



1-1-2011

# Chapter 64: Assisting Victims of Elder Financial Abuse in Recovering Their Judgment Awards

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## Recommended Citation

Ekaterina Deaver, *Chapter 64: Assisting Victims of Elder Financial Abuse in Recovering Their Judgment Awards*, 42 MCGEORGE L. REV. (2016).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol42/iss3/7>

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## Chapter 64: Assisting Victims of Elder Financial Abuse in Recovering Their Judgment Awards

*Ekaterina Deaver*

### *Code Sections Affected*

Code of Civil Procedure §§ 706.011, 706.023, 706.125 (amended);  
Welfare and Institutions Code § 15657.5 (amended).  
AB 2619 (Block); 2010 STAT. Ch. 64.

### I. INTRODUCTION

Merl Resler was nineteen years old and serving on the battleship *USS Maryland* when the Japanese attacked Pearl Harbor.<sup>1</sup> Resler and the *Maryland* survived numerous Japanese military attacks, including two suicide plane crashes that killed eighty-four sailors.<sup>2</sup> Several decades later, at age eighty-two, Resler sits at his kitchen table wondering why he is unable to collect a judgment for more than \$200,000 against an investor in Florida who ended up owning Resler's house.<sup>3</sup> Numerous letters of complaint and phone calls to public officials, court visits, and even several trips to Florida did not help.<sup>4</sup> Resler's problems started when he sold his real estate promissory note to an investment firm in Florida.<sup>5</sup> Resler had received about a third of the agreed amount from the buyer, when the payments under the contract stopped.<sup>6</sup> This scenario is only one of numerous ways by which seniors and dependent adults lose their property and life savings to financial perpetrators.<sup>7</sup>

Elder abuse is "one of the most disturbing and rapidly growing areas of crime in the new millennium."<sup>8</sup> In California, elder abuse is more prevalent than

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1. Nancy Weaver Teichert, *Battle-Forged Man Fights to Retrieve His Money*, SACRAMENTO BEE, May 17, 2004, at B1.

2. PEARL HARBOR SURVIVORS ONLINE: MERL RESLER, <http://www.pearlharborsurvivorsonline.org/html/RESLER,%20MERL%20-%20USS%20MARLAND.htm> (last visited Feb. 16, 2011) (on file with the *McGeorge Law Review*).

3. Teichert, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Lori A. Stiegel, *Financial Abuse of the Elderly: Risk Factors, Screening Techniques, and Remedies*, BIFOCAL, Summer 2002, at 1 (describing various methods of elder financial abuse, including "misuse of durable powers of attorney," misuse of bank accounts, "failure to provide reasonable consideration for the transfer of real estate," "excessive charges for goods or services," and "using fraud or undue influence to . . . obtain money or property" of a victim).

8. Office of the Attorney Gen. of the State of Cal., *Letter to Fellow Californians*, in CAL. DEPT. JUSTICE, A CITIZEN'S GUIDE TO PREVENTING & REPORTING ELDER ABUSE (2002) [hereinafter *Letter to Fellow Californians*], available at [http://www.ag.ca.gov/bmfea/pdfs/citizens\\_guide.pdf](http://www.ag.ca.gov/bmfea/pdfs/citizens_guide.pdf) (on file with the *McGeorge Law Review*).

burglary and auto theft (the two most frequently committed crimes).<sup>9</sup> Financial abuse is one of the most common types of elder abuse,<sup>10</sup> which “threatens the health, dignity, and economic security of millions of older Americans.”<sup>11</sup>

Despite an extensive legislative scheme designed to protect elders and dependent adults, hurdles preventing victims from recovering from their perpetrators remain.<sup>12</sup> Even if a victim succeeds in his or her lawsuit against an abuser, the defendant often lacks sufficient funds to pay damages.<sup>13</sup> As many victims of elder and dependent adult financial abuse<sup>14</sup> know, it is not enough to receive a judgment against the perpetrator, as the hard part is collecting the judgment.<sup>15</sup> Assembly Member Marty Block introduced Chapter 64 to aid victims of elder financial abuse in collecting their judgment awards.<sup>16</sup>

## II. LEGAL BACKGROUND

### A. Nature of Elder Financial Abuse

The National Center on Elder Abuse defines elder financial abuse as “the illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder at risk for harm by another due to changes in physical functioning, mental functioning, or both.”<sup>17</sup> Elder financial abuse “can be as simple as taking money from a wallet and as complex as manipulating a victim into turning over property to an abuser.”<sup>18</sup> Elder financial abuse has devastating consequences for its victims, who “have few options for resolving or avoiding

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9. Helen Karr, *Elder Abuse—A Silent Crime*, CAL. ST. B.J., May 2010, available at <http://calbarjournal.com/May2010/TopHeadlines/TH5.aspx> (on file with the *McGeorge Law Review*) (“[A]n elder is abused at a rate of more than one every two minutes.”).

10. Charles Pratt, *Banks’ Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 CAL. W. L. REV. 195, 195 (2003); see also METLIFE ET AL., *BROKEN TRUST: ELDERS, FAMILY, AND FINANCES: A STUDY ON ELDER FINANCIAL ABUSE PREVENTION 8* (2009) (“Elder financial abuse is regarded as the third most commonly substantiated type of elder abuse, following neglect and emotional/psychological abuse.”).

11. METLIFE ET AL., *supra* note 10, at 5.

12. See NAT’L COMM. FOR THE PREVENTION OF ELDER ABUSE, *RESTITUTION*, <http://www.preventelderabuse.org/issues/restitution.html> (last visited Feb. 16, 2011) [hereinafter NCPEA: RESTITUTION] (on file with the *McGeorge Law Review*) (specifying such problems as failure of many courts to issue restitution orders and absence of effective systems to ensure that judgment is enforced).

13. Lori Stiegel, *The Changing Role of the Courts in Elder Abuse Cases*, 24 GENERATIONS 59, 61 (2000); see also ASSEMBLY COMMITTEE ON JUDICIARY, *COMMITTEE ANALYSIS OF AB 2619*, at 1 (May 4, 2010) (“[V]ictims of elder and dependant [sic] adult financial abuse . . . have trouble collecting their damages if the defendant has already spent the money they defrauded from the elder or dependant [sic] adult and cannot otherwise pay the judgment.”).

14. Collectively referred to as “elder financial abuse” throughout this article.

15. Teichert, *supra* note 1.

16. ASSEMBLY COMMITTEE ON JUDICIARY, *COMMITTEE ANALYSIS OF AB 2619*, at 3 (May 4, 2010).

17. METLIFE ET AL., *supra* note 10, at 7.

18. CAL. DEPT. JUSTICE, *A CITIZEN’S GUIDE TO PREVENTING & REPORTING ELDER ABUSE 5* (2002), available at [http://www.ag.ca.gov/bmfea/pdfs/citizens\\_guide.pdf](http://www.ag.ca.gov/bmfea/pdfs/citizens_guide.pdf) (on file with the *McGeorge Law Review*).

the abusive situation.”<sup>19</sup> A Mature Market Institute study estimates that the annual loss by victims of elder financial abuse totals at least \$2.6 billion.<sup>20</sup> The consequences of elder financial abuse are not limited to negative monetary effects on the elder or dependent adult victims, but “reach[] far beyond its immediate victim, affecting . . . health care costs, living situations, filings for bankruptcy, and costs for its recuperation passed along in service industries.”<sup>21</sup> Moreover, elder financial abuse may lead to mental and physical ailments for the victim, and possibly result in untimely death.<sup>22</sup>

There are several reasons why seniors are frequent victims of financial abuse. First, seniors control a large portion of funds deposited in financial institutions, which makes them especially tempting victims.<sup>23</sup> Second, most senior adults are homeowners, which exposes them to various home improvement scams, home loan bailouts, and other types of homeowner scams.<sup>24</sup> Third, seniors can be socially “isolated due to their lack of mobility,” which increases their risk of victimization.<sup>25</sup>

#### B. California Laws on Protection of Elders and Dependent Adults

In many respects, California provides an example of current efforts to address the problem of elder financial abuse.<sup>26</sup> In 1991, California enacted the Elder Abuse and Dependent Adult Civil Protection Act<sup>27</sup> (EADACPA) “to protect the particularly ‘vulnerable’ elderly and those members of society who rely on others for their daily care.”<sup>28</sup> EADACPA defines elder abuse,<sup>29</sup> prescribes procedures for reporting such abuse,<sup>30</sup> and provides for remedies to victims.<sup>31</sup>

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19. Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 603 (2003).

20. METLIFE ET AL., *supra* note 10, at 7.

21. *Id.* at 30; see also Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 507 (2004) (discussing financial loss to society when elders “no longer have money to invest legitimately, depriving the state of the taxes they would normally pay on those investments”).

22. METLIFE ET AL., *supra* note 10, at 30.

23. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 205 (2000) (noting that 70% of funds deposited in financial institutions come from seniors).

24. METLIFE ET AL., *supra* note 10, at 14-15, 20.

25. Dessin, *supra* note 23, at 205; see also NAT’L COMM. FOR THE PREVENTION OF ELDER ABUSE, FIN. ABUSE, [http://www.preventelderabuse.org/elderabuse/fin\\_abuse.html](http://www.preventelderabuse.org/elderabuse/fin_abuse.html) (last visited Feb. 16, 2011) (on file with the *McGeorge Law Review*) (listing such factors as isolation, loneliness, recent losses, lack of familiarity with financial matters as reasons for increased risk of victimization of senior people).

26. Moskowitz, *supra* note 19, at 595.

27. CAL. WELF. & INST. CODE §§ 15600-15675 (West 2001).

28. Sande L. Buhai & James W. Gilliam, Jr., *Honor Thy Mother and Father: Preventing Elder Abuse Through Education and Litigation*, 36 LOY. L.A. L. REV. 565, 569 (2003).

29. CAL. WELF. & INST. CODE § 15610.07.

30. *Id.* § 15630 (“Any person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not he or she receives compensation, . . . is a mandated reporter.”).

Besides recovery of regular compensatory damages, victims of elder financial abuse are entitled to attorney's fees and costs,<sup>32</sup> compensation for pain and suffering,<sup>33</sup> and punitive damages.<sup>34</sup>

Victims of elder financial abuse can also recover from abusers on the basis of the Consumer Legal Remedies Act,<sup>35</sup> which provides legal remedies for unfair and deceptive practices in the sale or lease of goods to consumers.<sup>36</sup> In addition, the California Probate Code allows for the invalidation of transfers of property from an elderly or dependent adult to the drafter of a transfer instrument.<sup>37</sup>

### C. California's Wage Garnishment Laws

The California Code of Civil Procedure contains the Wage Garnishment Law, which "authorizes the enforcement of a judgment by an order to the . . . debtor's employer to withhold a portion of the debtor's earnings and pay it to the levying officer, who in turn pays the money to the judgment creditor."<sup>38</sup> Earnings withholding orders are subject to the following priority rules:

- (1) "[W]ithholding order[s] for [child and spousal] support [have] priority over any other earnings withholding order[s];"<sup>39</sup>
- (2) Withholding orders for taxes have priority over all other withholding orders except withholding orders for support;<sup>40</sup>
- (3) The employer has to comply with the first withholding order served;<sup>41</sup>
- (4) "If the employer is served with two or more . . . orders on the same day, the employer shall comply with the order issued [under] the

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31. *Id.* §§ 15657, 15657.5.

32. *Id.* § 15657.5(a).

33. *See id.* § 15657.5(b) (providing that the limitations imposed by section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply to elder and dependent adult abuse cases).

34. *See id.* (noting the plaintiff must prove by "clear and convincing evidence that the [perpetrator] has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse . . .").

35. CAL. CIV. CODE § 1750 (West 2009). Plaintiffs can use remedies provides by the Consumer Legal Remedies Act in conjunction with EDACPA. *Id.* § 1752.

36. *Id.* § 1770 (enumerating types of unlawful acts prohibited under the Act); *see also id.* § 1780(a) (specifying that a consumer can recover actual damages, restitution of property, punitive damages, and any other relief that the court deems proper); *id.* § 1780(b) (providing additional remedies for elder and disabled consumers).

37. CAL. PROB. CODE § 21350(a)(6) (West 2010); *see also* Suzanne E. Luna, *Financial Crimes Against the Elderly: Bernard v. Foley*, 22 PROB. & PROP. 35, 37 (2008) (rationale for such invalidation is that "such transfers are likely to be the result of 'fraud, menace, duress or undue influence.'").

38. 8 B.E. WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* § 241 (5th ed. 2008).

39. CAL. CODE CIV. PROC. § 706.030(c)(2) (West 2009).

40. *Id.* § 706.077(a).

41. *Id.* § 706.023(a).

judgment first entered[;]" if the judgments are entered on the same day, the employer may select the order with which to comply;<sup>42</sup>

- (5) A "withholding order . . . served while an employer is required to comply with another . . . order is ineffective and the employer shall not withhold earnings pursuant to the subsequent order."<sup>43</sup>

Federal and California law provide certain safeguards for defendants whose earnings are subject to a withholding order. The maximum amount of a withholding is either twenty-five percent of the individual's disposable earnings, or the amount by which the disposable earnings exceed thirty-times the federal minimum wage, whichever is less.<sup>44</sup> In addition to this limitation, California law protects the debtor's wages by "the hardship exemption," under which the portion of the judgment debtor's earnings necessary for the support of the debtor or the debtor's family "is exempt from levy."<sup>45</sup>

#### D. *The Need for Chapter 64*

In light of the problems that victims of elder financial abuse face in collecting their judgment awards, elder abuse prevention advocates and adult protective services have been increasingly discussing problems of collecting restitution awards as more cases of elder financial abuse appear in the judicial system.<sup>46</sup> Collection of a judgment is easier if the abuse happened "in an institutional setting or by a fiduciary, either of which is more likely to have 'deep pockets.'"<sup>47</sup> If the perpetrator is a family member or a third party individual, who are often "judgment proof or have limited resources," recovery is often impossible.<sup>48</sup> In such situations, defendants fail to pay a judgment and still retain the financial gain stolen from their victims.<sup>49</sup> Chapter 64 is the legislative attempt to aid victims of elder financial abuse in collecting their judgment awards from perpetrators.<sup>50</sup>

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42. *Id.* § 706.023(b).

43. *Id.* § 706.023(c).

44. 15 U.S.C. § 1673 (2009). There is an exception for withholding orders for support for which the law allows to withhold one-half of the debtor's disposable earnings. CAL. CODE CIV. PROC. § 706.052; *see also id.* § 706.050 (specifying that the maximum amount of withholdings is determined pursuant to 15 U.S.C. § 1673(a)).

45. CAL. CODE CIV. PROC. § 706.051. However, this exemption does not apply where the debt was incurred for common necessities of life furnished to the debtor or the debtor's family or for personal services rendered by an employee or former employee of the debtor. *Id.* § 706.051(c)(1)-(2)).

46. NCPEA: RESTITUTION, *supra* note 12.

47. Stiegel, *supra* note 13, at 61.

48. Moskowitz, *supra* note 19, at 607-08.

49. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2619, at 5 (June 15, 2010).

50. *Id.* at 3.

### III. CHAPTER 64

Chapter 64 allows victims of elder and dependent adult financial abuse a better opportunity to recover by providing that a withholding order for elder financial abuse has priority over any other withholding order, except orders for child and spousal support and back taxes.<sup>51</sup> Additionally, Chapter 64 prescribes the mechanics of implementing this priority in three ways. First, Chapter 64 amends section 706.011 of the Code of Civil Procedure to include the definition of a withholding order for elder financial abuse.<sup>52</sup> Second, Chapter 64 provides the procedure for collecting a judgment in elder financial abuse cases when the defendant's employer receives competing withholding orders.<sup>53</sup> Third, Chapter 64 amends sections 706.121 and 706.125 of the Code of Civil Procedure to provide that any withholding order or application shall specify "whether the judgment is based in whole or in part on a claim for elder or dependent financial abuse and, if in part, how much of the judgment arises from that claim."<sup>54</sup>

### IV. ANALYSIS

#### A. *Helping Victims of Financial Abuse to Recover Through Wage Withholdings*

Chapter 64 "allows victims of elder and dependant [sic] adult financial abuse who are victorious in court but unable to collect the judgment directly from the defendant, a better opportunity to collect through wage withholding . . . ."<sup>55</sup> If the defendant is employed, the victim can recover even if the defendant does not have property that can be used to satisfy the judgment.<sup>56</sup> However, the Legislature continues to stress the importance of collecting child and spousal support and delinquent taxes.<sup>57</sup> To this end, the Legislature upheld the priority of withholding orders for such obligations.<sup>58</sup> Thus, Chapter 64 moves victims of elder financial abuse towards the front of the line to collect wages, affording them the third place in the line of judgment collection.<sup>59</sup>

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51. CAL. CODE CIV. PROC. § 706.023(d) (amended by Chapter 64).

52. *Id.* § 706.011(b) (amended by Chapter 64) ("'Earnings withholding order for elder or dependent adult financial abuse' means earnings withholding order, made pursuant to Article 5 (commencing with section 706.100) and based on a money judgment in an action for elder or dependent adult financial abuse under section 15657.5 of the Welfare and Institutions Code.").

53. *Id.* § 706.023(d)(2)-(3) (enacted by Chapter 64).

54. *Id.* §§ 706.121(d), 706.125(d) (amended by Chapter 64). Chapter 64 introduces similar changes to section 15657.5 of the Welfare and Institutions Code, requiring that any money judgment in an action for financial abuse shall include a statement that the damages are pertaining to a claim for financial abuse of an elder or dependent adult. CAL. WELF. & INST. CODE § 15657.5(e) (enacted by Chapter 64).

55. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2619, at 3 (May 4, 2010).

56. *Id.* at 4.

57. *See id.* at 3 (noting that priority does not extend over these payments).

58. *Id.*

59. *Id.* at 5.

Chapter 64 reaffirms the general rules of judgment collection when an employer receives several competing orders by providing that an employer shall not execute an earnings withholding order for elder financial abuse if a withholding order for support or for taxes is in effect.<sup>60</sup> However, when an employer ceases withholding pursuant to a prior withholding order, the subsequent order for elder financial abuse becomes effective, and the employer shall notify the appropriate levying officer that the supervening order is in effect.<sup>61</sup>

Prior to Chapter 64, neither the judicial system nor publishers of courts' opinions categorized court orders as decisions rendered in elder abuse cases.<sup>62</sup> Chapter 64 changes this by requiring money judgments to include a statement about the damages being awarded "for financial abuse of an elder or dependent adult."<sup>63</sup> The application for issuance of an earnings withholding order and the withholding order itself need also state "whether the judgment is based . . . on a claim for elder . . . financial abuse."<sup>64</sup>

#### *B. Balancing the Rights of Victims and Defendants in Elder Abuse Cases*

The Legislature expressed confidence that Chapter 64 "is fair to both the plaintiff and the defendant."<sup>65</sup> While the new law provides victims of elder financial abuse with an effective mechanism to collect their judgments, existing law already safeguards defendants' rights in elder abuse cases.<sup>66</sup> For example, existing law gives defendants the opportunity to present evidence of their innocence in court, requires victims to "present a minimum level of evidence" in order to get restitution and additional damages, and contains restrictions on the amount of wage garnishment.<sup>67</sup>

#### *C. Support for Chapter 64*

The National Association of Insurance and Financial Advisors of California (NAIFA), the Insurance Brokers and Agents of the West (IBA West), and the Consumer Attorneys of California all support Chapter 64.<sup>68</sup> NAIFA lamented its awareness of "the unfortunate reality that elder and dependent adult financial

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60. CAL. CODE CIV. PROC. CODE § 706.023(d)(2) (enacted by Chapter 64). While an employer has outstanding withholding orders for support or back taxes, an order for elder financial abuse issued against the same employee is ineffective. *Id.*

61. *Id.* § 706.023(d)(3) (enacted by Chapter 64).

62. Stiegel, *supra* note 13, at 60.

63. CAL. WELF. & INST. CODE § 15657.5(e) (enacted by Chapter 64).

64. CAL. CODE CIV. PROC. § 706.121(d) (amended by Chapter 64).

65. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2619, at 4 (June 15, 2010).

66. *Id.*

67. *Id.*

68. *Id.* at 5.

abuse occurs and that . . . victims have difficulties collecting money that is awarded to them by the court for restitution.”<sup>69</sup> IBA West expressed its concerns that “[u]nfortunately . . . there are some bad actors in the insurance marketplace . . . that may have committed actions considered to be elder and financial abuse.”<sup>70</sup> When such insurance agents have to pay restitution and damages to several victims, they can become insolvent and fail to satisfy the judgments against them.<sup>71</sup> IBA West is convinced that Chapter 64 “recognizes the seriousness of these abuses” and believes that “if a rogue insurance agent is convicted of elder and dependent [adult] financial abuse, the victim should absolutely be made whole again.”<sup>72</sup> There was no known opposition to Chapter 64.<sup>73</sup>

#### D. Delay in Implementation of Chapter 64

Chapter 64 becomes effective on January 1, 2012.<sup>74</sup> The rationale for delay in the implementation of Chapter 64 is to give employers enough time to update the system of wage withholdings in light of the changes introduced by Chapter 64, including updating the necessary wage withholding forms.<sup>75</sup>

### IV. CONCLUSION

“Financial abuse of the elderly is hidden and insidious.”<sup>76</sup> It is one of the most worrisome problems facing senior citizens and dependent adults as the victims’ age and fragile health makes it “extremely difficult to recover from a financial loss.”<sup>77</sup> With the population of California aging rapidly, the number of elder financial abuse cases has also risen.<sup>78</sup> Society increasingly views the problem of elder financial abuse not simply as a social problem, but also as a legal problem that requires legal action.<sup>79</sup> The California Legislature has been trying to protect dependent adults like Merl Resler from financial exploitation.<sup>80</sup> With adoption of Chapter 64, the California Legislature has once again

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69. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2619, at 5 (May 4, 2010).

70. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2619, at 3 (June 15, 2010).

71. *Id.*

72. *Id.*

73. *Id.* at 5.

74. 2010 Cal. Stat. ch. 64, § 6.

75. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2619, at 3 (June 15, 2010).

76. Moore & Schaefer, *supra* note 21, at 508.

77. Dessin, *supra* note 23, at 204-05.

78. Moskowitz, *supra* note 19, at 601-02; *see also Letter to Fellow Californians*, *supra* note 8 (“Already at crisis proportions, the problem [of elder abuse] threatens to grow worse as the ‘graying’ of the Baby Boom generation results in unprecedented demographic shifts.”).

79. Stiegel, *supra* note 13, at 63.

80. Luna, *supra* note 37, at 37.

demonstrated its intent to protect victims of elder and dependent adult abuse, and has recognized the difficulties that victims of such abuse face in collecting their judgment awards when “the defendant fails to pay or becomes insolvent at the hands of other creditors.”<sup>81</sup> By giving “these vulnerable victims” the opportunity to receive restitution by garnishing a defendant’s wages, and by moving such victims towards the front of the line in collecting their judgment awards, Chapter 64 provides “a necessary avenue for the victims to recover.”<sup>82</sup>

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81. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2619, at 5 (June 15, 2010).

82. *Id.*

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