

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 496

BY SENATOR GAUNCH

[Originating in the Committee on the Judiciary;

reported on March 8, 2017]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §33-4-22, relating generally to guaranteed asset protection waivers; providing
3 short title, scope and legislative intent of section; defining certain terms; specifying
4 requirements for offering guaranteed asset protection waivers; requiring contractual
5 liability or other insurance policies on guaranteed asset protection waivers in certain
6 circumstances; providing for disclosures and cancellation; exempting commercial
7 transactions; providing for enforcement of section and severability; excluding waivers from
8 consumers sales and service tax; specifying effective date of section; and providing for
9 section to apply to guaranteed asset protection waivers issued on and after specified date.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
2 section, designated §33-4-22, to read as follows:

ARTICLE 4. GENERAL PROVISIONS.

§33-4-22. Guaranteed Asset Protection Waivers.

1 (a) Short title; scope. — This section may be cited as the Guaranteed Asset Protection
2 Waiver Act.

3 (b) Purpose. -- The purpose of this section is to provide a framework within which
4 guaranteed asset protection waivers are defined and may be offered within this state.

5 (c) Nonapplication. — This section does not apply to:

6 (1) An insurance policy offered by an insurer under the insurance laws of this state;

7 (2) A debt cancellation or debt suspension contract being offered in compliance with 12
8 CFR, part 37 or 12 CFR, part 721, or other federal law; or

9 (3) A contract or other agreement that obligates a third party to indemnify a creditor may
10 not be considered a guaranteed asset protection waiver under this section but shall be considered
11 insurance under the insurance laws of this state.

12 (d) Waivers not insurance. — Guaranteed asset protection waivers governed by this

13 section are not insurance and are exempt from the insurance laws of this state. Persons
14 marketing, selling or offering to sell guaranteed asset protection waivers to borrowers that comply
15 with this section are exempt from this state's insurance licensing requirement with regard to the
16 marketing, selling or offering to sell guaranteed asset protection waivers.

17 (e) *Legislative intent.* — The Legislature finds that guaranteed asset protection waivers
18 are not insurance. All guaranteed asset protection waivers, as defined in this section, are not
19 insurance and may not be construed as insurance by any person or by any court.

20 (f) *Definitions.* — The following terms are defined for purposes of this section. These terms
21 are not intended to be used or required in guaranteed asset protection waivers.

22 (1) "Administrator" means a person, other than an insurer or creditor, who performs
23 administrative or operational functions pursuant to guaranteed asset protection waiver programs.

24 (2) "Borrower" means a debtor, retail buyer or lessee under a finance agreement.

25 (3) "Creditor" means:

26 (A) The lender in a loan or credit transaction;

27 (B) The lessor in a lease transaction;

28 (C) A retail dealer of motor vehicles licensed under article six, chapter seventeen-a of this
29 code that provides credit to buyers as part of a retail sale, provided the dealer complies with the
30 requirements of this section;

31 (D) The seller in a commercial retail installment transaction; or

32 (E) The assignees of any of the foregoing persons to whom the credit obligation is payable.

33 (4) "Finance agreement" means a loan, lease or retail installment sales contract for the
34 purchase or lease of a motor vehicle.

35 (5) "Free look period" means the period of time from the effective date of the guaranteed
36 asset protection waiver until the date the borrower may cancel the contract without penalty, fees
37 or costs to the borrower. This period of time may not be less than thirty days.

38 (6) "Guaranteed asset protection waiver" or "GAP waiver" means a contractual agreement

39 that is part of, or a separate addendum to, the finance agreement in which a creditor agrees for
40 payment of a separate charge to cancel or waive all or part of amounts due to it on a borrower's
41 finance agreement if there is a total physical damage loss or unrecovered theft of a motor vehicle.

42 (7) "Insurer" means an insurance company required to be licensed, registered, or
43 otherwise authorized to do business under the insurance laws of this state.

44 (8) "Motor vehicle" means a self-propelled or towed vehicle designed for personal or
45 commercial use, including, but not limited to, an automobile, truck, motorcycle, recreational
46 vehicle, all-terrain vehicle, snowmobile, camper, boat or personal watercraft and a trailer used to
47 transport a motorcycle, boat, camper or personal watercraft.

48 (9) "Person" includes an individual, company, association, organization, partnership,
49 limited liability company, business trust, corporation and every form of legal entity.

50 (g) Requirements for offering guaranteed asset protection waivers. —

51 (1) GAP waivers may be offered, sold or provided to borrowers in this state in compliance
52 with this section.

53 (2) GAP waivers may, at the option of the creditor, be sold for a single payment or may be
54 offered with a monthly or periodic payment option.

55 (3) Notwithstanding any other provision of law, any cost to the borrower for a guaranteed
56 asset protection waiver entered into in compliance with the Truth in Lending Act, 15 U. S. C. 1601,
57 et seq., must be separately stated and may not be considered a finance charge or interest.

58 (4) A retail dealer of motor vehicles shall insure its GAP waiver obligations under a
59 contractual liability or other insurance policy issued by an insurer. A creditor, other than a retail
60 dealer of motor vehicles, may insure its GAP waiver obligations under a contractual liability policy
61 or similar policy issued by an insurer. The insurance policy may be directly obtained by a creditor,
62 a retail dealer of motor vehicles or may be procured by an administrator to cover a creditor's or
63 retail dealer's obligations: *Provided*, That retail dealers of motor vehicles that are lessors of motor
64 vehicles are not required to insure obligations related to GAP waivers on leased vehicles.

65 (5) The GAP waiver remains a part of the finance agreement upon the assignment, sale
66 or transfer of the finance agreement by the creditor.

67 (6) The extension of credit, the terms of credit or the terms of the related motor vehicle
68 sale or lease may not be conditioned upon the purchase of a GAP waiver.

69 (7) A creditor that offers a GAP waiver shall report the sale of, and forward funds received
70 on, all GAP waivers to the designated party, if any, as prescribed in any applicable administrative
71 services agreement, contractual liability policy, other insurance policy or other specified program
72 document.

73 (8) Funds received or held by a creditor or administrator and belonging to an insurer,
74 creditor or administrator, pursuant to the terms of a written agreement must be held by the creditor
75 or administrator in a fiduciary capacity.

76 (9) The sale of guaranteed asset protection waiver contracts is the sale of an intangible
77 and the gross proceeds from sale of the contract are not subject to the consumers sales and
78 service tax imposed in article fifteen, chapter eleven of this code.

79 (h) Contractual liability or other insurance policies. —

80 (1) Contractual liability or other insurance policies insuring GAP waivers must state the
81 obligation of the insurer to reimburse or pay to the creditor any sums the creditor is legally
82 obligated to waive under the GAP waivers issued by the creditor and purchased or held by the
83 borrower.

84 (2) Coverage under a contractual liability or other insurance policy insuring a GAP waiver
85 must also cover any subsequent assignee upon the assignment, sale or transfer of the finance
86 agreement.

87 (3) Coverage under a contractual liability or other insurance policy insuring a GAP waiver
88 must remain in effect unless canceled or terminated in compliance with applicable insurance laws
89 of this state.

90 (4) The cancellation or termination of a contractual liability or other insurance policy may

91 not reduce the insurer's responsibility for GAP waivers issued by the creditor prior to the date of
92 cancellation or termination and for which premiums have been received by the insurer.

93 (i) Disclosures. —

94 Guaranteed asset protection waivers must disclose, as applicable, in writing and in clear,
95 understandable language, the following:

96 (A) The name and address of the initial creditor and the borrower at the time of sale and
97 the identity of any administrator if different from the creditor;

98 (B) The purchase price and the terms of the GAP waiver, including, without limitation, the
99 requirements for protection, conditions or exclusions associated with the GAP waiver;

100 (C) That the borrower may cancel the GAP waiver within a free look period as specified in
101 the waiver, and may receive a full refund of the purchase price, so long as no benefits have been
102 provided under the waiver; or if benefits have been provided, the borrower may receive a full or
103 partial refund pursuant to the terms of the GAP waiver;

104 (D) The procedure the borrower must follow, if any, to obtain GAP waiver benefits under
105 the terms and conditions of the waiver, including a telephone number and address where the
106 borrower may apply for waiver benefits;

107 (E) Whether the GAP waiver may be canceled after the free look period and the conditions
108 under which it may be canceled or terminated, including the procedures for requesting any refund
109 due;

110 (F) That in order to receive any refund due if a borrower cancels the GAP waiver
111 agreement or early termination of the finance agreement after the free look period of the GAP
112 waiver, the borrower, in accordance with terms of the waiver, shall provide a written request to
113 cancel to the creditor, administrator or other party as specified in the GAP waiver. If a borrower is
114 canceling the GAP waiver due to early termination of the finance agreement, the borrower shall
115 provide a written request to the creditor, administrator or other party within ninety days of the
116 occurrence of the event terminating the finance agreement;

117 (G) The methodology for calculating any refund of the unearned purchase price of the
118 GAP waiver due if there is cancellation of the GAP waiver or early termination of the finance
119 agreement; and

120 (H) That neither the extension of credit, the terms of the credit, nor the terms of the related
121 motor vehicle sale or lease, may be conditioned upon the purchase of the GAP waiver.

122 (i) Cancellation. —

123 (1) Guaranteed asset protection waiver agreements may be cancellable or noncancelable
124 after the free look period. GAP waivers must provide that if a borrower cancels a GAP waiver
125 within the free look period, so long as no benefits have been provided, the borrower is entitled to
126 a full refund of the purchase price. If benefits have been provided, the borrower may receive a
127 full or partial refund pursuant to the terms of the GAP waiver;

128 (2) If the borrower cancels the GAP waiver or terminates the finance agreement early but
129 after the agreement has been in effect beyond the free look period, the borrower may receive a
130 refund of any unearned portion of the purchase price of the GAP waiver unless the GAP waiver
131 provides otherwise. In order to receive a refund, the borrower, in accordance with any applicable
132 terms of the waiver, shall provide a written request to the creditor, administrator or other party. If
133 the borrower is canceling the GAP waiver due to the early termination of the finance agreement,
134 the borrower shall provide a written request within ninety days of the event terminating the finance
135 agreement;

136 (3) If the cancellation of a GAP waiver occurs as a result of a default under the finance
137 agreement, or the repossession of the motor vehicle associated with the finance agreement, or
138 any other termination of the finance agreement, any refund due may be paid directly to the creditor
139 or administrator and applied as set forth in subdivision (4) of this subsection, below;

140 (4) A cancellation or termination refund under subdivision (1), (2) or (3) of this subsection
141 may be applied by the creditor as a reduction of the amount owed under the finance agreement,
142 unless the borrower can show that the finance agreement has been paid in full.

143 (k) Commercial transaction exempted. — Subsections (g), (h) and (i) of this section do not
144 apply to a guaranteed asset protection waiver offered in connection with a lease or retail
145 installment sale associated with a commercial transaction.

146 (l) Severability. — If any provision of this section, or the application of the provision to any
147 person or circumstance, is held invalid or unenforceable, the remainder of this section, and the
148 application of the provision to any person or circumstance other than those for which is held invalid
149 or unenforceable, is not to be affected.

150 (m) Effective date. — This section shall apply to all guaranteed asset protection waivers
151 which become effective on or after July 1, 2017.