

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Introduced

Senate Bill 496

BY SENATOR GAUNCH

[Introduced March 2, 2017; Referred
to the Committee on 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, 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; 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

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

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

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

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

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

(3) "Creditor" means:

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

(B) The lessor in a lease transaction;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(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

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

(i) Disclosures.--

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

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

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

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

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

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

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

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

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

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

(i) Cancellation.--

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

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

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

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

(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 waiver 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 this 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.