the account. See *TeSelle*, *supra* note 1, at 46 (special purpose account is account over which depositor only has limited control).

account was irrelevant since the account in *Bernardini* was not a special purpose account.¹¹¹ The account at issue in *Bernardini* was not a special purpose account because no third party had an interest in the account while the only people with an interest in the Barnardinis' bank account were the Bernardinis.¹¹²

Accounts containing statutorily exempt funds do not constitute special purpose accounts¹¹³ and are unrelated to the purpose and theory underlying special purpose accounts.¹¹⁴ The purpose of exempt funds is to provide income for the recipient of those funds so the recipient can maintain the necessities of life¹¹⁵ and, therefore, statutory restrictions preventing creditors from reaching exempt funds further the purpose of exemptions by enabling the recipient of exempt funds to use those funds for basic needs instead of having the recipient's creditors absorb those funds in payment of the recipient's debts.¹¹⁶ For example, Congress intended Social Security benefits to

Since the account in *Bernardini* was not a special account, knowledge on the part of the Bank was irrelevant in the determination of whether the Bank could setoff the depositor's account containing exempt funds.

111. See *supra* note 110 (account at issue in *Bernardini* was account containing exempt funds and not special purpose account); *infra* text accompanying note 112 (same).

112. See *Anderson v. First Nat'l Bank of Atlanta*, 151 Ga. App. 573, 574, 260 S.E.2d 501, 502 (1979) (depositor is only party with interest in bank account containing exempt Social Security benefits). Special purpose accounts include many different types of accounts, but do not include accounts containing statutorily exempt funds. See, e.g., *Engleman v. Bank of Am. Nat'l Trust & Sav. Ass'n.*, 98 Cal. App. 2d 327, 330, 219 P.2d 868, 870 (1950) (bank could not setoff special purpose account consisting of funds depositor pledged as security for specific debts); *Clarkson v. Selected Risk Ins. Co.*, 170 N.J. Super. 373, 381, 406 A.2d 494, 501 (1979) (bank could not setoff funds to satisfy individual debt of trustee owed to bank when trustee held funds in account in trust for third party); *Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 774 (Tex. Civ. App. 1981) (bank could not setoff special purpose account having characteristic of bailment agreement).

113. See *supra* note 112 (special purpose accounts do not include general accounts containing exempt funds).

114. Compare *TeSelle*, *supra* note 1, at 46 (theory underlying special purpose account is that depositor has only limited interest in account) with *supra* note 112 and accompanying text (depositor is only person with interest in account containing exempt funds). Cases dealing with a bank's right of setoff against special purpose accounts discuss the type of account, and not the source of funds a depositor has deposited in an account. See, e.g., *In re Saugus*, 7 Bankr. 347, 353 (Bankr. D. Mass. 1980) (type of account, not source of funds contained within account, prevents bank from exercising setoff), *rev'd on other grounds*, 698 F.2d 42 (1st Cir. 1983); *First City Nat'l Bank of Oxford v. Long-Lewis Hardware Co.*, 363 So. 2d 770, 773 (Ala. 1978) (same); *Hudson United Bank v. House of Supreme, Inc.*, 149 N.J. Super. 153, 156, 373 A.2d 438, 440-41 (1977) (same).

115. See *United States v. Silk*, 331 U.S. 704, 711 (1947) (overall objective of Social Security system is protection of benefit recipients from "hardships of existence"); *Lawrence v. Shaw*, 300 U.S. 245, 250 (1937) (purpose of veterans' benefits payments exempt from creditors under federal statute is support and maintenance of benefit recipients); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 370, 521 P.2d 441, 451, 113 Cal. Rptr. 449, 459 (1974) (policy underlying exemption of disability benefits from creditors is that benefit recipients should use benefits to support families); *Matthews v. Lewis*, 617 S.W.2d 43, 44 (Ky. 1981) (purpose of Workmen's Compensation benefits is to support injured people).

116. See *supra* note 115 and accompanying text (exemption from creditor action against support benefits furthers purpose of providing basic maintenance for recipients).

provide a source of income to the elderly for basic needs.¹¹⁷ By mistakenly examining whether the Bank had knowledge of the special purpose account instead of properly examining if and when the funds in the Bernardinis' account lost exempt status, the *Bernardini* decision allowed the Bank to reach Social Security benefits in contravention of the federal exemption statute.¹¹⁸

As a result of the Virginia Supreme Court's decision in *Bernardini*, a Virginia bank's extensive right of setoff effectively contravenes both federal and state policies underlying statutes exempting certain benefits from the reach of the recipient's creditors.¹¹⁹ Moreover, *Bernardini* enables creditor-banks to setoff exempt funds in a depositor-debtor's account that a garnishing creditor could not reach.¹²⁰ The *Bernardini* decision also allows banks to setoff funds in a depositor-debtor's account without having to comply with the provisions of Virginia's garnishment statute.¹²¹ Since creditors attempting to garnish a debtor's bank account must comply with the Virginia garnishment statute and give debtors notice and opportunity to protest the garnishment, *Bernardini* contravenes the policy underlying the Virginia garnishment statute by allowing banks to setoff funds before the depositor may protest.¹²² Unless the Virginia Supreme Court realizes that its decision in *Bernardini* contravenes the policies underlying several state and federal statutes, the Virginia legislature should consider adopting legislation to correct the inappropriate result in *Bernardini*.¹²³ The Virginia legislature could amend the Virginia exemption statutes making it clear that the statutes apply to a bank's right of setoff, and that the statutory exemption remains in force even if the recipient of exempt funds deposits those funds in a bank account.¹²⁴ Although the Virginia

117. See *United States v. Silk*, 331 U.S. 704, 710 (1947) (Congress and President designed Social Security system to help solve financial difficulties of life facing elderly people); see also Letter from Wilbur S. Cohen to Paul Aiken, June 22, 1972, Appendix A, Brief for Petitioner, *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973). Mr. Cohen was a member of the legislative staff in 1935 responsible for following the Social Security bill through Congress. *Id.* Mr. Cohen stated that people involved with the bill generally understood that Social Security payments would not be subject to any legal process. *Id.* Mr. Cohen said that the legislative intent underlying Social Security payments was to provide recipients a guaranteed payment every month with no possibility that a third party could intervene. *Id.* Mr. Cohen concluded Congress definitely intended the Social Security exemption to be unqualified and absolute. *Id.*

118. See *supra* notes 101-117 and accompanying text (demonstrating *Bernardini* approach of incorrectly using special purpose analysis contravenes policy underlying exemption statutes).

119. See *supra* notes 86-88 and accompanying text (demonstrating that *Bernardini* decision contravenes policy underlying federal and state exemption statutes).

120. See *supra* notes 81-85 and accompanying text *Bernardini* holding places bank in position superior to nonbank creditors).

121. See *supra* notes 81-89 and accompanying text (*Bernardini* decision allows banks to setoff accounts containing exempt funds without giving depositor chance to assert possible exemption defenses).

122. See *supra* notes 81-85 and accompanying text (demonstrating that *Bernardini* contravenes policy underlying garnishment).

123. See *infra* text accompanying notes 124-128 (suggested changes in Virginia law that would correct improper decision of Virginia Supreme Court in *Bernardini*).

124. See VA. CONST. art. IV, § 14. Section 14 of article IV of the Virginia Constitution

legislature cannot amend the federal Social Security statute,¹²⁵ the legislature could pass legislation specifically regulating a bank's right to setoff funds.¹²⁶ The law regulating a bank's right to setoff could require a court or the bank to hold a hearing within five days after the setoff so that the depositor would have a chance to assert any possible claim of exemption. For example, the bank could freeze temporarily the depositor's account and give the depositor five days to demonstrate that the funds in the account came from exempt sources. The notice to the depositor whose funds the bank had setoff should include a list of sources of funds, such as Social Security or Workmen's Compensation, that are exempt from the bank's right of setoff.¹²⁷ At the hearing, if the depositor could demonstrate that the deposits came from exempt funds, the bank should return the setoff funds to the depositor's account.¹²⁸ The suggested statute on a bank's right of setoff would correct the incorrect decision reached by the Virginia Supreme Court in *Bernardini* by allowing a depositor to assert possible claims of exemption, thereby preventing a creditor bank from exercising setoff against funds that exemption statutes protect.

S. PERRY THOMAS, JR.

grants authority to the Virginia legislature to enact or amend laws on all subjects except those subjects the Virginia Constitution specifically has forbidden or restricted. *Id.* The Virginia Constitution does not forbid the passing of laws covering exemption statutes. *See id.*

125. *See* 42 U.S.C. §§ 401-433 (1982) (Congress enacted Social Security law and, therefore, Virginia could not amend Social Security statutes).

126. *See* VA. CODE §§ 6.1-1 to -397 (1950 & repl. vol. 1983) (since Virginia can pass laws regulating banking industry, Virginia legislature presumably could pass law regulating bank's right of setoff).

127. *See* Letter from Virginia Attorney General to all Judges, Clerks, Sheriffs, and Other State Officials Empowered to Issue, Enforce, or Serve Garnishment Process in the Commonwealth of Virginia (Nov. 23, 1983). In response to a decision concerning the Virginia garnishment statute, the Virginia Attorney General issued a letter containing guidelines for serving garnishments. *Id.* The proposed guidelines contained a form that would inform a debtor of possible property or benefits that would be exempt from garnishment. *Id.* The form explicitly mentioned such specific exemptions as Social Security benefits, Unemployment Compensation benefits, and veteran's benefits. *Id.* The form also would provide a specific place on the form for the debtor to claim the exemptions before the garnishment would take place. *Id.*

128. *See supra* notes 48-50 and accompanying text (discussing tracing issue and how depositor could trace funds to exempt source).