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Customer Disservice

BANK COMPLIANCE WITH THE NEW YORK STATE EXEMPT INCOME PROTECTION ACT

INTRODUCTION

We live in “[o]ne of the worst economic downturns of modern history.”¹ Many Americans are mired in debt.² And if they stop paying their debts, creditors often take them to court.³ Most debtors do not mount a defense.⁴ Many do not even know they have been sued.⁵ Frequently, the creditor wins a money judgment against the debtor in court.⁶ Judgment in hand, the creditor turns to the debtor’s bank and informs it that the money in the debtor’s account belongs to the creditor.⁷ The bank, in turn, freezes the account.⁸ One day, the debtor goes to make a purchase with his bank card, and his card is rejected.⁹ The debtor is now unable to pay for food, rent, transportation, or other necessities.¹⁰ “People go hungry. They get sick or sicker. They suffer anxiety.”¹¹ The consequences can be “devastating.”¹²

Until a couple of years ago, most of this was perfectly legal in the State of New York. Not surprisingly, people started complaining.¹³ In response to these complaints, New York

¹ John Collins Rudolph, *Pay Garnishments Rise as Debtors Fall Behind*, N.Y. TIMES, Apr. 1, 2010.

² See *infra* Part I.B.

³ See *infra* Part I.E.

⁴ See *infra* notes 77-78 and accompanying text.

⁵ See *infra* Part I.E.

⁶ See *infra* Part I.E.

⁷ See *infra* Part I.D.

⁸ See *infra* Part I.D.

⁹ Rudolph, *supra* note 1.

¹⁰ See *Frozen Out: A Review of Bank Treatment of Social Security Benefits, Hearing before the S. Fin. Comm. 2* (2007) (statement of Margot Saunders, Counsel, National Consumer Law Center).

¹¹ *Id.*

¹² See *id.*

¹³ Johnson M. Tyler, *Exempt Income Protection Act Better Protects Strapped Debtors*, 241 N.Y.L.J. 4 (Jan. 27, 2009); see also Catherine M. Callery & Louise M.

lawmakers passed the Exempt Income Protection Act (“EIPA”),¹⁴ an amendment to the New York Civil Practice Law (“CPLR”).¹⁵ As a result of this new legal protection, when a bank receives notice of a money judgment from a creditor, the bank must withhold a certain amount of money—either \$1,740¹⁶ or \$2,500—in the account.¹⁷

In theory, EIPA prevents creditors from seizing every last penny from a debtor’s bank account, thus allowing the debtor to meet basic food, housing, and medical needs while seeking release from the account restraint. EIPA is designed to provide relief to indebted individuals who live paycheck to paycheck and who depend upon modest incomes for their sustenance.¹⁸ The statute has been praised by consumer advocate groups as a great step forward in consumer protection law.¹⁹ But in the short time since EIPA’s enactment, legal services groups have received numerous complaints that banks are not complying with the law.²⁰ This Note argues that banks fail to comply with EIPA because they have little incentive to do so—in fact, they profit by violating the law—and recommends that the statute be amended to better induce bank compliance so that the law may function as intended.

Part I of this Note explores the conditions that led to the passage of EIPA, including the rise of consumer debt, the increase in the use of electronic banking, the expansion of

Tarantino, *Bank Freeze Problems Attract Attention*, May 1, 2007, <http://www.empirejustice.org/issue-areas/disability-benefits/ssi-ssd/income-resources/bank-freeze-problems-attract.html> (last visited Apr. 19, 2010). The problems with restraints have also been documented by the courts. See generally *Lincoln Fin. Servs., v. Miceli*, 851 N.Y.S.2d 58 (N.Y. Dist. Ct. 2007); *Contact Res. Servs., LLC v. Gregory*, 806 N.Y.S.2d 407 (N.Y. City Ct. 2005).

¹⁴ 2008 N.Y. Sess. Laws 575 (McKinney).

¹⁵ South Brooklyn Legal Services, *SBLS Helps Draft New EIPA Law*, Jul. 10, 2008, <http://www.sbls.org/index.php?pg=2&s=spotlight&c=SSIDisability-Rights> (last visited Nov. 1, 2009). The law was passed on June 24, 2008. *Id.*

¹⁶ When EIPA went into effect, the law protected all bank accounts without statutorily exempt payments up to \$1,716, set to be increased incrementally based on the Consumer Price Index. In July, 2009 the amount increased to \$1,740. N.Y. C.P.L.R. 5222(i), 5205(l)(3)(ii).

¹⁷ N.Y. C.P.L.R. 5205(l) (2009).

¹⁸ NEW YORKERS FOR RESPONSIBLE LENDING, EXEMPT INCOME PROTECTION ACT MODEL BILL SUMMARY 2, 5-6 (2009), <http://www.nedap.org/programs/documents/EIPA-billsummary.pdf> [hereinafter NYRL SUMMARY].

¹⁹ See Press Release, Neighborhood Economic Development Advocacy Project, NEDAP Praises Legislature for Passing Bill to Prevent Abusive Debt Collection (Jun. 26, 2008), available at <http://www.nedap.org/pressroom/EIPAPressStatement6-26-08.html>.

²⁰ Kirsten E. Keefe & Gina Calabrese, *Exempt Income Protection Act Update*, Aug. 13, 2009, <http://www.empirejustice.org/issue-areas/consumer-community-development/fair-debt-collection/exempt-income-protection-act.html> (last visited Nov. 1, 2009).

consumer credit litigation, and the statutory shortcomings of the CPLR. Part II examines EIPA's intended effect and describes its procedural structure in detail. Part III surveys the available remedies against banks for EIPA violations under both federal and state law, arguing that these options are insufficient. Part III also appraises several model exempt income statutes, including existing state statutes similar to EIPA, and concludes that each lacks appropriate incentives to compel bank compliance. Lastly, Part IV suggests that an amendment to EIPA include a provision that provides individuals who prove injury due to banks' violation of EIPA with a remedy to recover actual damages, punitive damages, costs, and attorney's fees, similar to section 362(k) of the United States Bankruptcy Code.

I. BACKGROUND

Before EIPA, both New York and federal law prohibited creditors from using the legal system to satisfy debts with certain subsistence funds.²¹ For example, the federal Social Security Act protects Social Security, Social Security Disability, Supplemental Security Income, and Veterans' benefits from "execution, levy, attachment, garnishment, or other legal process."²² Likewise, New York law shields all statutorily exempt funds such as Social Security, Supplemental Security Income, Public Assistance, Workers' Compensation, and Unemployment Insurance from garnishment.²³ In addition, New York law protects from seizure a set amount of wages equal to thirty hours per week of employment at minimum

²¹ Those funds include government benefits and ninety per cent of earned income from the past sixty days. N.Y. C.P.L.R. 5222(b) (2000), *amended by* N.Y. C.P.L.R. 5222 (2009); *see also* 42 U.S.C. § 407(a) (2006); NYRL SUMMARY, *supra* note 18, at 2.

²² 42 U.S.C. § 407(a) (2006). The statute provides:

The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Id.

²³ N.Y. C.P.L.R. 5205(l). Other protected benefits include public or private pensions, retirement, survivors' and disability benefits, child support payments, Veterans Administration benefits, railroad retirement, and black lung benefits. *Id.*

wage,²⁴ and up to ninety percent of any individual's income earned within the last sixty days.²⁵

Prior to EIPA, a weakness in CPLR section 5222 allowed creditors to game the system and use a judgment—whether obtained by default or on the merits—to freeze bank accounts, regardless of their protected contents.²⁶ While some state laws require a judgment creditor to first obtain a court order prior to seizing a bank account,²⁷ CPLR section 5222 authorized a judgment creditor's attorney to send a restraining notice directly to the judgment debtor's bank without first obtaining a court order.²⁸ Under CPLR section 5222, the judgment debtor's bank must freeze the account or risk being held in contempt of court, without exception for accounts containing easily identifiable exempt income.²⁹ This defect in the CPLR resulted in harm to low-income New Yorkers whose bank accounts were restrained despite their exempt status, and often without prior notice of a lawsuit or judgment.³⁰

In the absence of EIPA, individuals had no effective recourse under the CPLR to assert claims that their restrained funds were exempt from collection under either federal or state law.³¹ In response to an account restraint, judgment debtors could either: (1) contact the judgment creditor's attorney to request a voluntary release of the restraint, or (2) file an order to show cause in civil court requesting that a judge lift the restraint.³² The former procedure left the judgment debtor at the will of the creditor's attorney, who could refuse to lift the restraint or who could lift the restraint on the condition that the judgment debtor enter a payment plan.³³ The latter procedure could take "weeks if not longer" before the court

²⁴ *Id.* at 5231(b).

²⁵ *Id.* at 5205(d).

²⁶ NYRL SUMMARY, *supra* note 18, at 2, 4.

²⁷ Allen C. Myers, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees, and Garnishment*, 66 WASH. & LEE. L. REV. 390 n.108 (2009).

²⁸ N.Y. C.P.L.R. 5222(a).

²⁹ *Id.* at 5222(b).

³⁰ NYRL SUMMARY, *supra* note 18, at 2-3.

³¹ Robert A. Martin, Written Comments of the Committee on Consumer Affairs Association of the Bar of the City of New York on Debt Collection Practices 1 (2006) <http://www.nycbar.org/pdf/report/CommentsDebtCollectionPracticesNYCBar.pdf> (last visited Apr. 19, 2010) [hereinafter Martin, Written Comments].

³² *Id.* at 2.

³³ Johnson M. Tyler, *Exempt Income Protection Act Better Protects Strapped Debtors*, 241 N.Y.L.J. 4, 7 (Jan. 27, 2009).

order went into effect.³⁴ For the majority of indebted individuals who cannot afford to hire an attorney, both options were extremely difficult.³⁵ While the debtor struggled through these difficult and time-consuming procedures, the debtor's bank often charged late fees, as well as overdraft fees if the judgment exceeded available funds.³⁶

Aside from the loophole in the CPLR, various factors have contributed to the problem of judgment creditors freezing bank accounts that contain exempt funds. These factors, identified by consumer attorney Johnson Tyler, include: (1) a decrease in credit card regulation, (2) a rise in consumer debt, (3) an increase in the use of electronic banking and direct deposit by recipients of exempt funds, (4) a provision in the CPLR that allows debt collectors to easily cross-reference their records with those of banks, and (5) an increase in the use of litigation by creditors to recuperate consumer debt.³⁷

A. *Decrease in Credit Card Regulation*

Since the 1970s, regulators and courts have relaxed the laws governing fees and interest charged by creditors.³⁸ Historically, national banks were subject to individual state anti-usury statutes that capped interest rates. But in 1996, the United States Supreme Court held in *Smiley v. Citibank*³⁹ that under the National Bank Act of 1864, late fees qualify as "interest."⁴⁰ As a result of the decision, national banks can charge credit card holders under the usury statute of the state where the bank is located.⁴¹ This unanimous decision incentivized credit card companies to incorporate in states with weak usury laws, to offer credit cards to individuals with a low likelihood of paying on time, and to rake in penalty fees.⁴² Not

³⁴ Legal Services NYC, *Governor Paterson Signs Exempt Income Protection Act*, <http://www.legalservicesnyc.org/index.php?option=content&task=view&id=178>; see also Martin, Written Comments, *supra* note 31, at [2].

³⁵ Martin, Written Comments, *supra* note 31, at [2].

³⁶ Legal Services NYC, *supra* note 34.

³⁷ Tyler, *supra* note 33, at 7.

³⁸ THE URBAN JUSTICE CTR., DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 3 (2007), http://www.urbanjustice.org/pdf/publications/CDP_Debt_Weight.pdf [hereinafter DEBT WEIGHT].

³⁹ 517 U.S. 735 (1996).

⁴⁰ *Id.* at 737.

⁴¹ *Id.*

⁴² Tyler, *supra* note 33, at 7.

surprisingly, *Smiley* also resulted in an increase in consumer debt among low income individuals.⁴³

B. Rise in Consumer Debt

Empirical studies demonstrate that our nation has recently seen an “explosive rise in consumer debt.”⁴⁴ A 2006 study by the Center for American Progress revealed that “[f]or the first time on record, families have outstanding debt that is greater than their incomes.”⁴⁵ For example, from 1989 to 2004, the average amount of credit card debt owed by a typical family rose 62.9 percent to \$2,150 per household.⁴⁶ In that same period, the proportion of families with credit card payments above ten percent of their income nearly doubled, from 13.5 percent to twenty-three percent.⁴⁷ Another study by the Center for Responsible Lending (“CRL”) revealed that in 2005, the mean amount of credit card debt for households with annual incomes of less than \$35,000 was \$6,504 per household.⁴⁸ As of 2009, Americans owe over \$900 billion in credit card debt⁴⁹ and since 1995, the personal savings rate in the United States has been below five percent.⁵⁰

For low- and middle-income families, credit card debt has risen the most.⁵¹ Importantly, these families are using consumer credit to pay for basic necessities at an ever-increasing rate.⁵² In the 2005 CRL study, seven out of ten low- and middle-income families reported a reliance on credit cards

⁴³ *Id.*

⁴⁴ TAMARA DRAUT ET AL., DEMOS & CTR. FOR RESPONSIBLE LENDING, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 4-5 (2005), http://www.demos.org/pubs/PSN_low.pdf [hereinafter PLASTIC SAFETY NET].

⁴⁵ CHRISTIAN E. WELLER, CTR. FOR AMERICAN PROGRESS, PUSHING THE LIMIT: CREDIT CARD DEBT BURDENS AMERICAN FAMILIES 1 (2006), http://www.americanprogress.org/kf/creditcarddebtreport_pdf.pdf [hereinafter PUSHING THE LIMIT].

⁴⁶ *Id.* at 1.

⁴⁷ *Id.*

⁴⁸ PLASTIC SAFETY NET, *supra* note 44, at 8.

⁴⁹ Federal Reserve Statistical Release, FRB: G.19 Release—Consumer Credit (March 4, 2010), available at <http://www.federalreserve.gov/releases/g19/Current/>.

⁵⁰ See MARSHALL B. REINSDORF, ALTERNATIVE MEASURES OF PERSONAL SAVING 7, 13 (2007) http://www.bea.gov/scb/pdf/2007/02%20February/0207_saving.pdf; see also Bureau of Economic Analysis, Overview of the Economy, Table (Sept. 16, 2009), available at www.bea.gov/newsreleases/xls/glance.xls.

⁵¹ PUSHING THE LIMIT, *supra* note 45, at 1.

⁵² PLASTIC SAFETY NET, *supra* note 44, at 10.

to pay for basic necessities such as housing, food, medicine, and transportation.⁵³

C. *Increase in the Use of Electronic Banking*

A 2007 study by the Federal Reserve shows that consumers increasingly manage their finances through electronic technology.⁵⁴ Between 2003 and 2006, “the number of debit card payments . . . increased from 15.6 billion to 25.3 billion.”⁵⁵ While low- and moderate-income households are overall less likely than higher-income households to have a bank account and use electronic banking services, the use of e-banking technologies by low- and moderate-income households has been growing at a significant rate.⁵⁶ For example, between 1999 and 2006, low-income consumers reported a tenfold increase in online banking, from three percent to thirty percent.⁵⁷ Furthermore, while older consumers are less likely than younger consumers to use ATMs, debit cards, and online banking, the use of direct deposit had generally increased with age.⁵⁸

Over a decade ago, the federal government began a campaign to encourage individuals who receive federal benefits payments to have those funds directly deposited because it would save the government the cost of printing, mailing, and processing benefit checks.⁵⁹ In 1998, the federal government enacted regulations requiring that payment of Social Security, Veterans, and other benefits be made by electronic funds transfer.⁶⁰ Consequently, as of March 2010, 86.9 percent of beneficiaries receive federal benefits by direct deposit.⁶¹

⁵³ *Id.*

⁵⁴ CATHERINE J. BELL ET AL., FED. RESERVE, U.S. HOUSEHOLDS’ ACCESS TO AND USE OF ELECTRONIC BANKING, 1989-2007 A99 (2009), <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/OnlineBanking09.pdf> [hereinafter ELECTRONIC BANKING].

⁵⁵ *Id.*

⁵⁶ *Id.* at A107.

⁵⁷ *Id.*

⁵⁸ *Id.* at A108.

⁵⁹ Daniel M. Gold, *Balances Without Checks*, N.Y. TIMES, Feb. 7, 1999, available at <http://www.nytimes.com/> (search “Daniel Gold Balances Without Checks”; then follow “All Results Since 1851” hyperlink).

⁶⁰ See 31 U.S.C. § 3332(a)(1) (2006). The Act contains an opt-out provision. *Id.* § 3332(c).

⁶¹ Social Security Administration Beneficiaries, *Social Security Direct Deposit and Check Statistics* (March 2010), <http://www.socialsecurity.gov/deposit/GIS/data/Reports/T2StateSum.htm> (last visited Nov. 1, 2009).

While the increase in the use of electronic banking means that people can better keep track of their finances, ensure timely bill payment and receipt of government benefits, and avoid hefty check-cashing fees,⁶² it also means that directly deposited benefits are at risk because they sit in a bank account where they are vulnerable to creditor garnishment.⁶³

D. CPLR Sections 5222(g) and 5224(a)(4) Allow Creditors Easy Access to Bank Records

CPLR sections 5222(g) and 5224(a)(4) give New York debt collectors powerful discovery tools to locate and freeze a bank account.⁶⁴ As noted earlier, under CPLR section 5222(a), a creditor that seeks to enforce a money judgment can serve a restraining notice directly on the judgment debtor's bank.⁶⁵ Upon receiving the restraining notice, the bank is required to freeze the debtor's funds up to twice the amount of the judgment.⁶⁶ Pursuant to CPLR sections 5222(g) and 5224(a), a debt collector may electronically search judgment debtor names and Social Security numbers through bank databases⁶⁷ and, if a match is found, instantaneously freeze the account.⁶⁸ Consequently, these provisions provide debt collectors immense power to swiftly collect on their claims once they have obtained a judgment in civil court.

E. Rise in Consumer Credit Litigation

Recently, there has been a sharp increase in the number of consumer debt lawsuits filed in New York City Civil Court.⁶⁹ Between 2001 and 2006, consumer credit litigation increased in

⁶² ELECTRONIC BANKING, *supra* note 54, at A99; *see also* Tyler, *supra* note 33, at 7.

⁶³ *See infra* Part I.D.

⁶⁴ Tyler, *supra* note 33, at 7. Debt collectors can "computer match the names and Social Security numbers of judgment debtors against bank records." *Id.* at 7. Once a judgment is obtained, the debt collector can "run[] tens of thousands of judgment debtor names through bank databases looking for matches. When an account is matched, the debt-collection firm freezes it." *Id.*

⁶⁵ *See* N.Y. C.P.L.R. 5222(g), 5224(a)(4) (2009). The creditor's attorney can then sign the restraining notice as an "officer of the court." *Id.* 5222(a).

⁶⁶ *Id.* 5222(b). The freeze remains in effect until the judgment is satisfied or vacated, or a sheriff seizes the debtor's property. *Id.* The bank is required to comply with the provisions of the restraining notice; disobedience is punishable by contempt of court. *Id.* 5222(a), (b).

⁶⁷ *See supra* note 64.

⁶⁸ *Id.*

⁶⁹ DEBT WEIGHT, *supra* note 38, at 1.

the five boroughs by nearly 300 percent.⁷⁰ In 2006, approximately 320,000 consumer debt lawsuits were filed in New York City, totaling almost \$1 billion in claims against New York City residents.⁷¹ The number of consumer debt cases filed in 2006 in New York City alone “is comparable to the total number of civil and criminal cases filed in the federal trial courts nationwide [during] that [same] year.”⁷²

Almost all consumer credit lawsuits are filed by third-party debt buyers who purchase defaulted debts in bulk for pennies on the dollar.⁷³ The third-party debt buyers then engage in aggressive and harassing tactics, including repeated phone calls and letters, to collect on the outstanding debt.⁷⁴ If these tactics fail, debt collectors frequently turn to the courts to recover on their claims.⁷⁵ This course of action is often a profitable one. A 2006 study by the Urban Justice Center reported that, of the \$1 billion worth of consumer credit lawsuits filed against New York City residents, debt collectors obtained judgments in the amount of almost \$800 million.⁷⁶ Eighty percent of these cases were decided not on the merits of the case, but by default.⁷⁷ Moreover, only 6.7 percent of New York City defendant debtors appeared in court when required to do so.⁷⁸ Frequently, the debtor did not know about the lawsuit until his bank account was frozen.⁷⁹

⁷⁰ See *id.* at 8.

⁷¹ *Id.* at 1.

⁷² *Id.*

⁷³ See *id.* at 3. “In 89.3% of the cases . . . reviewed, debt collection litigation was initiated not by the original creditor but by a third-party debt buyer who had purchased the debt in question.” *Id.* at 13.

⁷⁴ See *id.* at 3; see also Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, N.Y. TIMES, Jul. 5, 2006, available at http://www.nytimes.com/2006/07/05/nyregion/05credit.html?_r=1&pagewanted=2.

⁷⁵ DEBT WEIGHT, *supra* note 38, at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* A default judgment results when the defendant fails to appear in court and mount a defense. *Id.* The study found that

[i]n 99.0% of the cases where default judgments were entered, the materials underlying those applications constituted inadmissible hearsay and did not meet the standard set forth in section 3215(f) of the Civil Practice Law and Rules for the entry of a default judgment. Nevertheless, these applications were approved; the default judgments were entered; and New York consumers suffered the consequences.

Id. at 9, 11.

⁷⁸ *Id.* at 9.

⁷⁹ Press Release, Office of the Attorney General, Attorney General Cuomo Sues to Throw Out over 100,000 Faulty Judgments Entered Against New York Consumers in Next State of Debt Collection Investigation (Jul. 23, 2009), available at

The shockingly low defendant debtor appearance rate raises the question of whether those defendants received proper notice of their pending lawsuit. Indeed, on July 23, 2009, New York State Attorney General Andrew Cuomo sued thirty-five New York State law firms and two debt collectors for failure to serve defendants with the legally required notice that they were being sued.⁸⁰ The Attorney General is seeking to recover the proceeds of an estimated 100,000 default judgments.⁸¹ Significantly, the lawsuit alleges that the debt collectors systematically engaged in “sewer service” by failing to notify defendants of a lawsuit and falsifying sworn affidavits of service.⁸² The combination of all of these factors led to the passage of EIPA.

II. EIPA’S INTENDED EFFECT

A. *EIPA’s Procedural Structure*

The procedure by which judgment creditors, judgment debtors, and banks determine when and how to restrain bank accounts under EIPA is slightly complex. The statute sets out a multiple-step process for the debtor account-holder to claim as exempt certain amounts exceeding the minimum threshold, and for creditors to object to the debtor’s exemption claim. Arguably, the simplest part of the process is the bank’s early duty to spare a set amount of money from restraint. If a bank fails to comply with that crucial initial step, the remaining procedural steps are not triggered. By failing to comply with EIPA, the bank denies both the creditor and the debtor—the bank’s own customer—the opportunity to litigate over the remaining funds.

Under EIPA, when a creditor obtains a judgment in consumer credit litigation, the creditor sends a restraining notice, with exemption claim forms, to the judgment debtor’s bank.⁸³ If the account contains identifiable exempt funds deposited within the last forty-five days, \$2,500 of the account

http://www.oag.state.ny.us/media_center/2009/july/july23b_09.html [hereinafter Press Release, Office of the Attorney General].

⁸⁰ *Id.*; see also Jonathan D. Glater, *N.Y. Claims Collectors of Debt Used Fraud*, N.Y. TIMES, Jul. 22, 2009, available at <http://www.nytimes.com/2009/07/23/business/23cuomo.html>.

⁸¹ See Press Release, Office of the Attorney General, *supra* note 79.

⁸² See *id.*

⁸³ N.Y. C.P.L.R. 5222-a(b) (2009).

remains available to the judgment debtor.⁸⁴ If the account does not contain identifiable exempt funds, only \$1,740 of the account remains free from restraint.⁸⁵ However, if the account contains less than the respective threshold amounts (i.e., less than \$2,500 in a beneficiary's account and less than \$1,740 in any other account) the restraint is deemed void.⁸⁶ Consequently, if the account contains more than the respective threshold, the bank restrains any balance in excess of those amounts "subject to marshal's or sheriff's execution."⁸⁷

When the account contains more than the threshold amount, the bank takes the exemption claim form (initially sent by the judgment creditor) and forwards it to the judgment debtor.⁸⁸ If the debtor does not return the form to the bank, the excess funds remain restrained and subject to levy.⁸⁹ However, if the debtor completes and returns the form to the bank and the creditor within 20 days, the creditor may respond in several ways. First, the creditor can do nothing; but after eight days, the bank must release the account in full if the creditor fails to take further action.⁹⁰

If the debtor provides proof that all or part of the funds are exempt, the creditor must instruct the bank to release the

⁸⁴ *Id.* 5205(l)(1).

⁸⁵ *Id.* 5222(i). At the time of writing, this amount (\$1,740) equals the greater of 240 times the federal minimum wage or 240 times the state minimum wage; it is set to increase in tandem with the increase in the federal and state minimum wages. *Id.* 5232(e). However, the federal and state minimum wages do not rise in tandem. "Where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the greater of the two wages." U.S. Dept of Labor, *Wages—Minimum Wage*, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited Jan. 4, 2010).

⁸⁶ N.Y. C.P.L.R. 5205(h)(1), (i).

⁸⁷ GINA CALABRESE, THE EMPIRE JUSTICE CTR, NYS EXEMPT INCOME PROTECTION ACT FLOW CHART (2009), <http://www.empirejustice.org/assets/pdf/issue-areas/consumer-community-development/eipa-flow-chart.pdf> [hereinafter CALABRESE, FLOW CHART]. It should be noted that on May 4, 2009 New York lawmakers signed into law an amendment to EIPA in response to concerns regarding restraints issued by a municipality and restraints for child or spousal support. See Kirsten E. Keefe & Gina Calabrese, *Exempt Income Protection Act Update*, Aug. 13, 2009, <http://www.empirejustice.org/issue-areas/consumer-community-development/fair-debt-collection/exempt-income-protection-act.html> (last visited Nov. 1, 2009) [hereinafter, Keefe & Calabrese, *Update*]. The amendment provides that the provisions of EIPA do not apply when "the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony," and requires that the restraining notice contain a legend at the top stating the same. N.Y. C.P.L.R. 5222(k).

⁸⁸ N.Y. C.P.L.R. 5222-a(b)(3). A debtor can claim as exempt Social Security, Social Security Disability, Supplemental Security Income, Public Assistance, etc. For a full list of exempt income, see *id.* 5222-a.

⁸⁹ *Id.* 5222-a(c)(1).

⁹⁰ *Id.* 5222-a(c)(3).

exempt portion within seven days.⁹¹ However, should the debtor provide such proof that all or part of the funds is exempt, the creditor need not concede. Indeed, the creditor may object to the exemption, but it must do so in good faith and within eight days of receiving the exemption claim.⁹² If a creditor objects, the process moves quickly. A judicial hearing on the objection must occur seven days after the objection, and a decision must be rendered within five days of the hearing.⁹³ If the court grants the objection, the creditor must serve the court order on the bank within two days of the decision.⁹⁴ If the bank does not receive a court order within twenty-one days of the creditor's objection, the bank must release the account.⁹⁵ The quick pace of this process underscores the urgency of resolving EIPA disputes in a timely fashion, so that the judgment debtor has access to much-needed exempt funds that are rightfully his.

B. *Bank Compliance with EIPA*

Since EIPA became effective, legal services offices have received complaints regarding banks' failures to comply with the statute's provisions. For example, the Empire Justice Center, a New York public interest law firm, reports that "[i]ndividuals have reported that their accounts were restrained even though the account contained less than the threshold amounts"⁹⁶ Likewise, United States Senator Kirsten Gillibrand of New York has acknowledged that banks and debt collectors ignore EIPA because there is insufficient enforcement.⁹⁷

While no empirical study has been conducted regarding the number of illegal post-EIPA freezes and their effect on debtors, pre-EIPA case law illustrates the type of damages individuals face when their bank accounts are frozen. Thus,

⁹¹ *Id.* 5222-a(c)(4).

⁹² *Id.* 5222-a(d), (g).

⁹³ *Id.* 5222-a(d).

⁹⁴ *Id.*

⁹⁵ *Id.* 5222-a(e); see also CALABRESE, FLOW CHART, *supra* note 87. EIPA also provides that a judgment creditor may not serve more than two restraining notices per year on an individual's bank account. N.Y. C.P.L.R. 5222(c). EIPA further provides that a bank may not charge the account holder a processing fee in the event that the account contains below the threshold amount and as a result the bank is unable to restrain the account. *Id.* 5222(j).

⁹⁶ Keefe & Calabrese, *Update*, *supra* note 87.

⁹⁷ Jonathan D. Epstein, *Gillibrand Seeks to Protect the Elderly*, BUFFALO NEWS, Sept. 16, 2009, at B7.

one should assume that violations of EIPA result in similar harms, such as service fees and garnishments.⁹⁸

In *Mayers v. New York Community Bancorp, Inc.*,⁹⁹ three plaintiffs sued various financial institutions and political and judicial representatives of the State of New York to challenge the constitutionality of CPLR section 5222.¹⁰⁰ The first plaintiff, Denis Mayers, was dependent on the \$698 per month he received in Social Security Disability payments that were directly deposited into his bank account.¹⁰¹ In 2001, a creditor obtained a judgment against Mr. Mayers for \$1,594.15, and thereafter restrained the funds in his account.¹⁰² As a result, the bank dishonored four checks written by Mr. Mayers and charged him \$100 in bank fees.¹⁰³ Subsequently, Mr. Mayers closed his old account, switched banks, and opened a new one.¹⁰⁴ Soon after, the same creditor issued a second restraint on Mr. Mayers's new account.¹⁰⁵ Although Mr. Mayers did not incur any fees as a result of the second restraint, he, like many others, likely suffered emotional distress over the uncertainty of whether he would be able to have money for basic necessities.¹⁰⁶ In 2003, after the creditor made a third attempt to collect the judgment, Mr. Mayers's rent check bounced and generated a \$20 bank fee.¹⁰⁷ In addition, the bank returned Mr. Mayers' Social Security check to the Social Security Administration, which caused a delay in the receipt of his much-needed benefits.¹⁰⁸

⁹⁸ The Social Security Administration has conducted studies regarding instances of account restraints in violation of federal law which resulted in service fees and garnishments from beneficiaries' direct deposit accounts. See generally OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., PUBL'N NO. A-15-08-28031, CONGRESSIONAL RESPONSE REPORT: FINANCIAL INSTITUTIONS DEDUCTING FEES AND GARNISHMENTS FROM SOCIAL SECURITY BENEFITS 1 (2008), <http://www.ssa.gov/oig/ADOBEPDF/A-15-08-28031.pdf>. A financial institution generally charges \$100 to \$150 fees for the freeze and \$25 to \$35 for each automated check transaction the account holder makes while funds are unavailable due to the account freeze. *Id.* at 10.

⁹⁹ *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837, 2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005).

¹⁰⁰ See *id.* at *1.

¹⁰¹ *Id.* at *2. "The only other income he receive[d] was] a \$4.50 per diem stipend for volunteer work and \$141 per month in food stamps." *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Mayers*, 2005 WL 2105810 at *2.

¹⁰⁶ See *Frozen Out*, *supra* note 10, at 2.

¹⁰⁷ *Mayers*, 2005 WL 2105810 at *3.

¹⁰⁸ *Id.*

At the time of the litigation, Nancy Ciccone, the second plaintiff in *Mayers*, was a seventy year-old widow living with her mentally disabled son.¹⁰⁹ She supported herself and her son with \$954 monthly Social Security payments and \$715 monthly Social Security Disability payments that were electronically deposited into her bank account.¹¹⁰ In 2000, a creditor obtained a judgment against Ms. Ciccone for \$2,006.63.¹¹¹ In 2002 and again in 2003, the creditor, through an attorney, restrained Ms. Ciccone's bank account.¹¹² As a result of the restraints, Ms. Ciccone "bounced a number of checks, which generated a banking fee of about \$30" and incurred late payment penalties on her credit cards of approximately \$29 per card.¹¹³ In addition, "each restraint triggered a \$100 banking fee."¹¹⁴ In total, the two restraints "drained several hundred dollars from her monthly income."¹¹⁵

The third *Mayers* plaintiff, Elba Quinones, was fifty-eight years old and disabled at the time of litigation.¹¹⁶ When the suit was brought, her only income consisted of \$241 per month in Social Security Disability payments and \$430 per month in Supplemental Security Income.¹¹⁷ In 1997, a hospital obtained a judgment against Ms. Quinones in the amount of \$1,797.10.¹¹⁸ In both 1997 and 2002, the hospital restrained Ms. Quinones's account, but lifted the restraints after Ms. Quinones informed the hospital that her account consisted only of exempt funds.¹¹⁹ But then, in 2004, the hospital, through its attorney, restrained Ms. Quinones's account for a third time.¹²⁰ Due to the restraint, Ms. Quinones was unable to withdraw her benefits payments and "had to buy food on credit at the local bodega."¹²¹ In addition, she incurred penalty fees of \$29.99 for

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Second Amended Complaint at ¶ 77, *Mayers*, 2005 WL 2105810.

¹¹⁴ *Id.*

¹¹⁵ *Id.* The exact total amount drained from Ms. Ciccone's income is not stated in the pleadings. *Id.*

¹¹⁶ *Mayers*, 2005 WL 2105810 at *4.

¹¹⁷ *Id.*

¹¹⁸ Second Amended Complaint at ¶ 104, *Mayers*, 2005 WL 2105810.

¹¹⁹ *Mayers*, 2005 WL 2105810 at *4.

¹²⁰ *Id.*

¹²¹ Second Amended Complaint at ¶ 117, *Mayers*, 2005 WL 2105810.

each late payment of three or four credit card bills, and a \$10 late-payment penalty for failing to pay her rent on time.¹²²

In *Mayers*, the three plaintiffs demonstrate that individuals generally incur approximately \$100 in fees as a result of illegal account restraints. At the same time, these individuals suffer through the unknown of whether the restraint will be lifted and whether the next benefits payment will be available.¹²³ While \$100 may appear inconsequential to most—especially to the banks that service these clients—it is a considerable burden to low-income individuals who do not have consistent streams of income.

III. LEGAL REMEDIES AGAINST BANKS ARE INADEQUATE

A. *Legal Remedies Against Banks Are Insufficient Under EIPA*

Banks fail to comply with EIPA because they have incentives to disobey the law and because debtors' remedies against them are insufficient. Banks have an incentive to disobey the law because they generate legal and insufficient fund fees when all the money in the account is restrained.¹²⁴ While these fees may only add up to less than \$100 per customer, restraints against multiple accounts may result in a windfall to the bank. Consequently, the law must impose a penalty for noncompliance, and New York courts need to enforce this remedy. As it stands, EIPA provides no express remedy to the debtor in the event that a financial institution violates its provisions.¹²⁵ Furthermore, the law imposes few requirements on banks compared to the explicit restrictions against debt collectors.¹²⁶ Importantly, the only part of EIPA that contemplates bank compliance is section 5222(j), which provides that if a restraint is placed in violation of the CPLR, a bank may not charge a fee.¹²⁷ Similarly, section 5232(f) provides

¹²² *Mayers*, 2005 WL 2105810 at *4.

¹²³ See *Frozen Out*, *supra* note 10, at 2.

¹²⁴ See *supra* Part II.B.

¹²⁵ See N.Y. C.P.L.R. 5205(l)-(n); 5222(b)-(e), (h)-(j), 5222-a; 5230(a); 5231(b); 5232(e)-(g).

¹²⁶ For example, judgment creditors are not allowed to serve on banks more than two restraining notices per year. *Id.* 5222(c). If a court finds that a judgment creditor objects to a claim exemption in bad faith, "the judgment debtor shall be awarded costs, reasonable attorney fees, actual damages and an amount not to exceed one thousand dollars." *Id.* 5222-a(g).

¹²⁷ Section 5222(j) provides:

that a bank may not charge a fee for its costs in processing a levy by service of execution when the account only contains exempt funds.¹²⁸ However, the law does not afford a remedy to the debtor if the financial institution charges fees in violation of EIPA. By contrast, section 5222-a(g) affords a remedy to the debtor in the event that a judgment creditor objects to the debtor's exemption claim in bad faith.¹²⁹

In the absence of a specific statutory remedy for debtors, banks have little incentive to follow the law—especially when the account contains less than twice the judgment amount. As a consequence, banks have incentives to disregard the law, restrain the account, drive the account balance into a negative amount, and thus rake in overdraft fees.¹³⁰ In addition to the opportunity to charge fees, banks have additional economic incentives to ignore EIPA. By disregarding the law, banks avoid the cost of implementing a system that would determine, first, whether an account contains statutorily exempt funds (i.e., whether the account should be exempt up to \$2,500 or \$1,740), and second, whether the account qualifies as exempt (i.e., whether the account contains more or less than the \$2,500 or \$1,740).¹³¹ Significantly, the bank can shift some of the cost of

In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

Id. 5222(j).

¹²⁸ Section 5232(f) provides:

In the event that a banking institution cannot lawfully garnish or execute upon on a judgment debtor's banking institution account or funds are garnished or executed upon in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

Id. 5232(f).

¹²⁹ Section 5222-a(g) provides:

Where the judgment creditor objects to a claim of exemption pursuant to subdivision (d) of this section and the court finds that the judgment creditor disputed the claim of exemption in bad faith, as provided in paragraph four of subdivision (c) of this section, the judgment debtor shall be awarded costs, reasonable attorney fees, actual damages and an amount not to exceed one thousand dollars.

Id. 5222-a(g).

¹³⁰ See *supra* Part I.B.

¹³¹ See N.Y. C.P.L.R. 5205(l).

non-compliance to the courts. When the account holder is unable to access much-needed funds, he will rush to the courts to file an order to show cause to vacate the default judgment.

B. Legal Remedies Against Banks Are Insufficient Under Federal and State Law

Although remedies for noncompliance under EIPA itself are insufficient, a debtor may have a cause of action against a bank under federal or state law. While there are indications that New York courts are trending towards increased duties on financial institutions, current remedies for bank noncompliance under both federal and state law are insufficient.

Although the remedies available to judgment debtors bringing actions against *judgment creditors* are plentiful, debtors' remedies against *banks* are lacking. If creditors wrongfully seize account funds or other exempt property, debtors may bring common law claims of conversion,¹³² negligence,¹³³ or malicious prosecution,¹³⁴ as well as statutory claims for violations of the Fair Debt Collection Practices Act¹³⁵ and state deceptive practices statutes.¹³⁶ However, as the following cases show, courts are reluctant to impose similar liabilities on banks that participate in the seizure of exempt funds pursuant to a writ of execution or other court order served by the judgment creditor.

While the Second Circuit Court of Appeals has not addressed the issue of bank liability for the restraint of exempt funds, the Ninth Circuit Court of Appeals addressed the issue

¹³² See, e.g., *Rahaman v. Weber*, No. A04-882, 2005 WL 89413 (Minn. Ct. App. Jan 18, 2005) (debtor stated a state tort claim of conversion against creditor for wrongful seizure of her exempt bank account funds).

¹³³ See, e.g., *Pourny v. Maui Police Dep't*, 127 F. Supp. 2d 1129, 1152-53 (D. Haw. 2000) (debtor stated a negligence claim against creditor for "tak[ing] property . . . not subject to levy [and] property exempt under [a] writ, such as his personal property and tools of the trade").

¹³⁴ See, e.g., *Blankenship v. Staton*, 348 S.W.2d 925 (Ky. Ct. App. 1961) (debtor properly asserted a malicious prosecution claim against a creditor for wrongful attachment of property; but finding damages award excessive).

¹³⁵ See, e.g., *Todd v. Weltman, Weinberg & Reis, Co., L.P.A.*, 434 F.3d 432 (6th Cir. 2006) (debtor brought a claim under the Fair Debt Collection Practices Act against collection attorneys for filing false affidavits in support of action to garnish plaintiff's bank account).

¹³⁶ See *Myers*, *supra* note 27, at 371, 381.

in *Gorstein v. World Savings Bank*.¹³⁷ In *Gorstein*, an individual brought an action *pro se* alleging that his bank “wrongfully deprived him of his Social Security benefits”¹³⁸ by failing to “determine independently whether a portion of the funds in [his] account were subject to statutory protections.”¹³⁹ The Ninth Circuit found that the bank could not be held liable for depriving a customer of his Social Security funds since the bank had no duty to independently determine whether a portion of the funds in the account holder’s commingled account was subject to statutory protections.¹⁴⁰ Thus, the Ninth Circuit refused to put the onus on the bank to determine whether such funds had been deposited prior to effecting an account freeze, despite the increase in the use of direct deposit by Social Security recipients.¹⁴¹

In another opinion on the issue of bank responsibility, *Lopez v. Washington Mutual Bank*, the Ninth Circuit examined whether a bank may satisfy overdraft fees with protected benefits.¹⁴² While *Lopez* was decided outside the context of a court-ordered consumer credit judgment, *Lopez* is illustrative of the Ninth Circuit’s stance against bank liability for seizing exempt funds. In *Lopez*, a group of individuals receiving directly deposited exempt benefits challenged a bank’s practice of using the benefits to satisfy overdraft fees.¹⁴³ When the individuals overdrew on their accounts, the bank satisfied the deficiencies and overdraft fees with the exempt benefits.¹⁴⁴ In their complaint, the plaintiffs alleged that the bank’s practice of using statutorily exempt funds to set off overdrafts and overdraft fees was prohibited by 42 U.S.C. §§ 407(a) and 1383(d)(1), provisions of the Social Security Act.¹⁴⁵ Likewise, the complaint also alleged violations of California Civil Procedure Code section 704.080, California’s statutory equivalent to New York’s EIPA.¹⁴⁶

¹³⁷ *Gorstein v. World Savings Bank*, No. 03-55292, 2004 WL 1923596 (9th Cir. Aug. 27, 2004).

¹³⁸ *Gorstein v. World Savings Bank*, No. 01-56605, 2002 WL 31098439 (9th Cir. Sept. 19, 2002) (granting *Gorstein*’s motion to file a late reply brief).

¹³⁹ *Gorstein*, 2004 WL 1923596 at *1.

¹⁴⁰ *Id.*

¹⁴¹ *See supra* Part I.C.

¹⁴² *Lopez v. Washington Mut. Bank*, 302 F.3d 900, 902 (9th Cir. 2002).

¹⁴³ *Id.* at 902.

¹⁴⁴ *Id.* at 903.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

In their suit, the plaintiffs claimed that the bank's practices constituted a seizure of protected benefits by "other legal process" in violation of 42 U.S.C. § 407(a).¹⁴⁷ The Ninth Circuit held that the bank did not violate § 407(a) "because there is simply no indication that the plaintiffs did not voluntarily agree to apply their [Supplemental Security Income] benefits in such a fashion."¹⁴⁸ The court reasoned that because the plaintiffs voluntarily opened accounts with the bank, they engaged in "meaningful consent" when they executed account agreements which notified them of the bank's standard practices.¹⁴⁹ According to the court, the plaintiffs should have been aware that the account agreements allowed the bank to apply their directly deposited funds to cure any overdraft deficiencies and fees.¹⁵⁰ Moreover, the court reasoned that the plaintiffs voluntarily made arrangements to have their benefits deposited into their accounts, and in so doing, they were not forced to incur overdrafts.¹⁵¹

Next, the Ninth Circuit addressed the plaintiffs' state law claims under California Civil Procedure Code section 704.080, which prohibits the use of exempt funds to cure overdrafts and fees.¹⁵² The court held that 12 C.F.R. section 557.11,¹⁵³ a federal regulation that imposes requirements governing checking accounts, funds availability, and service charges and fees preempted section 704.080.¹⁵⁴ As a result, the Ninth Circuit avoided the application of California's equivalent to EIPA. While *Gorstein* and *Lopez* are not binding in New York, they are persuasive opinions that could potentially sway

¹⁴⁷ *Id.*

¹⁴⁸ *Lopez*, 302 F.3d at 904.

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 904-05.

¹⁵¹ *See id.* at 904-5. In a concurring opinion, Judge Noonan opined that were the plaintiffs to prevail, banks would surely have "denied overdraft privileges" to "Social Security recipients." *Id.* at 908 (Noonan, J., concurring).

¹⁵² *See id.* at 907 (majority opinion).

¹⁵³ 12 C.F.R. § 557.11 provides:

OTS hereby occupies the entire field of federal savings associations' deposit-related regulations. OTS intends to give federal savings associations maximum flexibility to exercise deposit-related powers according to a uniform federal scheme of regulation. Federal savings associations may exercise deposit-related powers as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect deposit activities, except to the extent provided in § 557.13.

¹⁵⁴ *Lopez*, 302 F.3d at 907.

future decisions by the Second Circuit on EIPA's effect on banks.

Recent cases in New York suggest that courts may be willing to impose additional duties on banks to determine whether accounts contain only exempt funds. Although the Second Circuit has not addressed this issue, the United States District Court for the Eastern District of New York ("Eastern District") has held in two recent decisions¹⁵⁵ that recipients of federal benefits may state a 42 U.S.C. § 1983¹⁵⁶ claim against banks that satisfy money judgments with federal benefits.

In *Granger v. Harris*, the Eastern District found that a federal benefits recipient has a valid § 1983 claim against banks that knowingly disburse Social Security benefits to a creditor.¹⁵⁷ The court acknowledged that, while "no state official was directly involved in the restraint of . . . [the] account,"¹⁵⁸ nonetheless the plaintiff asserted a claim under the § 1983 "state compulsion" test: "the State 'has exercised coercive power or had provided such significant encouragement, either

¹⁵⁵ See *Granger v. Harris*, No. CV-05-3607(SJF)(ARL), 2007 WL 1213416 (E.D.N.Y. April 17, 2007); *Mayers v. N.Y. Cmty. Bancorp, Inc.*, No. CV-03-5837, 2005 WL 2105810 (E.D.N.Y. Aug. 31, 2005).

¹⁵⁶ 42 U.S.C. § 1983 (2006). Thus, the plaintiffs in those two cases alleged that, by satisfying money judgments with federal benefits, the banks had deprived them of their constitutional rights under color of state law. Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

¹⁵⁷ *Granger*, 2007 WL 1213416, at *1-2. The court dismissed the plaintiffs claim under 42 U.S.C. § 1985. *Id.* at *9. "The elements of a claim under [Section] 1985(3) are: '(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, . . . ; (3) an act in furtherance of the conspiracy; (4) whereby a person is . . . deprived of any right of a citizen of the United States.'" *Id.* at *9 n.10 (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 341 (2d Cir. 2000)). The court also dismissed the plaintiffs claim under the Americans with Disabilities Act because the plaintiffs did not "allege that any of the acts of which they complain were taken by reason of [plaintiffs] disability." *Id.* at *10 ("In order to state a claim under the ADA, a plaintiff must allege (1) that he or she had a disability; (2) that he or she is otherwise qualified for the benefit that has been denied; and (3) that he or she has been denied that benefit by reason of his or her disability.") (citing *Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 146-47 (2d Cir. 2002)).

¹⁵⁸ *Id.* at *8.

overt or covert,' that the action of the private entity must be deemed that of the State."¹⁵⁹

Likewise, in *Mayers v. New York Community Bancorp, Inc.* the Eastern District found that a group of beneficiaries stated valid § 1983 claims in an action against various banks for restraining bank accounts that contained only directly deposited benefits.¹⁶⁰ In its holding, the court found that the plaintiffs alleged facts sufficient to show that the banks "believed N.Y. CPLR [section] 5222(a) required them to restrain accounts, irrespective of their contents, when served with restraining notices."¹⁶¹ In other words, the banks were "compelled to freeze the accounts . . . or risk being . . . in contempt of court."¹⁶² Accordingly, the court found facts sufficient to show that the state had "exercised coercive power or provided such significant encouragement, overt or covert, that the choice in law must be deemed to be that of the State."¹⁶³

In addition, the *Mayers* court found that the plaintiffs stated a claim under the Due Process clause of the Fourteenth Amendment.¹⁶⁴ The court applied the well-known *Mathews v. Eldridge* balancing test¹⁶⁵ and assessed whether New York's garnishment statute satisfied due process.¹⁶⁶ In *Mathews*, the United States Supreme Court established the due process analysis to be applied when an individual alleges an unlawful deprivation of property. Under the three-pronged approach, a court must weigh: (1) the competing interests involved and how state action affects those interests; (2) "the risk of an erroneous deprivation" of property under current procedures and the potential value of different procedures; and (3) the cost and

¹⁵⁹ *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)).

¹⁶⁰ *Mayers*, 2005 WL 2105810, at *8-10. The court also found that the plaintiffs stated facts sufficient to show that "New York's garnishment statute, [N.Y. C.P.L.R. § 5222,] as applied to bank accounts containing only electronically deposited social security payments, violates the Supremacy Clause of the Constitution because it conflicts with the [purpose] of the Social Security Act, 42 U.S.C. § 407(a)," of "ensur[ing] that [benefits] recipients have the resources necessary to meet their most basic needs." *Id.* at *15, *17.

¹⁶¹ *Id.* at *10.

¹⁶² *Id.* at *9.

¹⁶³ *Id.* (quoting *Blum*, 457 U.S. at 1004).

¹⁶⁴ *Id.* at *14.

¹⁶⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

¹⁶⁶ *Mayers*, 2005 WL 2105810, at *11-13.

administrative burden of implementing different procedures in comparison to their potential value.¹⁶⁷

Through the *Mathews* analysis, the plaintiffs in *Mayers* persuaded the court that the additional cost to the banks of implementing procedural safeguards was negligible in relation to the potential benefit of such implementation.¹⁶⁸ In agreeing with the plaintiffs, the court noted that advances in technology have made it easier for banks to determine whether accounts contain only exempt funds.¹⁶⁹ Likewise, the court reasoned that a reduction in the number of erroneous account restraints would, in turn, reduce the number of state court proceedings where debtors seek to vacate the judgment to have the restraint lifted.¹⁷⁰

Given that technological advances have further eased the process of determining the source of electronic deposits, both *Granger* and *Mayers* promisingly suggest that courts will impose additional duties on banks to determine whether their accounts contain exempt funds. However, these decisions are limited in scope. In both cases, the plaintiffs were able to show that their accounts contained *only* directly deposited federal benefits. Indeed, the opinions suggest that if the accounts contained exempt funds commingled with non-exempt funds, the banks would not be liable for the restraints. Furthermore, these decisions do not protect individuals who fail to receive statutorily exempt benefits but who are nonetheless low-income. The New York State legislature, in enacting the Exempt Income Protection Act, sought to protect *all* low-income New Yorkers, regardless of exemption status. Therefore, when banks do not comply with EIPA, individuals should be afforded a remedy, irrespective of whether their accounts contain exempt benefits, non-exempt funds, or some combination thereof.

¹⁶⁷ *Mathews*, 424 U.S. at 334-35.

¹⁶⁸ *Mayers*, 2005 WL 2105810, at *13.

¹⁶⁹ *Id.* at *13-14.

¹⁷⁰ *Id.* at *14.

C. *Legal Remedies Against Banks Are Insufficient Under Proposed Model Statutes and Existing Comparable State Statutes*

1. Model Statutes

The federal legislature and consumer advocates have recommended model statutes comparable to EIPA in both effect and purpose. However, none of the proposals incorporate remedial provisions for bank noncompliance.

In 2008, United States Senators Herb Kohl and Claire McCaskill introduced the Illegal Garnishment Prevention Act,¹⁷¹ which would have required the Social Security Administration to propose regulations to solve the problem of exempt fund garnishment before the Social Security Administration could advance its goal of promoting the direct deposit of federal benefits.¹⁷² Under the bill, the Department of the Treasury, pursuant to 42 U.S.C. § 407, would have direct authorization to issue regulations that protected Social Security benefits.¹⁷³ Thus, the bill, which has not passed,¹⁷⁴ does not directly provide for exempt income legislation.

The National Consumer Law Center (“NCLC”), a nonprofit consumer advocacy organization, has proposed model exempt income legislation to be enacted either at the federal or state level.¹⁷⁵ The NCLC model statute provides for a “universal exemption,” or a “minimum [threshold] amount of dollars that cannot be . . . frozen in any bank account . . . regardless of the source of the funds in the account.”¹⁷⁶ As under EIPA, the NCLC statute exempts the first \$1,740 in any account, and the first \$2,500 in bank accounts into which statutorily exempt payments have been directly deposited.¹⁷⁷ The NCLC statute further exempts the first \$5,000 if the bank account is under two or more names—one of whom is the judgment debtor—and both receive statutorily exempt payments deposited

¹⁷¹ Illegal Garnishment Prevention Act, S. 2850, 110th Cong. (2008).

¹⁷² *See id.*; *see also* Myers, *supra* note 27, at 408.

¹⁷³ S. 2850.

¹⁷⁴ *See* Govtrack.us, S.2850: Illegal Garnishment Protection Act, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2850> (last visited Nov. 7, 2009).

¹⁷⁵ PROTECTING EXEMPT BENEFITS § 1 (Nat’l Consumer Law Ctr.) (on file with author).

¹⁷⁶ *Id.* § 2(c).

¹⁷⁷ *Id.* § 2(c)(i).

electronically.¹⁷⁸ The statute provides that a bank cannot charge any fee for processing a garnishment order, regardless of the terms of the contract between the account holder and the bank.¹⁷⁹ Under the model law, *creditors* may be held liable for costs, attorney's fees, and statutory damages of up to \$1,000 for bad faith violations of the statute.¹⁸⁰ However, the NCLC model statute fails to provide legal remedies in the event of *bank noncompliance*.¹⁸¹

In his comprehensive and illuminating note, *Untangling the Safety Net: Protecting Federal Benefits from Freezes, Fees and Garnishment*, Allen C. Myers proposed draft legislation designed to address the exempt fund garnishment problem.¹⁸² Under Myers's approach, banks would be prohibited from restraining the first \$1,000 in an account containing statutorily exempt funds directly deposited within ninety days of the garnishment order.¹⁸³ Myers also advocates that a bank should not be held liable for "an erroneous good-faith assertion of [an] exemption."¹⁸⁴ However, like similar proposed legislation, Myers's proposal lacks an express remedy against noncompliant banks.

2. Comparable State Statutes

While the vast majority of states do not provide protection against account restraints, New York is not alone in doing so. To be sure, most states require, at minimum, notice to the judgment debtor of a garnishment and the opportunity for a hearing to allow the debtor to assert that funds may be exempt.¹⁸⁵ However, only four states—New York, California, Connecticut, and Pennsylvania—have enacted laws that require banks to exempt accounts from garnishment if the "account contains reasonably identifiable exempt funds."¹⁸⁶ However, only Connecticut's statute articulates a debtor's

¹⁷⁸ *Id.* § 2(d)(ii).

¹⁷⁹ *Id.* § 4(d).

¹⁸⁰ *Id.* § 10(c).

¹⁸¹ *Id.* § 10(d).

¹⁸² Myers, *supra* note 27, at 408-11.

¹⁸³ *Id.* at 408.

¹⁸⁴ *Id.* at 409.

¹⁸⁵ *Id.* at 386.

¹⁸⁶ *Id.* at 387.

remedy in the event that a bank restrains exempt funds in violation of the law.¹⁸⁷

Enacted in 2007, the Pennsylvania law arguably provides the most protection to beneficiaries of exempt funds.¹⁸⁸ Pennsylvania Rule of Civil Procedure 3111.1 (“Rule 3111.1”) provides that any account containing exempt funds directly deposited on a regularly recurring basis is completely exempt from garnishment, regardless of whether the account contains non-exempt funds.¹⁸⁹ Rule 3111.1, similar to Myers’s draft legislation,¹⁹⁰ immunizes banks from liability to creditors for good faith errors in processing garnishment orders.¹⁹¹ However, Rule 3111.1 contains no provision specifying remedies to the account holder should the bank restrain funds in violation of the law.¹⁹²

Whereas Pennsylvania law exempts from garnishment all monies in accounts containing directly deposited benefits, California and Connecticut (like New York) exempt certain minimum threshold amounts from garnishment when the account contains federally exempt funds. Under California Civil Procedure Code section 704.080 (“Code section 704.080”), the amount of exemption ranges from \$1,225 to \$3,650, depending on the type of benefits received and the number of account depositors.¹⁹³ While Code section 704.080 does not have a threshold exemption for those who do not receive statutorily exempt benefits, it shields from levy 75 percent of *any* debtor’s earned income in the account at the time the garnishment order is served.¹⁹⁴ While California debtors do not have to assert an exemption claim to prevent banks from freezing their account, Code section 704.080 contains no debtor remedy provision in the event that the bank restrains funds in violation of the law. As discussed previously, the Ninth Circuit has also expressly decided that banks cannot be held liable for violations of Code section 704.080.¹⁹⁵

¹⁸⁷ See CONN. GEN. STAT. ANN. § 52-367b(n).

¹⁸⁸ Myers, *supra* note 27, at 387.

¹⁸⁹ See PA. R.C.P. NO. 3111.1 (2009).

¹⁹⁰ See *supra* notes 182-184 and accompanying text.

¹⁹¹ See PA. R.C.P. NO. 3146(b)(2) (2009).

¹⁹² Author’s search of LexisNexis, Westlaw and Google on or around December, 2009 revealed no complaints that financial institutions have violated PA. R.C.P. NO. 3111.1.

¹⁹³ See CAL. CIV. PROC. CODE § 704.080(b) (West 2004).

¹⁹⁴ See CAL. CIV. PROC. CODE §§ 700.140(c), (e), 704.070(b)(2) (West 2004).

¹⁹⁵ See *supra* notes 142-154 and accompanying text.

Connecticut's General Statute 52-367b ("section 52-367b") is like EIPA to the extent that it provides for a flat exemption to all accounts containing exempt funds deposited within thirty days of the bank receiving the garnishment order.¹⁹⁶ However, the threshold amount of section 52-367b is only \$1,000, less than half of New York's \$2,500 exemption.¹⁹⁷ Furthermore, section 52-367b does not have a threshold exemption for accounts that do not contain Social Security or other exempt benefits. In addition, Connecticut's law provides that the bank may charge a fee of eight dollars to the judgment creditor for the costs in complying with the law, a provision that the other state laws lack.¹⁹⁸

As the only state that provides for bank liability for failure to comply with the law, Connecticut's law stands alone among the four states with exemplary exempt income statutes. Connecticut General Statute section 52-367b(n) provides:

If such financial institution pays exempt moneys from the account of the judgment debtor over to the serving officer contrary to the provisions of this section, such financial institution shall be liable in an action therefor to the judgment debtor for any exempt moneys so paid and such financial institution shall refund or waive any charges or fees by the financial institution, including, but not limited to, dishonored check fees, overdraft fees or minimum balance service charges and legal process fees, which were assessed as a result of such payment of exempt moneys. Thereupon, the rights of the financial institution shall be subrogated to the rights of the judgment debtor.¹⁹⁹

The statute also provides for liability of the financial institution to the judgment creditor for refusing to levy funds,²⁰⁰ so the financial institution also has a counter-incentive to turn the funds over to the creditor. The law further immunizes banks from liability to the creditor when making a "bona fide error" in asserting exemptions on behalf of debtors.²⁰¹ Moreover, the statute does not purport to penalize a bank should the bank merely restrain funds in violation of the law. It merely provides

¹⁹⁶ See CONN. GEN. STAT. ANN. § 52-367b(c).

¹⁹⁷ See *id.* The law provides that if the account contains more than \$1,000 in exempt funds, the debtor may notify the bank and the creditor with an exemption claim, asserting that the additional funds be exempt from collection. See *id.* § 52-367b(e). The creditor may contest the exemption through a judicial hearing. See *id.* § 52-367b(f).

¹⁹⁸ See *id.* § 52-367b(m).

¹⁹⁹ *Id.* § 52-367b(n).

²⁰⁰ *Id.*

²⁰¹ *Id.* § 52-367b(o).

a remedy if the bank goes so far as to pay money from the account to satisfy the judgment.²⁰² Therefore, while the statute goes further than any other in putting banks' feet to the fire, it falls far short of providing a strong incentive for bank compliance.

IV. TAKING GUIDANCE FROM THE BANKRUPTCY CODE

A. *Bankruptcy Code Section 362(k)*

The automatic stay provisions under section 362 of the United States Bankruptcy Code²⁰³ provide a useful corollary to the Exempt Income Protection Act. Like EIPA, the automatic stay gives the debtor a respite from collection actions. However, unlike EIPA, section 362(k) provides for an individual debtor's remedy should any entity violate its provisions. This Note argues that the New York State legislature should amend the CPLR to include a provision akin to the Bankruptcy Code's section 362(k).

Section 362 is a procedural law that halts almost all creditor action when a debtor files a bankruptcy petition.²⁰⁴ As a temporary injunction, the automatic stay prohibits a creditor from attempts to levy funds of the debtor²⁰⁵ or the debtor's bankruptcy estate.²⁰⁶ Pursuant to section 362, a creditor cannot initiate a lawsuit against the debtor,²⁰⁷ cannot attempt to enforce a judgment against the debtor,²⁰⁸ and must cease enforcement activities that are already in progress.²⁰⁹ However, the automatic stay may terminate upon the occurrence of certain events, such as the dismissal of the bankruptcy case, or upon request by a creditor to terminate the stay for cause.²¹⁰

Notably, the automatic stay does not require notice or a hearing to the creditor. Creditors are bound by the prohibitions of the automatic stay regardless of their knowledge of the stay,

²⁰² Author's search of LexisNexis, Westlaw and Google on or around December, 2009 revealed no complaints that financial institutions have violated CONN. GEN. STAT. ANN. § 52-367b.

²⁰³ 11 U.S.C. § 362 (2006).

²⁰⁴ *Id.*

²⁰⁵ *Id.* § 362(a)(1)-(2), (6)-(7).

²⁰⁶ *Id.* § 362(a)(2)-(5).

²⁰⁷ *Id.* § 362(a)(1).

²⁰⁸ *Id.* § 362(a)(2).

²⁰⁹ *Id.* § 362(a)(4).

²¹⁰ *See Id.* § 362(d).

but sanctions are imposed only against willful violations.²¹¹ If an entity violates the automatic stay, section 362(k) governs the debtor's remedies, stating:

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.²¹²

In essence, section 362(k) provides that a debtor who can prove injury due to a good faith violation of the automatic stay can recover actual damages, whereas a debtor who can prove injury due to a willful violation of the automatic stay can recover not only actual damages, including costs and attorney's fees, but also, potentially, punitive damages. Notably, section 362(k) is vague in its application; it does not provide that only creditors can be penalized for violations of the stay. Therefore, the statute contemplates application against financial institutions. Indeed, in its application of section 362(k), the United States Bankruptcy Court for the Southern District of New York has imposed liability against financial institutions for violations of the automatic stay. As explained below, the decision *In re Adomah*²¹³ illustrates how a New York court might enforce an amended provision of EIPA modeled after section 362(k) of the Bankruptcy Code.

B. New York Courts' Treatment of Bankruptcy Code Section 362(k)

In *In re Adomah*, an individual Chapter 7 debtor, Syrria Adomah, moved under section 362(k) "for an order imposing damages against Bank of America for an alleged violation of the automatic stay"²¹⁴ Prior to Ms. Adomah filing her bankruptcy petition, Mitsubishi Motors Credit of America ("Mitsubishi"), a creditor, entered a judgment against her in the amount of approximately \$8,927, and subsequently served

²¹¹ See 11 U.S.C. § 362(k).

²¹² *Id.*

²¹³ 340 B.R. 453 (Bankr. S.D.N.Y. 2006).

²¹⁴ *Id.* at 454.

a restraining notice on Bank of America.²¹⁵ Pursuant to CPLR section 5222(b), the bank restrained Ms. Adomah's account "in an amount equal to twice the judgment" amount.²¹⁶ Although the funds in Ms. Adomah's account fluctuated after the restraint, the account contained less than the judgment amount at all times.²¹⁷ For example, at the time of the restraint, Ms. Adomah's account contained approximately \$53.²¹⁸ Nine days later, Ms. Adomah directly deposited into her checking account approximately \$1,100, which became subject to the restraint.²¹⁹

Seventeen days after Mitsubishi served its restraining notice, Ms. Adomah filed for bankruptcy.²²⁰ In her petition, Ms. Adomah claimed her checking account funds as exempt from creditors and attempted to free her account from restraint.²²¹ She served a notice of the automatic stay on Bank of America by mail, fax, and in person.²²² In error, the bank advised Ms. Adomah that only Mitsubishi's attorney could lift the restraint, and required either: (1) a notarized statement by Mitsubishi's attorney stating that Ms. Adomah had settled the debt or (2) Mitsubishi's agreement to lift the account restraint.²²³

In the three weeks following the filing of her bankruptcy petition, Ms. Adomah was unable to pay her rent on time as a result of the restraint.²²⁴ She incurred a \$25 late fee and her landlord threatened to evict her.²²⁵ Likewise, she was unable to pay her telephone bill on time and thus had to pay an additional deposit to restore her phone service.²²⁶ While her account was restrained, Bank of America charged her an unspecified amount of bounced check fees,²²⁷ and Ms. Adomah depended on the charity of relatives for necessities such as food and transportation.²²⁸

²¹⁵ *Id.* at 454-55.

²¹⁶ *Id.* at 455.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *In re Adomah*, 340 B.R. 453 at 455.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *In re Adomah*, 340 B.R. at 455.

²²⁶ *Id.*

²²⁷ *Id.* at 460.

²²⁸ *See id.* at 455.

Eighteen days after Ms. Adomah initiated the process of freeing her account from restraint, Mitsubishi sent a letter to Bank of America authorizing it to release her funds.²²⁹ Six days after receipt of that letter, Bank of America released the account.²³⁰ In the time between the Mitsubishi letter and the account release, Ms. Adomah filed a motion for an order to impose damages for violation of the automatic stay.²³¹

In response to her motion, Bank of America contended that: (1) Ms. Adomah did not have standing to bring the motion because her bank account was property of the Chapter 7 bankruptcy estate, (2) even if Ms. Adomah had standing, the court could not hold the bank liable for a violation of the stay because the bank was a “passive garnishee” and was therefore not authorized to release the restraint under New York State law, and (3) Ms. Adomah’s motion was moot because the bank released funds prior to the filing of the motion.²³² With regard to the first defense, the court found that although the accounts were property of the bankruptcy estate, Ms. Adomah claimed all of the money as exempt pursuant to section 522(b) of the Bankruptcy Code²³³ and New York Debtor and Creditor Law.²³⁴ The court suggested that the bank’s standing argument was disingenuous—the bank treated the money as belonging to Ms. Adomah when it eventually released the funds without notice to the Chapter 7 trustee.²³⁵ Therefore, the court found that Ms. Adomah had standing to bring the motion.²³⁶

As to its second defense, the court rejected Bank of America’s claim pursuant to the Supremacy Clause of the United States Constitution.²³⁷ In its decision, the court reasoned that the federal Bankruptcy Code preempted state law, and thus Bank of America had no legal obligation to abide by the New York State requirements.²³⁸ In fact, Bank of America had an obligation to void the restraining notice. Under *Citizens Bank of Maryland v. Strumpf*, Bank of America would not have

²²⁹ *Id.* at 456.

²³⁰ *Id.*

²³¹ *In re Adomah*, 340 B.R. at 456.

²³² *Id.* at 454.

²³³ See 11 U.S.C. § 522(b) (2006).

²³⁴ See *In re Adomah*, 340 B.R. at 457; see also N.Y. DEBT. & CRED. § 283 (McKinney 2009).

²³⁵ *In re Adomah*, 340 B.R. at 457.

²³⁶ *Id.*

²³⁷ *Id.* at 458; see also U.S. CONST. art. VI, cl. 2.

²³⁸ *In re Adomah*, 340 B.R. at 458.

violated the automatic stay with a brief account restraint to maintain the status quo. This, however, was not the case.²³⁹ Instead, the bank maintained the restraint until Mitsubishi provided its release.²⁴⁰ The court noted that “Bank of America’s non-policy, which puts the onus entirely on the debtor and permits a bank to freeze an account indefinitely and then do nothing, violates any reading of *Strumpf*.”²⁴¹

Lastly, the court rejected the bank’s third defense that the motion became moot upon its release of the funds to Ms. Adomah.²⁴² The court applied section 362(k)²⁴³ and noted that in order for a violation to be “willful,” a bank need not have intended to violate the stay.²⁴⁴ Under the Bankruptcy Code, mere knowledge of the stay will suffice.²⁴⁵ In her complaint, Ms. Adomah sought “actual damages in the amount of \$500,” “punitive damages in an unspecified amount,” and \$2,500 in attorney’s fees.²⁴⁶ The court found that Ms. Adomah did not provide sufficient evidence that “she suffered \$500 in losses” because “it [wa]s unclear whether the \$1,100 in her [a]ccounts would have been sufficient [in the first place] to pay” her rent and telephone bills.²⁴⁷ While the court suggested that Ms. Adomah could recover bounced check fees charged by Bank of America, it did not award her those fees because the record did not demonstrate whether the fees were charged validly pre-petition or post-petition in violation of the stay.²⁴⁸ On the issue of emotional distress damages, while the court acknowledged that the Ninth Circuit has spoken of “an emerging consensus recognizing the availability of damages for emotional distress that results specifically from a willful violation of the automatic stay,”²⁴⁹ the court found that Ms. Adomah failed to

²³⁹ *Id.*; see also *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 19-21 (1995) (holding that a brief administrative hold on a bank account to protect the bank’s setoff rights did not violate the automatic stay).

²⁴⁰ *In re Adomah*, 340 B.R. at 458.

²⁴¹ *Id.* at 459.

²⁴² *Id.* at 460.

²⁴³ In the decision, the court referenced section 362(h), which was amended by the 2005 Amendments to the Bankruptcy Code to be a part of 362(k). See, e.g., *In re Weatherford*, 413 B.R. 273, 282 n.5 (Bankr. D.S.C. 2009); see also *In re Adomah*, 340 B.R. at 460.

²⁴⁴ *In re Adomah*, 340 B.R. at 460.

²⁴⁵ See *id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* (quoting *Dawson v. Washington Mut. Bank*, 390 F.3d 1139, 1147 (9th Cir. 2004)).

make out a case of emotional distress.²⁵⁰ Moreover, “[s]ince there [wa]s no indication that Bank of America acted maliciously or in bad faith, the court [did] not award punitive damages.”²⁵¹ Instead, the court set a “hearing on the issue of actual damages” and required Ms. Adomah’s counsel to “file a separate application for attorney’s fees” with “appropriate time records attached.”²⁵²

In the *Adomah* case, the account restraint in violation of the automatic stay operated in a similar manner to account restraints in violation of EIPA. Like EIPA, the automatic stay is automatic: neither statute requires notice to the bank, and banks are bound by the statute regardless of their knowledge. In *Adomah*, Bank of America was under the erroneous impression that the automatic stay was not automatic. To the contrary, the bank required approval of the judgment creditor’s attorney before lifting its restraint. Arguably, banks operate under similar misconceptions regarding EIPA. Moreover, as in cases of EIPA violations, Ms. Adomah suffered a negligible amount of actual damages, but her dependence on the charity of relatives for food and transportation suggests that she suffered some form of emotional distress.

In re Adomah provides a promising illustration of how a New York court might rule on a claim of an EIPA violation, should the law be amended to include a remedy provision similar to section 362(k) of the Bankruptcy Code. Applying *Adomah* in the context of an amended EIPA, a New York court would likely award actual damages and attorney’s fees for bank noncompliance. Should EIPA be amended, it ideally should provide for attorney’s fees and the recovery of emotional distress damages. The following sections explore how an EIPA amendment providing for the recovery of attorney’s fees is attainable, but one providing for emotional distress damages is not.

C. *The Importance of Fee Shifting*

In order to be an effective consumer protection law, EIPA should be amended to provide for damages in the event of bank noncompliance, and such amendment must provide for the award of attorneys fees. Generally, attorney’s fees are not

²⁵⁰ *In re Adomah*, 340 B.R. at 460.

²⁵¹ *Id.* at 461.

²⁵² *Id.*

awarded without a statutory or contractual authorization.²⁵³ While this general rule is designed to discourage litigation, in circumstances where low-income individuals would have no other way to access the courts, fee shifting allows them to be heard.²⁵⁴

In many cases, attorneys have to turn away clients with little expected return if the client lacks sufficient funds to pay the attorney's fees.²⁵⁵ Indeed, "[e]ven nonprofit organizations need the financing that comes from attorneys' fee awards."²⁵⁶ Importantly, fee shifting statutes give public interest and private lawyers an incentive to represent low-income litigants.²⁵⁷ Furthermore, these statutes "place the burden of financing access to justice squarely on those entities that have actually violated the law"²⁵⁸ and "give potential defendants an additional incentive to comply with the law."²⁵⁹

In consumer credit litigation, the need for attorney's fees is even greater.²⁶⁰ Often, the consumer attorney cannot seek fees from plaintiffs because the nature of consumer cases lends itself toward low-income litigants. Thus, the recovery of fees generally requires submission of an attorney fee application to the court. In turn, this requires a statutory authorization for a fee award.²⁶¹

To be sure, fee shifting may not be as effective in practice as it is in theory. For example, in consumer credit litigation, courts have "tended to make lower fee awards" in cases handled by public interest legal services "than for counsel from the private bar."²⁶² Judges and policymakers alike tend to

²⁵³ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 268-71 (1975).

²⁵⁴ See generally Evan L. Goldman, *Fee Shifting, The Great Leveler*, 187 N.J.L.J. 819 (Mar. 5, 2007).

²⁵⁵ *Id.*

²⁵⁶ Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* 21 (Univ. of Mich. Law Sch., Public Law and Legal Theory Working Paper Series, Working Paper No. 150, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407275&download=yes (citation omitted).

²⁵⁷ *Id.* at 13-14.

²⁵⁸ *Id.* at 2.

²⁵⁹ *Id.* (citation omitted).

²⁶⁰ See Michael P. Malakoff & Louise Reiber Malakoff, *Public Interest Practice in Consumer Credit Law*, in PUBLIC INTEREST PRACTICE AND FEE AWARDS 351, 397 (Herbert B. Newberg ed., 1980).

²⁶¹ *Id.* Alternatively, if a statute does not authorize the award of fees, the attorney may recover pursuant to a class action fund created by settlement or litigation. *Id.*

²⁶² *Id.* at 400.

romanticize the job of the public interest lawyer, and presume that such attorneys should not care whether they get paid.²⁶³ Additionally, calculating the fee award can be complicated.²⁶⁴ New York courts require the attorney to submit evidence showing the expenditure of time reasonably necessary to litigate the case,²⁶⁵ but limit recovery to fees actually incurred.²⁶⁶ Accordingly, the New York attorney seeking fees must keep careful track of time spent, including a breakdown of rates and hours. This requirement hardly seems insurmountable.

Any fee shifting clause added to EIPA need not specify the exact amount of fees to be awarded in the event of successful litigation. New York courts read a requirement of reasonableness into any fee shifting clause, regardless of its terms.²⁶⁷

D. *Unlikely Recovery of Emotional Distress Damages*

Although debtors may suffer more in emotional distress than in pecuniary damages as a result of bank noncompliance with EIPA, it is unlikely that any amendment to EIPA will explicitly allow for a debtor to recover emotional distress damages, nor is it likely to expect a New York court to award emotional distress damages for such acts. Significantly, New York courts are reluctant to allow a debtor to recover under the tort of intentional or reckless infliction of emotional distress for damages resulting from *creditors'* abusive debt collection methods, even if intentionally caused.²⁶⁸ Courts are wary of potentially false or frivolous claims and the difficulty of quantifying damages.²⁶⁹ For that reason, "liability has been found only where the actor's conduct has been extreme and outrageous, and that liability clearly does not extend to mere

²⁶³ Bagenstos, *supra* note 256, at 4.

²⁶⁴ Malakoff & Malakoff, *supra* note 260, at 398.

²⁶⁵ *SO/Bluestar v. Canarsie Hotel Corp.*, 825 N.Y.S.2d 80, 82 (N.Y. App. Div. 2006) (finding that a mere affidavit is inadequate; the attorney must provide breakdown of rates and hours).

²⁶⁶ *Kamco Supply Corp. v. Annex Contr., Inc.*, 689 N.Y.S.2d 189, 190 (N.Y. App. Div. 1999).

²⁶⁷ *See, e.g., SO/Bluestar*, 825 N.Y.S.2d at 82 (fee shifting clause entitled plaintiff to fees "to the extent that the amount is reasonable and warranted for the services actually rendered").

²⁶⁸ Joel E. Smith, Annotation, *Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R. 3d 201 (1978).

²⁶⁹ *Id.*

insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”²⁷⁰

Under New York law, a claim for intentional infliction of emotional distress requires allegations of: (1) extreme or outrageous conduct, (2) intent to cause severe emotional distress or reckless disregard of the probability of causing such distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress.²⁷¹ To assert a claim of intentional infliction of emotional distress, the tortfeasor’s conduct “must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society.”²⁷² Importantly, mere procedural defects do not rise to the level of conduct required.²⁷³ Accordingly, it is unreasonable to expect that those harmed by bank noncompliance with EIPA will recover for emotional damages, even though the damages resulting from emotional distress may arguably encompass the bulk of the victims’ injuries. The unlikely prospect of amending EIPA to provide for emotional distress damages should quell any potential criticisms that this Note’s proposed amendment would be too harsh on the banks.

V. CONCLUSION

New York’s Exempt Income Protection Act is a vital consumer law, paralleled in only three other states, and a great step forward in ensuring that low-income individuals have much-needed protection in the abusive debt collection environment. The amounts banks are required to withhold from judgment creditors under EIPA—either \$1,740 or \$2,500, depending on the account holder’s exemption status—are relatively low. More importantly, the money belongs not to the banks, but to their customers or, depending on the merits of the collection lawsuit, to the creditor. However, despite EIPA’s

²⁷⁰ *Id.*

²⁷¹ *In re Jacques*, 416 B.R. 63, 82 (Bankr. E.D.N.Y. 2009).

²⁷² *Id.* at 83; *see also* *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303 (N.Y. App. Div. 1985); *Callarama v. Assocs. Discount Corp.*, 329 N.Y.S.2d 711, 713 (N.Y. Sup. Ct. 1972).

²⁷³ *See, e.g., In re Jacques*, 416 B.R. at 83-84 (in bankruptcy case, creditor’s untimely filing of proof of claim was not sufficiently outrageous to support claim for intentional infliction of emotional distress); *Wehringer v. Helmsley-Spear, Inc.*, 457 N.Y.S.2d 78, 80 (N.Y. App. Div. 1982) (where a landlord continued to bill a tenant for use of an office space after the tenant had vacated the premises, relief was denied because the tenant did not require medical attention).

provisions, banks have failed to comply with the law since its inception in January 2009.

When consumer advocates and legislators designed EIPA, they likely focused on addressing the ills of abusive debt collection practices, not the banks' role in that process. In hindsight, the legislature should have drafted the law to recognize that banks play a crucial role in ensuring that their customers retain funds protected by the law. Accordingly, EIPA should be amended to include a remedy provision similar to section 362(k) of the Bankruptcy Code, and thus provide the victim of bank noncompliance with a remedy to recover actual damages and attorney's fees from the bank. Currently, existing remedies under federal and state law for violations of EIPA are insufficient, and model exempt income statutes fail to address bank noncompliance. Accordingly, banks need to be pressed with incentives to comply with the law.

While EIPA has apparent flaws, it serves the important purpose of limiting judgment creditors' ability to restrain a debtor's every last penny. Therefore, EIPA should be amended to allow the law to function as intended.

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