

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.)

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

BILL: SB 726

INTRODUCER: Senator Ring

SUBJECT: Consumer Protection

DATE: March 9, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McKay	CM	Pre-meeting
2.	_____	_____	AGG	_____
3.	_____	_____	FP	_____

I. Summary:

SB 726 requires retail stores to allow certain consumers to return purchases of \$1,000 or more for a full refund within 3 days of their purchase if the consumer has been adjudicated incapacitated, 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. The bill also empowers the Department of Agriculture and Consumer Services to enter an order requiring a retail store in violation of the bill to pay restitution to the consumer, and a fine of up to two times the value of the goods purchased.

II. Present Situation:

Consumer Protections

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, and is responsible for overseeing and regulating a range of businesses, including, pursuant to s. 501.142, F.S., refunds, returns, and exchanges at retail stores. Enforcement of s. 501.142, F.S., is based on complaints made directly to the DACS.¹ The DACS has issued only one administrative fine for a violation of s. 501.142, F.S., because retail stores’ generally comply with the law upon the department’s request to do so.²

Currently, s. 501.142, F.S., requires retail stores to clearly post a “no refunds” sign at the point of sale in order to enforce a no refunds policy. If the retail store does not have a posted “no refunds”

¹ Department of Agriculture and Consumer Services, *SB 726 Agency Analysis* (Feb. 24, 2015) (on file with the Senate Committee on Commerce and Tourism).

² *Id.*

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, F.S., which 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.

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.

Incapacity

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 2010.³ 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.⁴

A power of attorney or a durable power of attorney⁵ is a legally binding document that delegates specific authority to an agent to act on a person's behalf.⁶ Powers of attorney are often used by elderly persons to designate someone to handle their financial matters in anticipation of becoming incapacitated.⁷ 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.⁸ While a power of attorney terminates when a person becomes incapacitated, a durable power of attorney does not.⁹ 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."¹⁰ Any adult may petition a court to initiate a petition to determine another's

³ Consumer Financial Protection Bureau, *Protecting Residents from Financial Exploitation, A Manual for Assisted Living and Nursing Facilities* (May 2014) available at http://files.consumerfinance.gov/f/201406_cfpb_guide_protecting-residents-from-financial-exploitation.pdf (last visited 3/9/2015).

⁴ Section 744.331(6)(a), 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."

⁵ See Chapter 709, F.S.

⁶ The Florida Bar, *Florida Power of Attorney Pamphlet*, available at <http://www.floridabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/ab36277c4562e98885256b2f006c5ad6> Last accessed 3/9/2015.

⁷ *Id.*

⁸ *Id.*

⁹ Sections 709.2102(4), 709.2014, and 709.2109(1)(c) F.S.

¹⁰ Black's Law Dictionary (10th ed. 2014).

incapacity.¹¹ 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.”¹² In cases where incapacity has been determined by a court, the court may appoint a guardian, but must pursue lesser restrictive means if possible.¹³ Guardians are governed exclusively by the Florida Statutes, and may exercise for their ward only the enumerated rights that the court removed from the incapacitated person.^{14,15} A guardianship is more actively supervised by the court than a power of attorney, which results in more costs to the individual adjudicated incapacitated.¹⁶

III. Effect of Proposed Changes:

Section 1 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, either personally or through her representative:

- 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; 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.

The bill grants the DACS additional authority to enter an order that requires payment of restitution to the consumer who was refused a refund under the circumstances above and imposes an administrative fine of twice the value of the goods purchased.

Section 2 corrects cross-references.

Section 3 provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹¹ Section 744.331, F.S.

¹² Section 744.102(12), F.S.

¹³ Section 744.331(6), F.S.

¹⁴ *Poling v. City Bank & Trust Co. of St. Petersburg*, 189 So. 2d 176, 182 (Fla. 2d DCA 1966).

¹⁵ Section 744.361, F.S. provides the standard powers and duties of a guardian.

¹⁶ Section 744.108, F.S.

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 this bill.

C. Government Sector Impact:

The Department of Agriculture and Consumer Services estimates that there will be no fiscal impact because enforcement will remain complaint-driven.¹⁷

The administrative authority that the division holds over retail stores is limited to the ability to assess a penalty for a violation of s. 501.142, F.S. Therefore, the division would have to seek enforcement of a restitution order in favor of a consumer aggrieved by the bill in a court of competent jurisdiction. This may result in increased litigation costs to the department.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The “lack of understanding or capacity to make or communicate reasonable decisions concerning one’s person or property” standard is highly subjective and may result in a broader application than anticipated.

An individual may be adjudicated incapacitated, but retain her right to manage her property because this right must be specifically delegated to a guardian by a court.¹⁸ Therefore, proposed section 501.142(2)(c)1. may be broader than necessary.

Prior to October 1, 2011, a durable power of attorney that was contingent on the principal’s incapacity required a doctor’s certification of incapacity to become effective.¹⁹ However, powers of attorney and durable powers of attorney meant to serve the same function are now generally effective once the principal signs the document, and require no doctor’s certification of

¹⁷ Department of Agriculture and Consumer Services, *SB 726 Agency Analysis* (Feb. 24, 2015) (on file with the Senate Committee on Commerce and Tourism).

¹⁸ Section 744.3215, F.S.

¹⁹ The Florida Bar, *Florida Power of Attorney Pamphlet*, available at

<http://www.floridabar.org/tfb/TFBConsum.nsf/840090c16eedaf0085256b61000928dc/ab36277c4562e98885256b2f006c5ad6>

. Last accessed 3/9/2015.

incapacity. As a result, individuals subject to powers of attorney or durable powers of attorney may not be afforded rights under this bill unless they obtain a diagnosis of their capacity to communicate reasonable decisions concerning their person or property.

VIII. Statutes Affected:

This bill substantially amends ss. 501.142 and 501.95, F.S.

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.

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