

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **House Bill 2126**

BY DELEGATE WESTFALL

[Introduced February 8, 2017; Referred  
to the Committee on Banking and Insurance then the  
Judiciary.]

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; providing for disclosures and cancellation; exempting  
 6 commercial transactions; providing for enforcement of section and severability; excluding  
 7 waivers from consumers sales and service tax; specifying effective date of section;  
 8 providing for section to apply to guaranteed asset protection waivers issued on and after  
 9 specified date; and authorizing the Insurance Commissioner to impose a civil money  
 10 penalty for all violations of section.

*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, designate §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; or

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.

9 (d) Waivers not insurance. -- Guaranteed asset protection waivers governed by this  
 10 section are not insurance and are exempt from the insurance laws of this state. Persons  
 11 marketing, selling or offering to sell guaranteed asset protection waivers to borrowers that comply

12 with this section are exempt from this state's insurance licensing requirement with regard to the  
13 marketing, selling or offering to sell guaranteed asset protection waivers.

14 (e) *Legislative intent.* -- The Legislature finds that guaranteed asset protection waivers are  
15 not insurance. All guaranteed asset protection waivers issued prior to and after the effective date  
16 of this section are not insurance and may not be construed as insurance by any person or by any  
17 court.

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

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

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

23 (3) "Creditor" means:

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

25 (B) The lessor in a lease transaction;

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

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

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

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

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

36 (6) "Guaranteed asset protection waiver" or "GAP waiver" means a contractual agreement  
37 that is part of or a separate addendum to the finance agreement in which a creditor agrees for a

38 separate charge to cancel or waive all or part of amounts due on a borrower's finance agreement  
39 if there is a total physical damage loss or unrecovered theft of a motor vehicle.

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

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

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

48 (g) Requirements for offering guaranteed asset protection waivers.

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

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

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

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

63 (5) The GAP waiver remains a part of the finance agreement upon the assignment, sale,

64 or transfer of the finance agreement by the creditor.

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

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

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

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

77 (h) Contractual liability or other insurance policies.

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

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

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

88 (4) The cancellation or termination of a contractual liability or other insurance policy may  
89 not reduce the insurer's responsibility for GAP waivers issued by the creditor prior to the date of

90 cancellation or termination and for which premiums have been received by the insurer.

91 (i) Disclosures.

92 (1) Guaranteed asset protection waivers must disclose, as applicable, in writing and in  
93 clear, understandable language, the following:

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

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

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

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

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

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

115 (G) The methodology for calculating any refund of the unearned purchase price of the

116 GAP waiver due if there is cancellation of the GAP waiver or early termination of the finance  
117 agreement; and

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

120 (i) Cancellation.

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

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

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

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

141 (k) Commercial transaction exempted. – Subsections (g), (i) and (k) of this section do not

142 apply to a guaranteed asset protection waiver offered in connection with a lease or retail  
143 installment sale associated with a commercial transaction.

144 (l) *Enforcement.* -- The Insurance Commissioner may take action which is necessary or  
145 appropriate to enforce the provisions of this section and to protect guaranteed asset protection  
146 waver holders in this state. After proper notice and opportunity for hearing, the commissioner  
147 may:

148 (1) Order the creditor, administrator or any other person not in compliance with this section  
149 to cease and desist from further guaranteed asset protection waiver-related activities which are  
150 in violation of this section.

151 (2) Impose a civil money penalty of not more than \$500 per violation and not more than  
152 \$10,000 in the aggregate for all violations of a similar nature. For purposes of this section,  
153 violations are of a similar nature if the violation consist of the same or similar course of conduct,  
154 action or practice, irrespective of the number of times the section, conduct or practice which is  
155 determined to be in violation of this section occurs.

156 (m) *Severability.* -- If any provision of this section, or the application of the provision to any  
157 person or circumstance, is held invalid or unenforceable, the remainder of this section, and the  
158 application of the provision to any person or circumstance other than those for which is held in  
159 valid or unenforceable, is not to be affected.

160 (n) *Effective date.* -- This section shall take effect July 1, 2017, and apply to all guaranteed  
161 asset protection waivers which become effective on or after January 1, 2018.

NOTE: The purpose of this bill is to clarify that guaranteed asset protection waivers are not insurance; to specify terms and conditions under which guaranteed asset protection waiver contracts may be sold in this state; and to provide an exception for commercial transactions. The bill also authorizes the Insurance Commissioner to impose a civil money penalty for all violations of section.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.