The CARES Act authorizes payments up to $1200 to individuals and $2400 for couples, with an additional $500 for children under 17 years old. The payments phase out for those whose income is between $75,000 and $99,000 ($150,000/$198,000 for a married couple filing jointly). An eligible family of four with children under 17 will receive $3400. Social Security and SSI recipients who do not file tax returns will only receive $1200 as the IRS does not know which recipients have dependents. It is unclear whether these recipients will have an opportunity to provide dependent information in order to obtain the higher payment.

The U.S. Treasury will start issuing stimulus payments as early as April 15th to income-qualified Americans. Payments will first be made electronically to individuals who received their tax refunds by direct deposit for their 2018 or 2019 tax returns. Social Security recipients, SSI, and railroad retirees who are not required to file a tax return and did not file a return for 2018 and 2019 will receive stimulus payments in the same way they receive those benefits—in almost all cases either through direct deposit to their bank account or loaded onto their Direct Express prepaid card.

More information on eligibility criteria is available and is being regularly updated at [1]. This article focuses on advice an attorney can provide clients regarding creditors' seizure of stimulus payments. Consumers seeking legal advice can locate attorneys using a number of websites, including: How to Get Legal Assistance [2], Law Help [3], and NACA [4].

The Threat to Families’ Stimulus Checks

Certain creditors may view stimulus payments as an opportunity to seize money for amounts owed on outstanding court judgments. Millions of Americans have court judgments against them—often issued many years ago by default without the consumer’s knowledge. These consumers may not realize that they are potentially subject to bank account seizure, including the immediate loss of a stimulus payment.

Creditors may be lining up to obtain court garnishment orders to seize stimulus deposits and any other amounts present in the bank account, up to the amount of the garnishment order. In some states, a previous garnishment order may still be in effect that obligates the bank to review the account and seize deposited funds for a period of time. Unless the federal government, state governments, or the courts direct otherwise (see below), banks that are presented with a garnishment order are likely to freeze amounts in the account and give the consumer a short time to prove in court that account funds are exempt from seizure—a daunting prospect at any time, and a near impossibility today when many courts are at least physically closed, people are ordered to stay at home, and attorneys are often inaccessible.

Garnishments from creditors are not the only threat to bank accounts. Consumers who owe money to their bank (for other loans, outstanding fees, or overdrawn accounts) may find their own bank seizing stimulus payments deposited at that bank, even if the bank does not have a judgment against the consumer. See below “Will the Consumer’s Own Bank Seize the Stimulus Payment?”

For most consumers, there is no magic bullet to avoid a creditor or their own bank seizing the consumer’s bank account. Many approaches to minimize such seizures have drawbacks that are better to avoid if payments are not actually at risk of being seized. These are complex issues that consumers may not want to deal with on their own. This article provides factors an attorney should consider in advising clients about the risk and how to avoid the loss of their stimulus payments to judgment creditors.

Are There Special Limits on Judgment Creditors’ Garnishment of Stimulus Payments?

The CARES Act protects stimulus payments from certain offsets [5] to collect debts owed to federal and state governments. The Act does not address either private creditors’ seizure of the checks from bank accounts to satisfy outstanding court judgments or the banks’ ability to seize the funds to pay other debts owed the bank or for overdrawn accounts. While advocacy efforts are ongoing to change the federal law or the way Treasury treats these payments, as of the time the first set of payments were distributed (in mid-April 2020), these efforts have not been successful.

In a few states (such as New York), a certain dollar value in funds in a bank account is automatically protected from seizure, without requiring consumers to take any affirmative action.
Every state provides a method by which consumers can assert to a court that bank account funds are exempt under state law, but only after the account is frozen. Depending on the state, an exemption can be based on deposits up to a certain dollar amount, for public assistance benefits, under a “wild card” exemption which goes up to a certain dollar amount, or some similar category. See NCLC’s Collection Actions Appendix G [6] (now open to all readers even without a subscription through May 3, 2020). But in a frustrating situation with constitutional due process implications, consumers may not have an opportunity to raise these rights. Many state courts are closed for most proceedings and consumers are unable to reach the courts in any event.

In a growing number of states and counties, orders are being issued to prevent garnishments of bank accounts. Examples include:

- **California Governor’s Executive Order N-57-20** [7] (April 23, 2020) (also includes state assistance funds);
- **District of Columbia Act 23-286** [8];
- **Illinois Governor’s Executive Order 2020-25** [9] (April 14, 2020);
- **Indiana Supreme Court Order in case nos. 20S-MS-258 and 20S-CB-123** [10] (April 20, 2020);
- **Iowa**: Executive Department. Proclamation of Disaster Emergency [11] (April 24, 2020);
- **Maryland Governor's Order 20-04-29-03** [12] (April 29, 2020);
- **Massachusetts emergency regulation 940 C.M.R. 35.00** [13];
- **Minnesota Governor's Emergency Executive Order 20-50** [14] (May 4, 2020);
- **Nebraska Attorney General Warning** [15] (April 15, 2020);
- **Nevada Governor's Directive 017** [16] (April 30, 2020);
- **New York Attorney General Guidance on CARES Act Payments** [17] (April 17, 2020);
- **Oregon Governor’s Executive Order 20-18** [18] (April 17, 2020);
- **Rhode Island Attorney General Guidance AG 2020-3** [19] (April 28, 2020);
- **Texas Supreme Court Tenth Emergency Order Regarding the Covid-19 State of Disaster** [20] (April 9, 2020);
- **Virginia Supreme Court Third Order Extending Declaration of Judicial Emergency in Response to Covid-19 Emergency** [21] (April 22, 2020) and Processing Garnishments During the Pendency of Judicial Emergency [22] (April 23, 2020);
- **Washington State Governor’s Proclamation 20-49 Garnishments and Accrual of Interest** [23] (April 14, 2020);
- **Fulton County, Georgia Magistrate Court Third Amended Guidance During Judicial Emergency** [24] (April 7, 2020);
- **Jackson County, Missouri court order** [25]; and
- **Las Vegas, Nevada order of Justice Court, effective March 17, 2020** [26].

Delaware’s pre-existing law does not authorize garnishment orders directed to banks in Delaware. Del. Code tit. 10, § 3502(b). Relieving consumers of the need to contest garnishment orders could have public health benefits and would prevent widespread violations of consumers’ constitutional due process and other legal rights, as explained here [28].

### Determining If a Bank Account Is Subject to Garnishment

Many Americans do not know their bank account is at risk of seizure because they do not realize a default judgment has been taken out against them in a collection lawsuit. Joint bank accounts are subject to seizure for judgments taken out against either owner of the account. Even where a consumer’s creditor is announcing debtor-friendly policies because of the COVID-19 epidemic, the creditor may have already sold the account to a debt buyer its rights to enforce the court judgment against the consumer or may have sold the debt after default to a debt buyer that obtained a judgment against the consumer. In either case, the debt buyer is unlikely to be so considerate. However, the debt buyers trade group does encourage its members to be sensitive to consumers [29] during the COVID emergency.

Here are clues to tell if a creditor will garnish a stimulus payment (there is a greater risk that the consumer’s own bank will seize the stimulus payment; see below “Will the Consumer’s Own Bank Seize the Stimulus Payment?”).

- Has the consumer’s bank account been garnished before—consumers are supposed to receive notice after a garnishment. If the garnishment does not satisfy the judgment, the bank account may be at risk for additional seizures?
Protecting Against Creditor Seizure of Stimulus Checks

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- Has the consumer ever lost a court lawsuit or had a judgment entered against them?
- Has the consumer ever been served legal papers relating to a suit, but the consumer did not respond?
- Call up the bank holding the consumer’s deposit (when it is possible to get through to them) to ask if a continuing garnishment order will seize new money coming into the account. But this may not obtain reliable information.
- A credit report from the major reporting agencies no longer includes information about court judgments against the consumer, but other data aggregation services should collect and be able to provide this information.
- Determine how long a garnishment order lasts in the state and whether courts or other applicable officials are issuing new garnishment orders during the COVID-19 emergency.
- Are banks with branches just in the state not subject to a garnishment order pursuant to state law (e.g., Delaware)?

Strategies for At-Risk Direct Deposit Recipients

Many people receiving stimulus payments by direct deposit received them on April 15th. How soon this money can be seized by a judgment creditor depends not only on the state law where the consumer banks, but also the state laws where that bank has other branches or its main office (e.g., New York).

Immediate garnishment may have occurred as soon as April 15th where state law allows a garnishment order previously delivered to the consumer’s bank before the direct deposit to remain effective on a continuing basis through the date of direct deposit. Pre-existing garnishment orders may have a continuing life for a certain number of days, depending on state law. Many pre-existing orders will have expired prior to April 15th, requiring the creditor to obtain a new order to access the stimulus payments.

There may still be time to move funds out of an at-risk account. It is possible that creditors may have obtained new garnishment orders that have not yet been served on the banks. In addition, it is unclear to what extent creditors are able to access the courts during this emergency to obtain new garnishment orders. Some courts may be open electronically but some may be fully or partially closed and not issuing garnishment orders or issuing them slowly. If a bank account is at risk of a new garnishment order that has not yet been served on the bank, the consumer has some time to move the stimulus payment out of the account to prevent seizure.

At-risk consumers should monitor their accounts and consider moving all money out shortly after it arrives. Consumers should consider withdrawing the funds in cash or transferring the funds electronically or through a debit card payment to pay for necessary goods or services. If it is safe to access an ATM, many banks are waiving their daily limits on ATM withdrawals.

Another option that may reduce but will not eliminate the risk of garnishment is to move out any existing funds in an account and seek direct deposit of the stimulus payment onto a prepaid card or a new bank account at a smaller bank or credit union. Prepaid cards are not exempt from garnishment, but most are issued by smaller institutions that are not on creditors’ radar screens. (See below for special issues involving the Direct Express card.)

These actions may, however, make it more difficult for consumers to use their funds or cause them to pay prematurely for bills that should be delayed. Whether to move funds from a bank account will be a difficult decision, in large part based on how real the risk of garnishment is if they are left in the account.

Pressing Exemptions from Garnishment. Also determine if a certain amount of funds in a bank account is exempt from garnishment under state law. Delaware does not authorize garnishment orders served on banks in Delaware, so that funds should be protected, particularly if the bank does not have branches in other states. New York and possibly other states make protection automatic for a certain dollar amount in an account and do not require consumers to take action to protect those funds. Many other states have protections that consumers must invoke after a garnishment order is served. See NCLC’s Collection Actions Appendix G [6] (now open to all readers even without a subscription through May 3, 2020) for a particular state’s exemptions. See also the analysis of state bank account exemptions in NCLC’s No Fresh Start in 2019 [30]. If state law provides that amounts in bank accounts are automatically protected (in other words, the exemption protection is self-actuating, such as in New York and Delaware), leaving the protected amount in the bank account should be safe.

If there are exemptions that are not automatically protected under state law, and the account has been frozen pursuant to a garnishment order, the attorney can seek the release of the exempt funds. The stimulus payments may be exempt because state law protects a certain dollar amount in the account or may exempt such categories as “public benefits” or “public assistance benefits,” or pursuant to a “wild card” amount that can be used to protect any of the consumer’s property. See, e.g., Massachusetts Attorney General Guidance [31] (April 13 2020) (stimulus payments are exempt from garnishment under Massachusetts law as paid as “public assistance”); Minnesota Governor’s Emergency Executive Order 20-50 [14] (May 4, 2020) (stimulus payments defined as “government assistance based on need”); New York Attorney General Guidance on...
Constitutional Claims. Attorneys should consider filing preemptive actions before a garnishment order is served, as a state’s procedures allowing the consumer to raise exemptions only immediately after a bank account is frozen should not apply during the COVID-19 emergency. Such procedures in the current circumstances violate constitutional due process, as consumers do not have the opportunity to be heard. Due process allows garnishment only if the consumer has an immediate opportunity to raise defenses after a freeze or seizure. See NCLC’s Collection Actions § 13.5 [33]. It will be a factual question, with courts mostly closed during the COVID-19 emergency, whether there is in fact an immediate opportunity to raise those defenses. If not, any bank freeze should be viewed as wrongful and a violation of due process. A West Virginia court [34] on April 15, 2020 ordered garnished stimulus funds in a bank account to be unfrozen and not seized because of these due process concerns. Click for the complaint [35] and also the motion for temporary restraining order [36] in that case.

Special Strategy for At-Risk Social Security, SSI, and VA Beneficiaries

A special strategy for those at risk of garnishment is available for recipients of Social Security, SSI, Veterans, or certain other federal benefits. A U.S. Treasury rule exempts from garnishment an amount in a bank account or Direct Express card equal to two months of federal benefit payments for that individual. See 31 C.F.R. § 212; NCLC’s Collection Actions § 14.5.4 [37].

The protected amount in a consumer’s account need not be traced to the federal benefits—that dollar amount is protected no matter its source. If two months of federal benefits for a Social Security recipient is $2000, the account will be fully protected from garnishment if there is only $800 in the bank account before the stimulus payment is deposited. Once the $1200 is deposited, the total amount will still be less than $2000. Before the next Social Security or other benefit payment is deposited, however, the recipient will need to withdraw additional amounts to keep the new balance under $2000. Fortunately, benefit payments come on a predictable date each month, such as the second Wednesday of the month.

This strategy comes with a cost, as described above, since it may be more convenient and safer to keep all funds in the bank account than to rush to withdraw cash or make payments from the account.

Should Consumers Provide Their Direct Deposit Information to the IRS or Wait to Receive Stimulus Payments by Paper Check?

For many millions of Americans, the Treasury Department has no information about how to pay them electronically and will be sending a paper check unless the consumer provides their information via the new Treasury web portal. As described below, paper checks offer an opportunity to avoid garnishment. But, if Americans switch to direct deposit via the Treasury web portal [38], receipt of the stimulus payment will be sped up by weeks or even months. Paper checks also may be sent to the wrong address, otherwise lost, or stolen. Consumers may incur check cashing fees and be subject to check scams. Waiting months for payment, recipients may also be victimized by predatory lenders offering cash up front in return for the stimulus payment—with interest rates of hundreds of percent.

Strategies to Avoid Garnishment for Those Receiving Paper Checks

For paper checks, until the check is deposited into a consumer’s account, their attorney has some time to determine the risk of a garnishment order and also whether under state law a certain dollar amount in the account is automatically protected.

If there is a risk of seizure, recipients of paper stimulus checks can avoid garnishment by cashing them and not depositing them into their bank accounts. The consumer’s bank may be willing to confirm that there is no garnishment order and to cash the check immediately.

Walmart and many grocery stores or other merchants may accept the federal checks and provide cash back that can be saved or loaded onto a prepaid card. Some banks, including JP Morgan Chase and Wells Fargo, have announced that they will not charge check cashing fees for non-customers that cash stimulus checks. PNC has just announced the same policy [39]. If consumers cash the stimulus check at a bank where they do not have an account, there should be no risk of garnishment.

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Where a creditor knows the consumer’s regular bank account, the risks of garnishment can be reduced, but not eliminated by opening up a new account at a small local bank. Watch out though for extra bank fees for this additional account.

Friends or relatives may be willing to provide cash in return for endorsement of the check to them, but they may face significant problems depositing an endorsed check into their account. Already banks are concerned about extensive fraud involving stimulus paper checks and will be very cautious about depositing them into someone else’s account. A bank may either refuse or request a hold on the funds in a friend’s account.

Clients should be warned about expensive check cashing companies. If other means of cashing the check are unavailable, the risk of bank account garnishment must be weighed against the high cost of the check cashing.

**Will the Consumer’s Own Bank Seize the Stimulus Payment?**

Stimulus payments are at even greater risk of seizure by the consumer’s own bank or credit union (all references to banks in this article also apply to credit unions). Even if the bank does not have a court judgment against the consumer, the bank generally has the right to seize money deposited in the consumer’s account to repay amounts owed to the bank. This is called the banker’s right of setoff. See NCLC’s *Consumer Banking and Payments Law* Chapter 10 [40].

Even if state emergency declarations prohibit or make it difficult for a judgment creditor to garnish a consumer’s bank account, the bank itself may not be covered by an emergency prohibition. Moreover, the bank does not have to seek out a seizure order from a court or other government agency—it can do it by itself. The law is far from clear about whether federal or state exemptions protecting amounts in a bank account from garnishment even apply to a bank’s right of set off.

Federal law prohibits a bank from exercising the right of setoff to seize money in the consumer’s bank account to pay for overdue credit card payments owed to the same bank unless the consumer has provided a consensual security interest in the funds (as with a secured credit card). See 15 U.S.C. § 1666(h)(a); 12 C.F.R. § 1026.12(d). This federal protection only applies to credit card debt though and does not protect the consumer’s bank account from setoff for amounts owed to that bank for other purposes. Seizure might occur to repay a delinquent car loan or personal loan, or amounts owed on an overdrawn account, including nonsufficient fund fees.

If a direct deposit of a stimulus check goes to a closed account at the bank, the bank will have to return the amount to the U.S. Treasury. See 31 C.F.R. § 210.4(c)(3). Treasury will then send the consumer a paper check unless the consumer has directed a direct deposit to a different account. The bank cannot seize the direct deposit on the closed account even if the consumer still owes payment to the bank. However, an account with a negative balance may have been charged off but may not be officially closed. In that situation, the rules governing closed accounts do not apply and the bank may attempt to keep the funds.

California Governor’s Executive Order N-57-20 [7] (April 23, 2020) orders that CARES Act stimulus payments and any other government payments in response to COVID-19 are exempt from banker’s right of set off to the extent the funds are traceable in the bank account.

Maryland Governor’s Order 20-04-29-03 [12] (April 29, 2020) prohibits Maryland state banks and credit unions from setting off stimulus payments to the extent they are traceable to that source.

Minnesota Governor’s Emergency Executive Order 20-50 [14] (May 4, 2020) makes stimulus payments exempt from any contractual setoff or security interest asserted by a financial institution.

The New York Guidance on CARES Act Payments [17] (April 17, 2020) warns banks that it views set off of stimulus payments to be illegal and an unfair and deceptive and abusive practice and the state attorney general may prosecute banks that set off such payments.

A number of banks are announcing that temporarily they will not apply their right of set off against stimulus payments deposited with that bank. These banks include JP Morgan Chase, Citibank, Bank of America, USAA, and Wells Fargo. This is a temporary policy and the consumer’s account may be debited after the policy expires. See also Connecticut Banking Commissioner’s Guidance on CARES Act Payments [41] letter to Connecticut Financial Institution CEOs (April 16, 2020) urging Connecticut banks not to set off stimulus payments.

See a bank-by-bank listing [42] of virtually all banks and the actions each bank Is voluntarily taking. This should list whether
a particular bank states that it is voluntarily refraining from set off of stimulus payments.

Since this is a voluntary action, the exact extent of the policy may vary by the bank making the announcement. One would assume that any bank with this policy will not apply its banker’s right of set off for a period of time to amounts owed the bank. For example, amounts overdue for a car loan should not be seized. A number of banks are also announcing a voluntary policy allowing the consumer to have access at least for a limited period of time to the full stimulus payment even if it was deposited into an account with a negative balance or even if overdraft fees are owed. However, implementation issues may result in stimulus payments being seized even at banks adopting this policy.

Whether or not a bank has announced such a voluntary policy, consumers who have found their stimulus funds subject to setoff should contact the bank to ask the bank to make the funds available.

Other than when deposited at a bank with a favorable voluntary policy, the stimulus payment is at great risk if directly deposited into a bank where the consumer is delinquent with that bank. Receiving the stimulus payment by a paper check and cashing it elsewhere will protect that payment.

For More Information

The Internal Revenue Service (IRS) has more information online [1] about distribution of stimulus payments checks.

State-by-state summary of exemption laws: During the month of April 2020, NCLC is making a summary of each state’s exemption laws available to the public without a subscription from NCLC’s Collection Actions Appendix G [6].

NCLC’s Treatise Section on Bank Account Seizures: For detailed legal rights concerning bank account seizures and freezes, see NCLC’s Collection Actions § 14.5. [43]

NCLC’s Treatise Section on Banker’s Right of Setoff: See NCLC’s Consumer Banking and Payments Law Chapter 10 [40].


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Links
[9] https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-25.aspx
[12] https://www.lawhelp.org/find-help
[16] https://library.nclc.org/link/CA.AG
[17] https://library.nclc.org/link/CA.AG
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