

# Evolving trends in the regulation of ancillary vehicle protection products

When buying or leasing a new car, additional products may be offered, but they are not traditional insurances.

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Financial and insurance firms, insurance producers and motor vehicle retailers offer, market, sell and administer a myriad of ancillary protection products in the motor vehicle space. Although they're not a substitute for automobile insurance, ancillary vehicle protection products may offer coverage in the event of a natural disaster (such as flood or hail damage), financial problem (such as unemployment or disability), crime (vehicle vandalism or theft), or a motor vehicle accident. The most common ancillary vehicle protection products are:

- **Guaranteed Asset Protection (GAP)** — In the event that a motor vehicle is a total loss due to an accident or theft, GAP generally covers the amount between the vehicle's current value (which is covered by a traditional auto policy) and the outstanding balance on the loan collateralized by the vehicle.
- **Credit Insurance** — Credit insurance products provide assistance with a purchaser's auto loan payments to the purchaser's auto finance lender in certain situations, such as if the purchaser dies or becomes disabled.
- **Vehicle Service Contracts** — Often referred to as "extended warranties," vehicle service contracts cover parts and labor in the event of mechanical breakdown or manufacturer's defects.

The regulation of ancillary vehicle protection products varies widely depending on the state and product in question. Many ancillary vehicle protection products are regulated as "quasi-insurance" products. For example, most states regulate such products through their insurance departments, but the majority of states expressly exclude vehicle service contracts from their insurance code's statutory definition of insurance. Many states even have separate licensing and financial security requirements that apply to vehicle service contract obligors offering products to consumers.

The regulation of ancillary vehicle protection products at the state level has been a somewhat predictable factor for the financial and insurance firms, insurance producers and motor vehicle/truck retailers that operate in the space (though state regulation continues to evolve and change like any other regulated industry).

State regulation has evolved in a somewhat foreseeable manner, but recent attempts at federal legislative and regulatory oversight over ancillary vehicle protection products have been anything but predictable as Democrats on Capitol Hill have raised questions about the extent to which ancillary vehicle protection products are or should be subject to federal oversight.

## Congressional interest

As the 116th U.S. Congress convened earlier this year, with Democrats taking a majority in the House of Representatives, Rep. Maxine Waters (D-Calif.) became chair of the House Committee on Financial Services. Chairwoman Waters has long been a champion of promoting what she argues are protections for consumers in the marketplace. Notably, this past May, the House Committee on Financial Services' Subcommittee on Oversight and Investigations held a hearing titled, "Examining Discrimination in the Automobile Loan and Insurance Industries."

Ancillary vehicle protection products industry professionals paid close attention to the hearing, as the Majority Staff's memo announcing the hearing indicated the potential for tough questions and direct scrutiny of ancillary vehicle protection products.

For example, the memo referred to "[p]redatory practices used by dealers to drive up profits, including inconsistent, opaque pricing of often 'mandatory' add-on products with questionable utility and value, such as service contracts and GAP (guaranteed asset protection) insurance." This concerned many providers of ancillary vehicle protection products, as the industry has long fought allegations that its products are "predatory," "mandatory" or of "questionable utility and value." The memo also implied a possible correlation between a consumer's purchase of ancillary vehicle protection products and difficulty in making timely auto loan payments. The memo stated, "For example, research by the Center for Responsible Lending ('CRL') showed that the likelihood of late payment was higher (14% versus 8%) where consumers were sold multiple add-on products as compared to the likelihood of late payment where no add-on products were purchased."

At the hearing, most of the questions that members of the subcommittee directed to the witnesses related to:

- (1) alleged disparities in auto insurance pricing (including the use of non-driving factors in the underwriting process), and
- (2) alleged discrimination in the consumer auto financing space.

Ancillary vehicle protection products executives were pleased when the hearing adjourned with no negative comments or questions on GAP, credit insurance or vehicle service contracts. But that doesn't mean that businesses engaged in the marketing, sale and servicing of ancillary vehicle protection products can fully exhale just yet.

### Consumer Financial Protection Bureau regulation?

First, the recent push by Rep. Waters is by no means the first attempt by Democrats in recent history to assert more regulatory control over ancillary vehicle protection products. Under the Obama Administration, questions were raised about whether the Consumer Financial Protection Bureau (CFPB) could regulate ancillary vehicle protection products. As a general matter, the "business of insurance" is not subject to regulation by the CFPB. However, many state insurance codes expressly provide that ancillary vehicle protection products are not insurance or are subject to very limited parts of a state's insurance code, even though state insurance regulators maintain at least some oversight of such products. The classification of such products as non-insurance products (or only quasi-insurance products) potentially exposes them to the CFPB's jurisdiction because they are likely not covered under the "business of insurance" exception to the CFPB's jurisdiction.

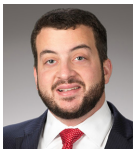
In order for the CFPB to meaningfully regulate ancillary vehicle protection products, the CFPB would generally have to promulgate new regulations that make those products "covered financial products" subject to CFPB regulation.

There is one exception, however. An obligor whose ancillary vehicle protection product is financed by a consumer auto loan is a "service provider" of the covered lender, which grants the CFPB regulatory authority over such obligor as if it were a CFPB-covered person. Under the Trump Administration, which has taken numerous actions that have meaningfully reduced the CFPB's power, promulgation of such regulations seems highly unlikely.

Even though the prospect of greater CFPB scrutiny of ancillary vehicle protection products seems unlikely at present, the same arguments identified previously as to why the CFPB may have jurisdiction over ancillary vehicle protection products may be used by Democrats in Congress to push for greater federal legislative scrutiny of such products. For example, Democrats may argue that ancillary vehicle protection products are not true insurance products, and therefore do not enjoy the limited federal legislative or regulatory oversight expressly guaranteed to insurance products under the McCarran-Ferguson or Dodd-Frank Acts. Democrats may use such an argument as the basis for calling additional, potentially acrimonious hearings examining the business of ancillary vehicle protection products.

Moving forward, the ancillary vehicle protection products industry would be wise to remain focused on ensuring that business is conducted in full compliance with existing legal and regulatory requirements, especially anti-discrimination and unfair trade practice laws.

Given the current climate on Capitol Hill, allegations of discrimination or unfair trade practices in the ancillary vehicle protection products industry would make it a ripe target for more hearings. Finally, the ancillary vehicle protection products industry must remain focused on proposed legislative and regulatory activity in the space and remain engaged to ensure that the industry's voice is heard when proposed changes are being negotiated.



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