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AMENDED

Guidance from Maine Regulators to Automobile Dealers and Guaranteed Asset Protection (GAP) Waiver Administrators

In 2017, the Maine Legislature required the Bureau of Consumer Credit Protection to begin supervising the sale and administration of guaranteed asset protection (GAP) waivers; *see* Title 10 M.R.S. § 1500-H.

The Bureau has now had the opportunity to review GAP waiver contracts from all registered GAP administrators.

Several issues in those contracts have been identified. The most important of those issues, and the Bureau's position on each, are summarized below.

The Bureau's positions set forth below apply to any GAP waiver addenda entered into with consumers after **January 1, 2018**, which is the date made applicable to GAP waivers by Title 10 M.R.S. § 1500-H

1) An automobile dealer or GAP administrator may not avoid responsibility under a waiver contract by claiming that the dealer should have known not to sell the contract.

The best way to illustrate this point is to list language excerpted from some contracts presented to our agency:

"No coverage will be provided if the dealer knew, or should have known, that the covered vehicle was ineligible for coverage under this addendum. If coverage under this addendum is denied because the dealer knew, or should have known, that the covered vehicle was ineligible for coverage, this addendum shall be void, and consumer will receive a full refund of the addendum retail price."

In other words, one party to the contract (the dealer) is stating that the contract is void if that same party (the dealer) knew or should have known that the contract should not be sold in a certain type of transaction.

Our agency first encountered this situation several years ago when a consumer purchased a vehicle at a well-known buy-here, pay-here dealership in Central Maine. Shortly after the purchase, the vehicle was totaled, and the consumer applied for a waiver of the deficiency under a GAP addendum. The administrator initially denied coverage, pointing out that the language of the contract made clear that it would not provide coverage in buy-here, pay-here transactions.

The dealership offered to refund the purchase price. However, our Bureau investigators did not allow that resolution. Rather, they required the dealership to make good on the waiver and extinguish the deficiency balance – the benefit for which the consumer had contracted and paid.

Our agency has seen other language in which the contract states that it is invalid if it's written for a sale in excess of a certain amount, or if it is sold on specific brands of exotic vehicles.

The bottom line? A GAP waiver addendum is *not* a contract between an *administrator* and a consumer. Instead, it is a contract

between the *dealer* and the consumer, by which the dealer (and any entity that takes assignment of the contract) agrees to waive a deficiency remaining after collision insurance pays in full.

The administrator is not a party to the contract; rather, it is an entity that "performs administrative or operational functions pursuant to a waiver program," according to the statute.

Because the dealer is the contracting party, a waiver must not be sold that the dealer is not prepared to honor for the vehicle and terms of the underlying credit transaction. In our view, it is not the responsibility of the buyer to second-guess a dealer that offers to sell a GAP waiver. Refund of the waiver price at some later date is not a sufficient satisfaction of potential loss by the buyer.

To summarize, there should be no limitations or exclusions based on any fact or circumstance that was known or which should have been known by the dealer/seller/lender/assignee ("dealer") at the time of sale of a GAP waiver addendum. An insurer of the GAP waiver may include language in its insurance policy with the dealer denying coverage to the dealer for waivers sold in violation of the insuring agreement, but the dealer (or assignee) cannot deny coverage to the consumer in those circumstances.

2) GAP waivers cannot be sold on leases in Maine

Maine has what may be a unique law from 1991 regarding deficiency balances if a fully-insured, leased vehicle is totaled. The law establishes that under those circumstances, other than the insurance deductible, the consumer's liability is $0. In other words, GAP coverage on leases serves no purpose.

The statute, 11 M.R.S. sub-§2-1221(2), reads as follows:

Casualty to identified goods.

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(2) After delivery in a consumer lease, if the goods are lost or destroyed:

(a). If the lessee is not in default under the lease, the lessee may provide substitute goods of at least equal kind and quality satisfactory to the lessor and continue the lease. Permission to substitute goods may not be unreasonably withheld by the lessor. Any insurance proceeds paid with respect to the goods must be applied to the purchase of the substitute goods; or

(b). At the consumer's option, any insurance proceeds must be paid to the lessor and, in such an instance, the lessee remains liable only for the insurance deductible plus any amounts otherwise due to the lessor because of any prior default by the lessee under the terms of the lease *(emphasis added).*

Because under law there is no deficiency balance "gap" remaining in a fully-insured, leased vehicle that is totaled once insurance proceeds and any applicable deductible are paid, the Bureau does not permit the sale of GAP waivers on leased vehicles in Maine. That exclusion can be accomplished by amending the GAP waiver addendum to add a state-specific section, or by including a state-specific endorsement.

3) Maine law does not permit cancellation fees.

Maine law (10 MRS §1500-H(5)(B)) provides that if a consumer cancels a waiver after the free-look period, the consumer "is entitled to a *pro rata* refund of any unearned portion of the purchase price of the

waiver."

Because the statute does not authorize a cancelation fee, and because such a fee would have the effect of reducing the consumer's recovery under the required *pro rata* method of refunding, such cancellation fees are not permitted.

The Bureau does not have the ability to supersede the terms of a contract entered into prior to the effective date of Maine's GAP law (November 1, 2017). However, this provision and others in the guidance apply to any contracts entered into after that date.

4) The Bureau will not allow unreasonable time limits for the completion of claims.

Many of the initial proposed contracts submitted to the Bureau for review and approval contained relatively short time-frames from the date of loss or the date of insurance settlement, within which the claims process had to be started *and completed*, to avoid having the claim disallowed.

These included provisions that seemingly would allow an administrator to request additional documents from a consumer on Day #89 of a 90-day period, and then deny the claim on Day #91 because the consumer could be deemed to have not submitted a timely, completed claim.

Our requirements here are two-fold: First, there can be no absolute timelines after which a claim will be denied without review of the circumstances that led to the delay. Instead, a consumer must be able to present information to explain or excuse a late filing of a claim, and the administrator must honor reasonable submissions.

Second, additional time must be granted if the administrator makes requests of the consumer for additional information or documentation.

Our rationale behind the first requirement is that the time period after an automobile accident that totals the vehicle may be extremely hectic, through no fault of the consumer. The consumer may have suffered mild or serious injury requiring hospitalization and rehabilitation. The consumer may be required to obtain alternate transportation, for reasons including getting to his or her place of employment. And the insurance claims process, especially in a multiple-vehicle accident, may be complex and time-consuming. For a contract to provide an absolute deadline after which a claim will be denied, without providing an opportunity to extend that time for good cause shown, in our opinion, is unfair.

The second, related issue arises because many contracts define a fully-submitted or complete claim as one in which the consumer has submitted all information – not only that required by the contract, but also any additional information requested by the administrator. In our view, if additional requests are made, any time periods must be extended to allow such reasonable additional time as is necessary for the consumer to locate and provide that information.

5) A GAP waiver may not condition the application for or granting of a waiver on the production of documents by a buyer when such documents are equally available to the dealer.

As in the case or paragraph 1, above, the best way to illustrate our concern here is to cite a specific example: The Bureau has seen several proposed contracts that, by their terms, could be used to deny a consumer's claim outright if the consumer does not, or cannot, produce "*the original window sticker*" for the vehicle.

Although some consumers retain original window stickers once

they have been scraped off the inside of windows, others do not. And still other consumers retain the stickers, but keep them in their vehicles, where they may be destroyed or lost if the vehicles are severely damaged by collision or fire.

Many contracts also require the consumer to produce all original documentation relating to the sale, including the finance agreement, a complete payment history and the GAP addendum itself. These are documents and information that should be in the possession of the dealer. Requiring the consumer to provide such documents or information, and denying a claim in which the consumer cannot provide each item of documentation, serves no purpose other than to place a technical roadblock in the claim process.

We require that administrators use a "reasonableness" standard in all requests of this nature, rather than employing the use of technical requirements for an application for benefit under these contracts as a screening tool to discourage or prevent otherwise legitimate claims. This applies to all items of paperwork or information.

Our reasoning is that, as is stated in paragraph #1, above, the dealer is a party to the contract, and the dealer has or could have equal access to any and all paperwork resulting from the sale of the vehicle or the sale of the GAP waiver that is required to make a claim.

Dated: _____

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