

CONCURRENCE IN SENATE AMENDMENTS

AB 2311 (Maienschein)

As Amended June 30, 2022

Majority vote

SUMMARY

Establishes rights and remedies for consumers who purchase guaranteed asset protection waivers (GAP waivers) when buying a new or used car.

Major Provisions

- 1) Defines "guaranteed asset protection waiver" (GAP waiver) as an optional contractual obligation under which the seller of a motor vehicle agrees, for additional payment, to cancel or waive all or part of amounts due on a conditional sale contract if the vehicle is subject to a total loss or unrecovered theft.
- 2) Requires, prior to the execution of a conditional sale contract, that the seller provide and obtain the buyer's signature on a written disclosure that includes a description and the price of any GAP waiver agreement, and a statement that the GAP waiver is an optional addition to the sales contract.

Senate Amendments

Increase the price cap on GAP waivers from 2% to 4% of the amount borrowed; permit sales of GAP waivers that do not cover the full amount borrowed if this fact is conspicuously disclosed to the buyer and acknowledged in writing; define the method by which the refund of any unearned GAP waiver charges is to be calculated; change the time in which the refund must occur from 25 business days to 60 business days; provide for notice to the buyer by additional means if the GAP waiver agreement is assigned; clarify the role of any third party GAP waiver administrator; and modify the text of a mandatory disclosure to potential purchasers.

COMMENTS

GAP waivers are meant to protect car owners whose vehicles are declared a total loss after an accident, or are stolen and unrecovered, while the owner still owes money on the loan used to purchase the car. Low-income owners might be unable to afford comprehensive auto insurance that includes GAP coverage, and instead purchase the minimum liability policy required under law. In this situation, the owner may be doubly harmed in the event of a wreck or theft. They will no longer have a vehicle to drive, and because they are still repaying the loan, they cannot obtain financing to buy a replacement vehicle.

To address this risk, car buyers, particularly low-income car buyers, often purchase GAP waivers: add-on products to auto loan contracts under which the lender agrees to waive some or all of the remaining balance on the car loan if the car is subject to a total loss or is stolen and never recovered. The full cost of the GAP waiver is included as an upfront add-on charge for the vehicle, and the buyer makes interest payments on the cost of the waiver over the life of the loan. GAP waivers are generally sold in the indirect-lending context, in which dealers originate auto loans at the time of sale, and then sell the conditional sale contract governing the purchase and financing of the car, to a third-party lender.

Even though they resemble insurance products, GAP waivers sold by dealers are carved out from regulation under the Insurance Code. But there is no corresponding statute setting forth the specific responsibilities of sellers and lenders and the rights of buyers of GAP waivers.

Consequently, purchasers of GAP waivers are often subject to significant consumer abuses. This bill, sponsored by Attorney General Rob Bonta, is meant to address common abuses and thereby fill the gap in GAP waiver regulation under California law. If this bill were enacted, California would join at least 15 other states (Alabama, Colorado, Indiana, Minnesota, Missouri, Nevada, New Jersey, Oregon, South Carolina, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming) that offer statutory protections for buyers of GAP waivers.

Before turning to this bill's substance, it is important to note that nearly every one of this bill's provisions is equivalent to one or more currently-existing laws in the states listed above. As such, automobile dealers and financial institutions are already complying with equivalent laws in many other states.

What this bill would do. Broadly speaking, this bill would offer car buyers four categories of protections:

- 1) *Ensure any unearned amounts that car buyers pay for GAP waivers are promptly and automatically refunded if they pay off their loans early or cancel GAP coverage.*

Perhaps this bill's most important feature is its requirement that, if a car buyer paid off their loan early or canceled their GAP waiver, then the holder would be required to refund them the unearned balance of any prepaid GAP waiver charges, including any precomputed or accrued interest. The bill also makes clear that car buyers have the right to cancel their GAP waivers, with no cancellation fees, at any time.

To illustrate how this would work, assume a consumer borrows \$20,000 from a dealer to buy a car, including \$700 for a GAP waiver and precomputed interest on the waiver's cost. Under this bill, if the buyer cancels the GAP waiver within 30 days of purchase, the holder must automatically refund the full \$700 to the buyer. If the buyer pays off the loan in full or cancels at a later date – say, several years later, after repaying the first \$10,000 of the principal – then they would be refunded \$350, that is, the pro rata amount of the total cost of the GAP waiver and related initial charges. This is logical, as the buyer no longer needs a GAP waiver if they have paid off their loan. Under either option (cancellation within the first 30 days, or afterwards), the holder would have to provide the refund to the buyer within **60** business days. However, if the buyer still owes money on the car loan, instead of providing a direct refund, the holder could instead apply the refund amount to cancel an equal portion of the loan.

Note that the right to cancel a GAP waiver and to obtain a refund already exists under long-established contract law doctrines, such as unjust enrichment. But most car buyers are unaware of these rights, and it is not worth the expense of finding an attorney to recover a few hundred dollars. Making the right to cancel explicit, and any refunds automatic, ensures that buyers are given the money that they are rightly owed.

- 2) *Provide car buyers with important disclosures.*

This measure would mandate that car buyers be provided the following disclosures at the time of purchase:

- a) The GAP waiver is an optional addition to the conditional sale contract.
- b) Purchase of a GAP waiver cannot be required in order to get a loan, particular loan terms, or a certain purchase price.
- c) The cost of the GAP waiver, itemized as a separate add-on item.
- d) The responsibility of the holder for all obligations to the buyer under the GAP waiver
- e) The name and mailing address of any third-party GAP waiver administrator known at the date of the sale.

This is all crucial information. Without the first three disclosures, consumers could easily be misled into purchasing GAP waivers that they neither want nor need. Without the last two disclosures, owners whose cars are totaled or stolen and unrecovered might find themselves unable to obtain financial assistance, and those who seek to cancel their GAP waivers may not know whom to contact in order to request cancellation.

3) *Prohibit unfair pricing of GAP waivers.*

The cost of GAP waiver currently is not limited by law. In order to prevent waivers that are unlikely to benefit buyers, this bill would require as follows:

- a) The cost of the GAP waiver would be capped at 4% of the underlying loan's principal amount.

Under the earlier example, a GAP waiver covering a \$20,000 loan could cost the buyer no more than \$800 upfront.

- b) Any GAP waiver sold cannot cover less than the amount financed through the auto loan unless this fact is conspicuously disclosed in a writing acknowledged by the buyer.

In the example above, either the GAP waiver would have to cover the full \$20,000 borrowed when the car was purchased or the buyer would have acknowledge in writing having been informed that the waiver will not cover the full amount.

- c) No GAP waiver could be sold if the amount financed for the car purchase—not including the charge for the GAP waiver, credit insurance, and any service contracts—is 70% or less than the car's value. In other words, buyers who are able to come up with down payments of 30% or more of the car's value would not be eligible to purchase GAP waivers.

In the example above, assuming the car buyer did not purchase credit insurance or a service contract, \$19,300 of the principal borrowed would go towards the car purchase. To meet the 70% loan-to-value requirement under this bill, the car's value would have to be at least \$27,571 for the purchase to be eligible for a GAP waiver. This provision is meant to safeguard consumers from buying low-value GAP waivers.

4) *Provide for enforcement under the Automobile Sales Finance Act.*

The Automobile Sales Finance Act, Civil Code Sections 2981 to 2984.6, has for decades provided a private right of action against car dealers and holders of conditional sale contracts that violate its provisions. By codifying the protections listed above in ASFA, this bill would ensure that injured consumers, as well as attorneys for the public, such as the Attorney General's Office and district attorneys, have a meaningful ability to enforce its provisions. Enforcement both helps ensure that dealers and holders comply with the bill's provisions and deters wrongdoing.

According to the Author

Despite their name, GAP waivers hardly provide the bare minimum protections for the car buyer. This bill will ensure that car buyers are covered through stricter consumer protection laws, helping them avoid this costly add-on when necessary.

Arguments in Support

Attorney General Rob Bonta explains how this bill would help car buyers:

Without specific consumer protections, unfair practices in the sale and administration of GAP waivers enable auto dealers and lenders to take advantage of vulnerable consumers and harm competition. GAP waivers are usually very costly. The product only benefits consumers who are underwater on their auto loan at the time that a triggering event occurs. In addition, the full cost of a GAP waiver is charged up front and typically financed at a high interest rate. [...] Accordingly, AB 2311 would establish a number of consumer protections for GAP waivers within the Rees-Levering Act (Civil Code § 2981 et seq.) First, the bill requires the prompt refund of the unearned, prepaid GAP waiver charges when the loan or waiver agreement terminates early, as specified. Second, the bill caps the amount that may be charged for a GAP waiver relative to the loan amount, and seeks to restrict partial waivers and valueless waivers from being sold as GAP waivers. Third, AB 2311 requires the seller to make important disclosures to consumers regarding GAP waivers, including that the product is optional and cannot be a condition to the loan or sale terms. Finally, the bill makes violations of these provisions enforceable under the Rees-Levering Act.

Arguments in Opposition

No opposition on file.

FISCAL COMMENTS

According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

VOTES:

ASM JUDICIARY: 7-1-2

YES: Stone, Holden, Kalra, Maienschein, Reyes, Robert Rivas, Luz Rivas

NO: Davies

ABS, ABST OR NV: Cunningham, Mathis

ASM APPROPRIATIONS: 11-4-1

YES: Holden, Bryan, Calderon, Mike Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Wilson

NO: Bigelow, Megan Dahle, Davies, Fong

ABS, ABST OR NV: Carrillo

ASSEMBLY FLOOR: 52-16-10

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Bloom, Boerner Horvath, Mia Bonta, Bryan, Calderon, Carrillo, Cervantes, Cooley, Cunningham, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Petrie-Norris, Quirk, Ramos, Reyes, Luz Rivas, Robert Rivas, Blanca Rubio, Salas, Santiago, Stone, Ting, Villapudua, Waldron, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon

NO: Bigelow, Chen, Megan Dahle, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Nguyen, Patterson, Seyarto, Smith, Valladares, Voepel

ABS, ABST OR NV: Berman, Choi, Cooper, Daly, Gray, Grayson, Mayes, O'Donnell, Quirk-Silva, Rodriguez

SENATE FLOOR: 32-0-8

YES: Allen, Archuleta, Atkins, Becker, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

ABS, ABST OR NV: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Nielsen, Wilk

UPDATED

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CONSULTANT: Jith Meganathan / JUD. / (916) 319-2334

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