

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Commerce and Tourism

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BILL: SB 148

INTRODUCER: Senator Ring

SUBJECT: Consumer Protection

DATE: October 2, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	<b>Pre-meeting</b>
2.			AGG	
3.			FP	

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**I. Summary:**

SB 148 requires retail stores to allow certain consumers to return purchases of \$1,000 or more for a full refund within three business days of their purchase if the consumer:

- Has been adjudicated incapacitated;
- Is subject to a guardianship, and the guardian has the authority to determine the consumer's right to manage property; or
- Has a doctor's note that indicates that he has been diagnosed with a medical condition that causes him to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning his person or property, and has a power of attorney in effect.

The bill requires the Department of Agriculture and Consumer Services to administer a fine of up to two times the value of the goods purchased if a person is found in violation of this provision.

**II. Present Situation:**

**Consumer Protections**

*Department of Agriculture and Consumer Services*

The Department of Agriculture and Consumer Services (DACS) is charged with protecting consumers from deceptive business practices. The Division of Consumer Services (division) serves as a clearinghouse for consumer complaints. Specifically, s. 501.142, F.S., tasks the division with the oversight and regulation of a range of business practices related to refunds, returns, and exchanges at retail stores. The enforcement of s. 501.142, F.S., results from complaints made directly to the DACS by consumers. The DACS has issued only one

administrative fine for a violation of s. 501.142, F.S. Retail stores generally comply with the law upon request by the DACS.<sup>1</sup>

Currently, s. 501.142(1), F.S., requires retail stores to clearly post a “no refunds” sign at the point of sale in order to enforce this policy. If the retail store does not have a posted “no refunds” policy, then it must present a written version of its refund policy upon a consumer’s request or adhere to the default refund policy described in s. 501.142(1), F.S. This provision requires a full refund to any customer who presents to the retail store within 7 days of the original purchase their proof of purchase and the unused and originally-packaged item. A retail store’s refund policy may allow for a longer return period.<sup>2</sup>

The division may impose a \$100 administrative fine per violation of s. 501.142(1), F.S., or issue a directive to cease and desist from the violation. Additionally, a local government may apply penalties as outlined in s. 501.142(6), F.S.

These refund policy requirements do not apply to perishable or custom goods, items that are custom altered at the customer’s request, or goods that may not legally be resold by the retail store.<sup>3</sup>

### ***Seniors vs Crime***

Seniors vs Crime (SVC) is a Special Project of the Florida Office of the Attorney General with a mission to reduce the victimization of senior citizens.<sup>4</sup> SVC utilizes volunteers across the state to monitor and report on scams against the elderly, such as fraud, high pressure sales techniques, false advertising, and unfair and deceptive trade practices. Some cases discovered by SVC are referred to state agencies for an investigation of an administrative violation, or to law enforcement for further investigation of a criminal violation. Some civil issues, however, are retained by SVC for mediation conducted by its members or by the consumer herself with assistance from SVC.<sup>5</sup> In 2013, SVC assisted 5,145 Florida seniors.<sup>6</sup>

### ***Exploitation of the Elderly***

Elderly persons and disabled adults receive enhanced protection from financial exploitation under s. 825.103, F.S., “Exploitation of an Elderly Person or Disabled Adult,” which criminalizes, generally, the theft or unauthorized appropriation of their funds, assets, or property.

Section 825.101, F.S., defines the following terms:

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<sup>1</sup> Department of Agriculture and Consumer Services, *SB 148 Agency Analysis* (September 1, 2015) (on file with the Senate Committee on Commerce and Tourism).

<sup>2</sup> Section 501.142(1), F.S.

<sup>3</sup> Section 501.142(2), F.S.

<sup>4</sup> Seniors vs Crime, *The History of the Seniors vs Crime Project*, available at <http://www.seniorsvscrime.com/history> (last visited October 2, 2015).

<sup>5</sup> See, e.g., *2013 Cases Resolved by Seniors vs Crime*, available at <http://www.seniorsvscrime.com/test-cases> (last visited October 2, 2015).

<sup>6</sup> Press Release, Attorney General Pam Bondi, Attorney General Pam Bondi Recognizes the Silver Anniversary of Florida’s Seniors vs. Crime Program (April 9, 2014). Available at <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/248AB317E66FDCFF85257CB5006B12E6> (last visited October 2, 2015.)

- An “elderly person” as a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability to provide adequately for his or her own care is impaired; and
- A “disabled adult” is a person 18 years or older who suffers from physical or mental incapacitation due to developmental disability, organic brain damage, or mental illness, or has at least one physical or mental limitation that restricts his or her ability to perform normal activities of daily living.

Criminal prosecutions under s. 825.103, F.S., must prove that a victim of alleged financial exploitation not only meets the age requirement provided for in s. 825.101, F.S., but also that the victim suffers from infirmities of aging, which results in an impaired ability to care for or protect herself.<sup>7</sup>

### **Incapacity**

The 2010 Census recorded the greatest number and proportion of people aged 65 and over in the history of the U.S.—10,300,000, or 13 percent of the total population.<sup>8</sup> In 2010, Florida had the highest proportion of people over the age of 65, making up 17 percent of the total state population.<sup>9</sup>

Older Americans are at a greater risk of victimization of financial crimes than the general population due to cognitive impairment or incapacity. It is estimated that older Americans lost at least \$2.9 billion to financial exploitation by a broad spectrum of perpetrators in 2010.<sup>10</sup> Protections exist for individuals with cognitive impairment or incapacity and range from issue or authority-specific grants of power (powers of attorney), to a determination of partial- or total-incapacity by a court.<sup>11</sup>

A power of attorney or a durable power of attorney<sup>12</sup> is a legally binding document that delegates specific authority to an agent to act on a person’s behalf. Powers of attorney are often used by elderly persons to designate someone to handle their financial matters in anticipation of becoming incapacitated. The authority granted by a power or attorney or durable power of attorney can be limited to specific acts, such as caring for a particular property, or may be broadly drawn to cover all legal acts that the principal could otherwise do.<sup>13</sup> While a power of

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<sup>7</sup> *Watson v. State*, 95 So. 3d 977, 981-982 (Fla. 1<sup>st</sup> DCA 2012).

<sup>8</sup> Administration on Aging, National Center for Elder Abuse, *America’s Growing Elderly Population*, available at <http://www.ncea.aoa.gov/Library/Data/index.aspx> (citing U.S. Department of Commerce, U.S. Census Bureau, *The Older Population: 2010, 2011*, Publication C2010BR-09) (last visited October 2, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> Consumer Financial Protection Bureau, *Protecting Residents from Financial Exploitation, A Manual for Assisted Living and Nursing Facilities*, p. 7-8 (May 2014), available at [http://files.consumerfinance.gov/f/201406\\_cfpb\\_guide\\_protecting-residents-from-financial-exploitation.pdf](http://files.consumerfinance.gov/f/201406_cfpb_guide_protecting-residents-from-financial-exploitation.pdf) (last visited October 2, 2015).

<sup>11</sup> Section 744.331(6)(a), F.S. The court shall make a finding of “the exact nature and scope of the person’s incapacities; . . . and the specific rights that the person is incapable of exercising.”

<sup>12</sup> See ch. 709, F.S.

<sup>13</sup> The Florida Bar, *Florida Power of Attorney Pamphlet*, available at <http://www.floridabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/ab36277c4562e98885256b2f006c5ad6> (last visited October 2, 2015).

attorney terminates when a person becomes incapacitated, a durable power of attorney does not.<sup>14</sup> A power of attorney is an efficient and low-cost alternative to guardianship.

Alternatively, a court may appoint a guardian, who “has the legal authority and duty to care for another’s person or property, especially because of the other’s infancy, incapacity, or disability.”<sup>15</sup> Any adult may petition a court to initiate a petition to determine another’s incapacity.<sup>16</sup> An “incapacitated person” is a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.<sup>17</sup> In cases where incapacity has been determined by a court, the court may appoint a guardian, but must pursue lesser restrictive means if possible.<sup>18</sup> Guardians are governed exclusively by the Florida Statutes,<sup>19</sup> and may exercise for their ward only the enumerated rights that the court removed from the incapacitated person.<sup>20</sup> A guardianship is more actively supervised by the court than a power of attorney, which results in more costs to the individual adjudicated incapacitated.

### III. Effect of Proposed Changes:

**Section 1** provides that the act may be cited as “Terry’s Law.”

**Section 2** amends s. 501.142, F.S., to require all retail stores to grant a full refund to a consumer who purchased goods valued at \$1,000 or more and complies, either personally or through his or her representative, with the provisions below:

- Within 3 business days of the purchase, presents to the store both proof of purchase and the purchased goods in their unused and original condition including the original carton, if any; and
- Provides documentation establishing that:
  - The consumer has been adjudicated incapacitated pursuant to ch. 744, F.S., or similar law;
  - The consumer is subject to a guardianship pursuant to ch. 744, F.S., or similar law, and the guardian has authority to determine the consumer’s right to manage property; or
  - The consumer has been diagnosed with a medical condition that causes him or her to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning his or her person or property, and has a power of attorney or durable power of attorney, pursuant to ch. 709, F.S., or similar law in effect.

The bill also requires the DACS to impose an administrative fine of twice the value of the goods purchased if the DACS finds that a person is in violation of this provision.

**Section 3** corrects cross-references in s. 501.95, F.S.

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<sup>14</sup> Sections 709.2102(4), 709.2104, and 709.2109(1)(b) F.S.

<sup>15</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>16</sup> Section 744.3201(1), F.S.

<sup>17</sup> Section 744.102(12), F.S.

<sup>18</sup> Section 744.331(6)(b), F.S.

<sup>19</sup> *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla. 2d DCA 1966).

<sup>20</sup> Section 744.361, F.S., provides the standard powers and duties of a guardian.

**Section 4** provides an effective date of July 1, 2016.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private businesses will be subject to fines as penalties for violations of the bill.

C. Government Sector Impact:

The DACS estimates there will be an insignificant, indeterminate fiscal impact as enforcement is based on consumer complaints. Historically, the DACS has only issued one administrative fine for noncompliance with current consumer returns laws.<sup>21</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

An individual may be adjudicated incapacitated, but retain his or her right to manage his or her property because this right must be specifically delegated to a guardian by a court.<sup>22</sup> Therefore, proposed s. 501.142(2)(c)1., may be broader than necessary.

The Legislature may create a civil cause of action by either an express creation in law, or by implication. Where a statute does not expressly provide for a civil cause of action, a court may

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<sup>21</sup> Department of Agriculture and Consumer Services, *SB 148 Agency Analysis* (September 1, 2015) (on file with the Senate Committee on Commerce and Tourism).

<sup>22</sup> Section 744.3215, F.S.

judicially imply one.<sup>23</sup> To do so, a court must examine the legislature's intent,<sup>24</sup> which may manifest in legislative history, the structure of the statute, or the circumstances of its enactment.<sup>25</sup> An implied cause of action may result where a legislature created a clear duty or right, but did not include a way to enforce the duty or protect the right.<sup>26</sup> However, an implied cause of action will not be found where the statute does not "purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity."<sup>27</sup>

### **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 501.142 and 501.95.

### **IX. Additional Information:**

#### **A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

#### **B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>23</sup> *Murthy v. N. Sinha Corp.*, 664 So. 2d 983 (Fla. 1994).

<sup>24</sup> *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16 (1979); *King v. Florida*, 650 F. Supp 2d 1157 (N.D. Fla. 2009).

<sup>25</sup> *Id.* at 18.

<sup>26</sup> See, e.g. *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979).

<sup>27</sup> *Cf. Moyant v. Beattie*, 561 So. 2d 1319, 1320 (Fla. 4<sup>th</sup> DCA 1990). See also, Fla. Jur. §38 (2015).