NATIONAL CENTER ON LAW & ELDER RIGHTS

Using Consumer Law to Help Survivors of Elder Abuse

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The National Consumer Law Center uses its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults and people of color. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

Introduction

Older adults suffering from cognitive or physical limitations often rely on the assistance of trusted family members, friends, or caregivers to help manage their household finances. Unfortunately, sometimes trusted individuals exploit the vulnerabilities of older adults, leaving them emotionally and financial harmed. Older adults seeking to leave an abusive environment may need help protecting their limited income and resources from seizure by creditors and debt collectors. Below is a summary of some of the consumer protection laws and rules advocates can use to assist survivors of elder abuse, including state and federal exemption laws, the Fair Debt Collection Practices Act, and bankruptcy law.

Key Lessons

1. Older adults with physical or cognitive limitations often rely on caregivers, family members, or friends to manage their finances.
2. Older adults' increased reliance on the assistance of others can make them vulnerable to financial abuse.
3. It is imperative that advocates help survivors access their consumer law options, leave their abusers, and regain a strong financial foundation.

Prioritizing Debt Payments

Survivors of elder abuse may need guidance on how to prioritize debts. High-priority debts are those that are secured by collateral, such as mortgages and auto loans. If survivors fall behind on mortgage payments, they may lose their homes to a foreclosure. However, if the survivor has moved out to leave an abuser who is living in the shared home, the survivor should prioritize paying rent for the new residence. Remaining current on auto loans is also critical if the survivor uses a car as their primary method of transportation for outings, such as medical appointments.

Conversely, unsecured debts are typically low priority. This includes credit card debts. Unsecured debts are not typically subject to the same risk of repossession as secured debts, so survivors should pay these only after daily necessities and high-priority debts are paid.

Reporting Unauthorized Use of Credit and Debit Cards and Related Protections

Credit Cards

Federal law protects survivors against the unauthorized use of a credit card if the abuser steals, borrows, or otherwise uses the survivor's credit card without permission. The survivor's responsibility for unauthorized use of a credit card is limited to $50.[1] Survivors may challenge an unauthorized charge or any other error (e.g., billed for incorrect amount) that appears on a monthly credit card statement.[2] Information regarding how to raise the dispute appears on the back of the credit card statement.

Consumers also have the right to stop payment if they have a legitimate complaint about the quality of goods or services they bought with the card. Consumers must first make a good faith effort to resolve the problem with the merchant directly. In addition, the goods or services must have cost more than $50 and the consumer must have bought those goods or services in their home state or within 100 miles of their mailing address.[3]

Debit Cards

Federal law protects survivors against unauthorized, fraudulent, or illegal debits against bank accounts, such as those made with debit cards.[4] The extent of the survivor's responsibility for the unauthorized transfer of funds with a debit card is determined by their promptness in notifying the financial institution. In general, a consumer is not responsible for a timely reported unauthorized transfer of money. If a report is not timely made, the consumer may be responsible for $50, $500, or an unlimited amount depending on:

1. When the unauthorized transfer occurred;
2. Whether the access device was lost or stolen;
3. When a statement was sent; and
4. When the consumer reported the loss or theft of the access device or the unauthorized transfer of funds. Survivors can notify the financial institution by telephone, in writing, or in person.

Federal law also allows consumers to dispute errors involving debit cards or other electronic transactions, such as a direct deposit from your employer. **Consumers must dispute an error within 60 days of the first bank statement with the error.**

Placing Fraud Alerts and Setting up a Security Freeze

Survivors who have had their identities stolen by their abusers have free tools available to protect and repair their credit. By federal law, effective September 21, 2018, consumers may place a security freeze on their credit report at no charge. A security freeze will stop all new accounts from being opened, preventing abusers from taking out credit in the survivor's name. In order to open their own accounts, the survivor will need to call the credit bureau to temporarily lift the freeze.

Alternatively, survivors may place a free fraud alert on their credit report. A fraud alert warns potential creditors that the survivor is a victim of identity theft. Any potential creditor will need to contact the applicant to verify their identity before opening a new account. Survivors who fear that their abuser may steal their

1 Truth in Lending Act, 15 U.S.C. § 1643.
2 The Fair Credit Billing Act, part of the Truth in Lending Act, 15 U.S.C. §1666.
3 These two limits do not apply if the credit card was issued by the seller (such as a department store card) or if the seller mailed the consumer the advertisement for the goods or servicespurchased.
4 The Electronic Funds Transfer Act (EFTA), 15 U.S.C. §§ 1693–1693r.

identity in retaliation for leaving can request an initial fraud alert, which stays on the survivor's credit report for one year, after which it may be renewed.

Survivors who have been a victim of identity theft and filed a police report may request an extended fraud alert, which remains on the credit report for seven years.

PRACTICE TIP

Advocates should help survivors determine whether a security freeze or fraud alert will best protect their credit while they get their finances in order. To place a security freeze or fraud alert, the survivor must contact one of the three national credit bureaus (Experian, TransUnion, and Equifax). Advocates and survivors should beware of credit monitoring and other subscription products that are not free.

State and Federal Exemption Laws

State and federal exemption laws provide fundamental protections for low-income debtors and their families. Every state has a general exemption law that protects a variety of income and property from judgment creditors. In addition, many federal and state statutes that deal with a particular type of income or asset, such as Social Security benefits or state employees' pensions, include their own exemption provisions. Special exemption rules are also sometimes found in statutes dealing with a certain types of debt, such as tax debts.

A debtor who possesses only exempt assets is referred to as "judgment proof" or "collection proof." While a judgment may be taken against such a person, there is no way for the creditor to compel collection of the judgment from the debtor's income or assets unless the debtor's circumstances change.

Homestead Exemptions

Homestead exemptions are designed to protect the home for the debtor and the debtor's family. The amount of the homestead exemption varies significantly from state to state. The dollar amount of the homestead exemption generally refers to the debtor's equity in the property.

Household Goods and Vehicles

Every state protects at least some of a debtor's basic personal possessions from the reach of creditors. The purpose of these statutes is to allow debtors to retain basic necessities for living. Some exemption statutes list specific items or categories of household goods that are exempt. Courts construe "necessary" to include not just what is needed for bare subsistence, but items generally found in the home and used to facilitate day-to-day living. Many statutes provide an exemption for motor vehicles.

Protection of Money on Deposit in Bank Accounts/The Treasury Rule

A number of states provide a specific exemption for a certain amount of money in a bank account. Others make a wildcard exemption available for this purpose. In the absence of a specific exemption for bank accounts or a wildcard exemption, money on deposit in a bank account, such as wages or benefits, may retain their exempt status. Regardless of whether the funds in a bank account are exempt, a creditor can reach the money only if it belongs to the debtor.

A federal rule, effective May 1, 2011, vastly strengthens protections for exempt federal benefits deposited into bank accounts.[5] The rule, announced by the United States Department of Treasury and several benefits-paying agencies, limits creditors' ability to garnish bank accounts that contain Social Security, Supplemental

5 31 C.F.R. §§ 212.1 through 212.12. *See also* U.S. Dep't of Treasury, Fin. Mgmt. Serv., Guidelines forGarnishment of Accounts Containing Federal Benefit Payments (Mar. 2013), *available at* www.fms.treas.gov.

Security Income (SSI), VA, and certain other federal benefits. Federal law makes these funds immune from seizure by creditors.

The rule requires all banks to determine whether certain exempt federal benefits have been electronically deposited within the preceding two months. If they have, the bank must protect whatever amount was deposited during that period.

The rule does not operate as a limit on the debtor's right to exempt Social Security benefits in addition to those that fall within the two-month window.[6] However, to protect funds deposited before the two-month window, or funds that have been transferred between accounts, the recipient will have to use state procedures.

The rule protects Social Security, SSI, VA benefits, federal Railroad Retirement, federal Railroad Unemployment and Sickness, federal Civil Service Retirement System, and federal Employee Retirement System benefits.[7] The rule does not protect state benefit payments, such as state employee retirement benefits, workers' compensation benefits, and unemployment compensation.

Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act (FDCPA) restricts debt collectors' efforts to collect debt. The FDCPA applies to debt collector's activities.[8] The term "debt collector" generally includes debt collection agencies, creditors using false names or collecting for other creditors, collection attorneys, purchasers of delinquent debts, repossession companies, and suppliers or designers of deceptive forms, but generally excludes creditors collecting their own debts.[9] The Act applies to attorneys who regularly collect consumer debts for creditors or collection agencies. Several states have laws similar to the FDCPA that apply to all collectors of debts.

The FDCPA establishes general standards of prohibited conduct, defines and restricts abusive collection acts (in detail), and provides specific rights for consumers. Generally, the Act protects consumers from invasion of privacy, harassment, abuse, false or deceptive representations, and unfair or unconscionable collection methods. Specific prohibited debt collection acts include late night or repetitive phone calls and false threats of legal action. The Act gives a consumer the right to require a collector to stop all collection contacts. It requires a collector to deal with a consumer's attorney when the consumer has one. It gives a consumer the right to require a collector to verify the existence, legality, or amount of the debt it is attempting to collect.

A debt collector who violates the federal FDCPA while collecting a consumer debt is subject to suit by any person adversely affected by the violation. The Act grants concurrent federal and state jurisdiction, and the successful plaintiff may recover actual damages, additional statutory damages, attorney fees, and costs.[10]

Section 6. Bankruptcy Basics

A voluntary bankruptcy case is a legal proceeding, brought by a debtor, that seeks relief specifically provided by a federal statute, the Bankruptcy Code.[11]

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6 31 C.F.R. § 212.8(a). *See* International Painters v. Riffle Carpet Installation, 2015 WL 6755320 (W.D. Miss. Nov. 4, 2015) (rule does not prevent debtor from claiming exemption in funds in addition to protected amount, if shown to be exempt); Craig B. Hammond, Ltd. v. Smith, 2015 WL 5095317 (Ill. App. Ct. Aug. 28, 2015).

7 76 Fed. Reg. 9939, n.1 (Feb. 23, 2011).

8 15 U.S.C. §§ 1692–1692o. For more information see National Consumer Law Center, *Fair Debt Collection* (8th ed. 2014).

9 15 U.S.C. § 1692a(4), (6).

10 15 U.S.C. §§ 1692k. For more information see National Consumer Law Center, *Federal Deception Law* (2012).

11 11 U.S.C. §§ 101–1532. Most bankruptcies are voluntary petitions filed by debtors. The Bankruptcy Code also provides for involuntary bankruptcy cases filed by creditors. 11 U.S.C. § 303

Chapter 7 and Chapter 13 Bankruptcy

For individuals, two types of relief are usually used. The first is liquidation under chapter 7 of the Bankruptcy Code. The second is "reorganization" under chapter 13. In a chapter 7 liquidation case, sometimes referred to as a straight bankruptcy, any substantial nonexempt[12] assets of the debtor are converted to cash and distributed to creditors according to certain statutory rules. Any individual residing, domiciled, or having property or a place of business in the United States may file a petition to commence a chapter 7 bankruptcy case.[13] To be eligible, the individual must, with certain limited exceptions, have received a credit counseling briefing from an approved nonprofit budget and counseling agency within the 180 days before filing the bankruptcy petition.[14] The individual need not be insolvent. A person, whether a citizen or not, may file a bankruptcy case even if the person does not reside in the United States, as long as the person has assets in the United States.

Chapter 13 bankruptcy gives the debtor the opportunity to adjust their financial affairs without having to liquidate current assets. Chapter 13 is available to "individual[s] with regular income"[15] who reside, are domiciled, or have a place of business or property in the United States. Rather than being designed to pay debts out of those assets, a chapter 13 case usually involves payment of debts out of future income (although the debtor may also choose to make some payment out of current assets). The debtor is allowed to keep and use all property, whether exempt or not, and to pay some or all debts according to a plan approved by the court. At the completion of this plan (or, in some cases, earlier) the debtor receives a discharge that, with several significant exceptions, is similar to the discharge received in a chapter 7 case.

PRACTICE TIP

Advocates assisting older survivors who may need to file for bankruptcy should refer to additional guidance from the National Consumer Law Center to understand different options, in addition to consulting with a lawyer who may be able to assist. NCLC's Surviving Debt is available to provide this guidance.

Determining When Bankruptcy is the Right Option

Bankruptcy cannot cure every financial problem. Nor is it the right step for every individual. Bankruptcy allows the debtor to keep certain assets of significance to older adults. For example, the older adult consumer is allowed to exempt or keep certain retirement funds, including common types of pension, profit-sharing, and stock bonus plans; employee annuities; individual retirement accounts (including Roth IRAs); deferred compensation plans of state, local government, and tax-exempt organizations; and certain trusts. On the other hand, bankruptcy cannot discharge several types of debts singled out by the bankruptcy law for special treatment, such as child support, alimony, most student loans, court restitution orders, criminal fines, and most taxes. Bankruptcy also cannot discharge debts that arise after bankruptcy has been filed. Because of this, older adults may wish to delay a bankruptcy filing until they are reasonably sure that they will not incur new major debts. Older adults with debt problems often want to file bankruptcy primarily to stop collection harassment. While this can be a good reason for seeking bankruptcy protection, there may be other ways to stop the harassment or to ease their fears about the collection process. For some, simply becoming aware that that they are "collection proof" may reduce their stress and desire to file.

12 Many assets, called exempt assets, may be retained by individual debtors in bankruptcy.
13 11 U.S.C. § 109.
14 11 U.S.C. § 109(h).
15 11 U.S.C. § 109(a), (e).

Glossary of Consumer Law Terms

Automatic Stay

With a few exceptions, the automatic stay stops creditors from taking debt collection action once the consumer files the necessary paperwork to begin a bankruptcy case.

Bankruptcy

The legal proceeding designed to help people and businesses get protection from creditors.

Collection Proof

A consumer is collection proof if all of their assets and income are protected by law from a creditor trying to collect on a debt or enforce a court judgement. Also known as "judgment proof."

Discharge

Elimination of the legal obligation to pay a debt.

Exempt

Property that the law allows consumers to keep when faced with collection of an unsecured debt. In bankruptcy, exempt property cannot be sold and the debtor gets to keep the property in a chapter 7 or chapter 13 bankruptcy.

Garnishment

A creditor's seizure, to satisfy a debt, of property belonging to the debtor. The property is in the hands of a third party (e.g., money in bank, wages). Usually a court has to authorize the seizure in advance.

Liquidation

A process associated with a chapter 7 bankruptcy where the court's appointed trustee examines the debtor's asset and determines whether anything is available to be sold for the benefit of creditors.

Reorganization

A process associated with a chapter 11 or 13 bankruptcy where the debtor submits a plan to repay their debts.

Secured Creditors

A creditor that has taken a mortgage or other lien on a property as collateral for a loan.

Conclusion

Victims of elder abuse do not have to fear moving forward with their lives after experiencing financial abuse. An array of consumer law tools are available to elder abuse victims to regain their financial footing and lead fulfilling lives.

Additional Resources

- National Consumer Law Center Resources
  - Surviving Debt
  - Facts for Older Consumers: Protections for Debit Card and Electronic Transactions
  - Facts for Older Consumers: Your Credit Card Rights

- Federal Trade Commission Resources
    - » Lost or Stolen Credit, ATM, and Debit Cards
    - » Disputing Credit Card Charges
    - » Place a Fraud Alert
    - » Blog: Free Credit Freezes Are Here

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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