

SUPERINTENDENT OF INSURANCE
John G. Franchini 505-827-4299



DEPUTY SUPERINTENDENT
Robert Doucette 505-827-5832

NEW MEXICO | OFFICE OF
SUPERINTENDENT
OF INSURANCE

Bulletin 2018-011
July 31, 2018

FILED
2018 JUL 31 PM 3:24
NEW MEXICO
OFFICE OF
SUPERINTENDENT
OF INSURANCE

**TO: CONSUMERS, AUTOMOBILE DEALERS, AND COMPANIES AUTHORIZED
TO TRANSACT INSURANCE IN NEW MEXICO**

**RE: REGULATION OF GUARANTEED ASSET PROTECTION PRODUCTS BY THE
NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE**

THE FOLLOWING BULLETIN is issued pursuant to NMSA 1978, § 59A-2-8, and 13.1.2.8
NMAC *et seq.*

This Bulletin is issued to differentiate between GAP Insurance and GAP Waivers, and to clarify the general regulation of GAP Products by the Office of Superintendent of Insurance (“OSI”).

Background

When a consumer leases, or finances the purchase of, a vehicle, it is not uncommon for the balance owed under the lease or finance agreement to exceed the insured value of the vehicle. This occurs because most vehicles depreciate in value faster than the amount owed under a lease or finance agreement is reduced by periodic payments. The difference between the amount owed by the consumer under a lease or finance agreement, and the amount the consumer would receive from a property and casualty (“P&C”) insurer if the vehicle is totaled or stolen, is commonly referred to as the “gap balance due”. With the advent of zero down loans, extended term leases/financing, and escalating vehicle costs, a consumer who purchases or leases a vehicle confronts the possibility of a significant gap balance, which the consumer will remain obligated to pay to a lender or lessor even after a P&C insurer pays a total or theft loss claim on the vehicle.

Types of GAP Products

To avoid having to pay the gap balance due, a consumer can purchase any one of several Guaranteed Asset Protection (“GAP”) products. Some P&C insurers offer GAP protection as a supplemental coverage for an additional charge. Under these types of GAP products, the P&C insurer typically pays the full balance due under a lease or finance agreement regardless of the market value of the insured vehicle when a total or theft loss occurs. This Bulletin refers to these products as “**P&C GAP Insurance**”.

A consumer may also be offered a certificate of GAP insurance as part of the vehicle purchase or lease transaction. This product is offered directly by a vehicle dealer under a master policy of GAP

Main Phone: 505-827-4601
Main Fax: 505-827-4734
Toll Free: 1-855-4-ASK-OSI

Mailing Address:
P.O. Box 1689
Santa Fe, NM 87504-1689

Physical Address:
1120 Paseo de Peralta
Santa Fe, NM 87501

Website: WWW.OSI.STATE.NM.US

insurance purchased by the dealer. This product, like P&C GAP Insurance, will pay the gap balance due after a P&C insurer pays a total loss or theft claim. However, this product provides no P&C coverage for damage to or theft of a vehicle. This Bulletin refers to these products as “**Stand Alone GAP Insurance**”.

A third type of product is a GAP waiver. This product is an optional addendum to a vehicle finance or lease agreement. The addendum obligates the dealer/creditor to waive collection of the gap balance due on the finance or lease contract if the financed or leased vehicle is deemed a total loss by a P&C insurer. This Bulletin refers to these products as “**GAP Waivers**”.

Regulation of GAP Products

The OSI has received inquiries from consumers, dealers and insurers concerning its regulation of each type of GAP product. Specifically, consumers, dealers and insurers have asked whether, and if so, how, OSI regulates each GAP product. This Bulletin provides general answers to those questions.

The main, if not sole, purpose of both P&C GAP Insurance and a Stand Alone GAP Insurance contract is to transfer risk. As such, these are both insurance products that are regulated by OSI.

P&C GAP Insurance

OSI enforces a well-established regulatory scheme with respect to vehicle P&C insurance policies. Insurers who offer such policies are generally well versed in their obligations under the regulatory scheme, and the OSI has not received any inquiries concerning its regulatory authority over such policies with respect to GAP insurance issues. That being so, the OSI will not address any regulatory issues relating to such policies in this Bulletin, other than to note that the applicable Insurance Code provisions and regulations are the same regardless of whether a vehicle P&C insurance policy includes P&C GAP Insurance.

Stand Alone GAP Insurance

The 2016 revisions of the Insurance Code, which became effective July 1, 2017, identify “gap” as a form of casualty insurance that can permissibly be sold in New Mexico. NMSA (1978), § 59A-7-6(A)(26). This product is subject to the same Insurance Code provisions as every other kind of casualty insurance identified in NMSA (1978), § 59A-7-6(A).

Insurers offering Stand Alone GAP Insurance have also raised the question of whether a vehicle dealer who holds a master policy of Stand Alone GAP Insurance can be licensed to sell certificates of insurance under that policy. NMSA (1978), § 59A-12-2(I) defines a “limited lines credit insurance producer” as a person who sells “limited line credit insurance coverage to individuals through a master, corporate, group or individual policy” Under NMSA (1978), § 59A-12-18(A), a limited insurance producer license is available to individual applicants employed by a vendor of merchandise or other property. Stand Alone GAP Insurance is a limited line product

under NMSA (1978), § 59A-12-2(H). Under NMSA (1978), § 59A-12-18(A), only an “individual” who is employed by a vendor of merchandise can obtain a license to sell a limited line product. It follows that a dealer who sells or leases vehicles to consumers cannot qualify for a license to sell Stand Alone GAP Insurance.

GAP Waivers

OSI asserts no regulatory authority over GAP Waivers. OSI’s regulatory authority extends to matters “conferred by or reasonably implied by the Insurance Code”, including “insurance” products. NMSA 1978, § 59A-2-8(C). A GAP Waiver purchased as part of a vehicle finance or lease agreement is not an insurance product as that concept is defined in New Mexico law. NMSA 1978, § 59A-2-8(C). The Insurance Code, at NMSA 1978, § 59A-1-5, defines “insurance” as:

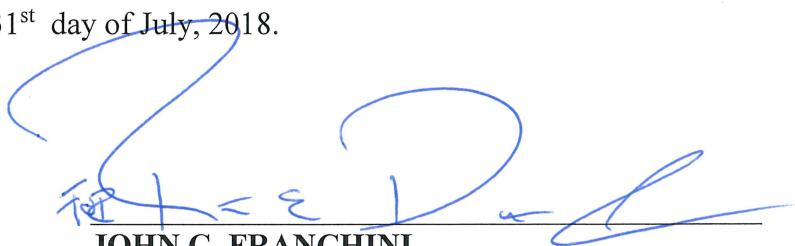
a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies, or to act as surety.

New Mexico applies a “principal object and purpose” test to determine whether a transaction involves “insurance”. See *Guest v. Allstate Ins. Co.*, 2010-NMSC-047, 149 N.M. 74. Under that test, a contract that has, as its principal object and purpose, shifting a risk of loss through indemnification will constitute “insurance.” Conversely, a contract under which risk shifting is only incidental to some other principal object and purpose will not constitute “insurance”.

When a GAP Waiver is offered as an addendum to a finance or lease contract, the main purpose of the transaction is to allow a consumer to acquire a vehicle. Because the principal object and purpose of a vehicle finance or lease agreement is not the transfer of risk relating to a gap balance due, the OSI does not view a GAP Waiver purchased as part of a vehicle finance or lease agreement as an insurance product subject to its regulatory authority.

Please direct your questions regarding this bulletin to Vicente Vargas, at 505-476-0333, or via e-mail to vicente.vargas@state.nm.us

DONE and ORDERED this 31st day of July, 2018.



JOHN G. FRANCHINI
Superintendent of Insurance