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Refunds of GAP and Other Voluntary Protection Products—a Federal UDAAP Issue?

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If you thought that a finance company's obligation to automatically credit a consumer's account for prorated fees for GAP or any other voluntary protection product depended on the product's contract or even the applicable state law, it's time to think again.

Auto dealerships offer a variety of VPPs, like GAP waivers, service contracts, paintless dent repair, theft-deterrent products, tire and wheel coverage, windshield repair, replacement key fobs, and many more. These products can last for a set time period (such as a 48-month service contract), for the life of the financing (like most GAP contracts), or for as long as the customer owns the car. VPPs are popular with many consumers, and they are often an important source of revenue for dealers.

VPPs have at least a couple of things in common. First, their purchase is optional; that's why they are called voluntary protection products. Second, they have a contract that addresses the scope of the coverage and other issues, like whether the consumer is entitled to cancel and get a refund and, if so, how to do it. Beyond that, the rules are all over the road, so to speak.

This article is about refunds. Let's start with GAP waivers. Some state laws require GAP contracts to have a 30-day "free look" period, entitling the buyer to a full refund if the contract is cancelled within that period. After that time, state laws might entitle the buyer to get a prorated refund if the financing contract or lease ends early. Some states make it a matter of contract, so if the GAP contract says the provider will issue a refund for cancellation after the "free look" period, that contractual provision will control. Other states are silent on the issue. If a refund is due, the rules that control giving the refund vary from state to state. Some states say that the consumer must contact the dealer who sold the GAP policy. Others say that the consumer should contact the holder of the financing contract. Some say that the consumer must apply for a refund. In other states, the refund is automatic. The answer can even depend on whether the financing was a direct loan or indirect financing. (Thank you, Massachusetts, for not making the answer too easy!)

State legislatures often carefully consider the scheme they want to adopt, preferring one approach or another for their residents. Some states opt to leave the decision up to the contract governing the terms of the deal. If the contract provides for a refund, how is that done? Does the contract tell the consumer to seek a refund from the dealer, the GAP administrator, or the creditor?

Once we move from GAP to other products, it is even more likely that the state law is silent and the contract controls. Of course, the availability of cancellation and a refund can depend on the product. Something that is permanent, like some theft deterrents and appearance products, can't be cancelled.

In short, the answer to the refund question, and how to claim it, differs by product type, by state law, and by the provider's contract.

But the Consumer Financial Protection Bureau has now declared that it—not the states or the product contracts—should decide these answers for GAP.

Careful readers of the CFPB's *Supervisory Highlights* learned of this decision in the CFPB's Spring 2022 issue. In case you missed it, here's the new rule, regardless of what any other legal authority we thought controlled the answer has said:

It is an unfair practice for an auto servicer to fail to request refunds from third-party administrators for "unearned" fees related to GAP products and to fail to apply the applicable refunds to accounts after repossession and cancellation of the contracts.

You will see that this rule is limited to GAP and to contracts that end due to repossession. But why does the CFPB apply this UDAAP unfairness theory only to GAP that ends when the servicer repossesses a vehicle? The CFPB doesn't provide a rationale, which leaves open the distinct risk that it would apply the same rule to other VPPs whenever a contract ends early, whether due to repossession, trade in, refinancing, or another reason. The discussion only says that because the consumer no longer has the vehicle covered by GAP, GAP no longer provides benefits. However, GAP no longer provides benefits any time the contract ends early, whatever the reason.

Further, many other VPPs can cease providing benefits when the consumer sells or trades in the car. Without an explanation as to why the CFPB applies this rule only to GAP that ends due to repossession, we can hardly feel confident that the CFPB's newly applied unfairness theory is limited to these situations.

You may recall that an important element of any unfairness claim is that the consumer cannot reasonably avoid the injury. The CFPB argues, unpersuasively to my ears, that consumers cannot reasonably avoid the injury of not receiving a credit against a deficiency in the amount of the refund. Why, you ask? The CFPB says that the injury is not avoidable because the consumers "had no control over the servicers' refund processing actions" and "generally could not apply for such refunds themselves because they were unaware that the contract provided they could do so."

This makes no sense. The servicer repossessed the car, not the consumer's copy of the contract. Nothing prevents a consumer who experiences a repossession from requesting a refund and, if the refund is sent to the servicer instead of to the consumer, directing the servicer to apply it to the consumer's account. If the real issue is that the CFPB thinks consumers don't read the contracts that tell them how to request a refund for GAP or any other VPP financed by a contract that ends early, maybe the CFPB is right. Consumers can misplace paperwork or fail to read it. But that is quite different from concluding that, as a matter of law, consumers *cannot* reasonably know what their VPP contract says. If that's the case, can we ever hold a consumer to a signed contract?

But here is a mistake that no servicer wants to make—and it is important that procedures are buttoned down on this point. If the servicer *does* request a refund from the administrator, receives it, and puts the refund in its own pocket rather than applying it to the consumer's account, that is a serious problem. The refund belongs to the consumer, either in cash or credited to the account, including a credit to any deficiency balance.

At a minimum, this is one more action to put on a repossession checklist: Was there a GAP contract on the financing for the repossessed car? If so, and if the administrator makes a refund to the servicer, be sure the consumer is credited with the refund.

Does this mean we have to worry about crediting only GAP refunds when a vehicle is repossessed? Do we have to worry about refunds for other VPPs? Must we affirmatively request and apply a refund for any VPP when a contract ends early, even if the state law or VPP contract says that the duty lies elsewhere? The CFPB does not answer these questions, but its reasoning hints that we may read in a future issue of *Supervisory Highlights* that not following the rule that the CFPB prefers for any aspect of VPP refunds is unfair. Rewriting state laws that the CFPB dislikes—*that* does not seem fair!

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com