S T A T E O F N E W Y O R K

5731

2011-2012 Regular Sessions

I N S E N A T E

June 14, 2011

Introduced by Sen. SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the personal property law and the banking law, in relation to guaranteed asset protection waivers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The personal property law is amended by adding a new article 13 to read as follows:

ARTICLE 13

GUARANTEED ASSET PROTECTION WAIVERS

SECTION 555. SCOPE.
556. DEFINITIONS.
557. REQUIREMENTS FOR OFFERING GUARANTEED ASSET PROTECTION WAIVERS.
558. CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICIES.
559. DISCLOSURES.
560. CANCELLATION.
561. COMMERCIAL TRANSACTIONS EXEMPTED.
562. ENFORCEMENT.
563. INTENT.
564. SEVERABILITY.

S 555. SCOPE. 1. THE PURPOSE OF THIS ARTICLE IS TO PROVIDE A FRAMEWORK WITHIN WHICH GUARANTEED ASSET PROTECTION WAIVERS ARE DEFINED AND MAY BE OFFERED WITHIN THIS STATE.

2. THIS ARTICLE DOES NOT APPLY TO:

(A) AN INSURANCE POLICY OFFERED BY AN AUTHORIZED INSURER UNDER THE INSURANCE LAWS OF THIS STATE; OR

(B) A DEBT CANCELLATION OR DEBT SUSPENSION CONTRACT BEING OFFERED IN COMPLIANCE WITH 12 CFR PART 37 OR 12 CFR PART 721 OR OTHER FEDERAL LAW.

3. NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW, GUARANTEED ASSET PROTECTION WAIVERS GOVERNED UNDER THIS ARTICLE DO NOT CONSTITUTE INSUR-

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD13042-01-1

ANCE AS DEFINED IN SECTION ONE THOUSAND ONE HUNDRED ONE OF THE INSURANCE LAW. PERSONS MARKETING, SELLING OR OFFERING TO SELL GUARANTEED ASSET PROTECTION WAIVERS TO BORROWERS THAT COMPLY WITH THIS ARTICLE ARE NOT AGENTS, BROKERS, OR INTERMEDIARIES AS DEFINED IN SECTION TWO THOUSAND ONE HUNDRED ONE OF THE INSURANCE LAW AND ARE NOT DOING AN INSURANCE BUSINESS AS PROVIDED UNDER SECTION ONE THOUSAND ONE HUNDRED ONE OF THE INSURANCE LAW.

S 556. DEFINITIONS. THE FOLLOWING TERMS ARE DEFINED FOR PURPOSES OF THIS ARTICLE AND ARE NOT INTENDED TO PROVIDE ACTUAL TERMS REQUIRED IN GUARANTEED ASSET PROTECTION WAIVERS.

1. "ADMINISTRATOR" MEANS A PERSON, OTHER THAN AN AUTHORIZED INSURER OR CREDITOR THAT PERFORMS ADMINISTRATIVE OR OPERATIONAL FUNCTIONS PURSUANT TO GUARANTEED ASSET PROTECTION WAIVER PROGRAMS.

2. "AUTHORIZED INSURER" MEANS AN INSURANCE COMPANY LICENSED, REGISTERED, OR OTHERWISE AUTHORIZED TO DO BUSINESS IN THIS STATE AS DEFINED IN SECTION THREE HUNDRED ONE OF THIS CHAPTER.

3. "BORROWER" MEANS A DEBTOR, RETAIL BUYER OR LESSEE, UNDER A FINANCE AGREEMENT.

4. "CREDITOR" MEANS:

(A) THE LENDER IN A LOAN OR CREDIT TRANSACTION;

(B) THE LESSOR IN A LEASE TRANSACTION;

(C) ANY "RETAIL SELLER", AS DEFINED IN SECTION THREE HUNDRED ONE OF THIS CHAPTER OR "RETAIL LESSOR" AS DEFINED IN SECTION THREE HUNDRED THIRTY-ONE OF THIS CHAPTER, OF MOTOR VEHICLES THAT PROVIDES CREDIT TO "RETAIL BUYERS", AS DEFINED IN SECTION THREE HUNDRED ONE OF THIS CHAPTER OR "RETAIL LESSEE" AS DEFINED IN SECTION THREE HUNDRED THIRTY-ONE OF THIS CHAPTER, OF SUCH MOTOR VEHICLES PROVIDED THAT SUCH ENTITIES COMPLY WITH THE PROVISIONS OF THIS SECTION;

(D) THE SELLER IN COMMERCIAL RETAIL INSTALLMENT TRANSACTIONS; OR

(E) THE ASSIGNEES OF ANY OF THE FOREGOING TO WHOM THE CREDIT OBLIGATION IS PAYABLE.

5. "FINANCE AGREEMENT" MEANS A LOAN, LEASE OR RETAIL INSTALLMENT SALES CONTRACT FOR THE PURCHASE OR LEASE OF A MOTOR VEHICLE.

6. "FREE LOOK PERIOD" MEANS THE PERIOD OF TIME FROM THE EFFECTIVE DATE OF THE GAP WAIVER UNTIL THE DATE THE BORROWER MAY CANCEL THE CONTRACT WITHOUT PENALTY, FEES OR COSTS TO THE BORROWER. THIS PERIOD OF TIME MUST NOT BE SHORTER THAN THIRTY DAYS.

7. "GUARANTEED ASSET PROTECTION WAIVER" OR "GAP WAIVER" MEANS A CONTRACTUAL AGREEMENT WHEREIN A CREDITOR AGREES, FOR A SEPARATE CHARGE, TO CANCEL OR WAIVE THE GAP AMOUNT AS DEFINED IN SUBDIVISION FIFTEEN OF SECTION THREE HUNDRED THIRTY-ONE OF THIS CHAPTER DUE ON A BORROWER'S FINANCE AGREEMENT IN THE EVENT OF A TOTAL PHYSICAL DAMAGE LOSS OR UNRECOVERED THEFT OF THE MOTOR VEHICLE, WHICH AGREEMENT MUST BE PART OF, OR A SEPARATE ADDENDUM TO, THE FINANCE AGREEMENT. GAP AMOUNT SHALL HAVE THE SAME MEANING AS SET FORTH IN SUBDIVISION FIFTEEN OF SECTION THREE HUNDRED THIRTY-ONE OF THIS CHAPTER, BUT SHALL NOT BE DEEMED TO INCLUDE ANY AMOUNTS ACTUALLY REFUNDED FROM OTHER SOURCES.

8. "MOTOR VEHICLE" MEANS SELF PROPELLED OR TOWED VEHICLES DESIGNED FOR PERSONAL OR COMMERCIAL USE, INCLUDING BUT NOT LIMITED TO AUTOMOBILES, TRUCKS, MOTORCYCLES, RECREATIONAL VEHICLES, ALL TERRAIN VEHICLES, SNOWMOBILES, CAMPERS, BOATS, PERSONAL WATERCRAFT, AND MOTORCYCLE, BOAT, CAMPER AND PERSONAL WATERCRAFT TRAILERS.

9. "PERSON" INCLUDES AN INDIVIDUAL, COMPANY, ASSOCIATION, ORGANIZATION, PARTNERSHIP, BUSINESS TRUST, CORPORATION, AND EVERY FORM OF LEGAL ENTITY.

S 557. REQUIREMENTS FOR OFFERING GUARANTEED ASSET PROTECTION WAIVERS. NOTWITHSTANDING ANY CONTRARY PROVISION OF LAW:

1. GAP WAIVERS MAY BE OFFERED, SOLD OR PROVIDED TO BORROWERS IN THIS STATE IN COMPLIANCE WITH THIS CHAPTER.

2. GAP WAIVERS MAY, AT THE OPTION OF THE CREDITOR, BE SOLD FOR A SINGLE PAYMENT OR MAY BE OFFERED WITH A MONTHLY OR PERIODIC PAYMENT OPTION.

3. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, ANY COST TO THE BORROWER FOR A GUARANTEED ASSET PROTECTION WAIVER ENTERED INTO IN COMPLIANCE WITH THE TRUTH IN LENDING ACT (15 USC 1601 ET. SEQ.) AND ITS IMPLEMENTING REGULATIONS, AS THEY MAY BE AMENDED FROM TIME TO TIME, MUST BE SEPARATELY STATED AND IS NOT TO BE CONSIDERED A FINANCE CHARGE OR INTEREST.

4. A RETAIL SELLER MUST INSURE ITS GAP WAIVER OBLIGATIONS UNDER A CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICY ISSUED BY AN AUTHORIZED INSURER. A CREDITOR, OTHER THAN A RETAIL SELLER, MAY INSURE ITS GAP WAIVER OBLIGATIONS UNDER A CONTRACTUAL LIABILITY POLICY OR OTHER SUCH POLICY ISSUED BY AN AUTHORIZED INSURER. ANY SUCH INSURANCE POLICY MAY BE DIRECTLY OBTAINED BY A CREDITOR, RETAIL SELLER, OR MAY BE PROCURED BY AN ADMINISTRATOR TO COVER A CREDITOR'S OR RETAIL SELLER'S OBLIGATIONS. HOWEVER RETAIL SELLERS THAT ARE LESSORS ON MOTOR VEHICLES ARE NOT REQUIRED TO INSURE OBLIGATIONS RELATED TO GAP WAIVERS ON SUCH LEASED VEHICLES.

5. THE GAP WAIVER REMAINS A PART OF THE FINANCE AGREEMENT UPON THE ASSIGNMENT, SALE OR TRANSFER OF SUCH FINANCE AGREEMENT BY THE CREDITOR.

6. NEITHER THE EXTENSION OF CREDIT, THE TERM OF CREDIT, NOR THE TERM OF THE RELATED MOTOR VEHICLE SALE OR LEASE MAY BE CONDITIONED UPON THE PURCHASE OF A GAP WAIVER.

7. ANY CREDITOR THAT OFFERS A GAP WAIVER MUST REPORT THE SALE OF, AND FORWARD FUNDS RECEIVED ON ALL SUCH WAIVERS TO THE DESIGNATED PARTY, IF ANY, AS PRESCRIBED IN ANY APPLICABLE ADMINISTRATIVE SERVICES AGREEMENT, CONTRACTUAL LIABILITY POLICY, OTHER INSURANCE POLICY OR OTHER SPECIFIED PROGRAM DOCUMENTS.

8. FUNDS RECEIVED OR HELD BY A CREDITOR OR ADMINISTRATOR AND BELONGING TO AN AUTHORIZED INSURER, CREDITOR OR ADMINISTRATOR, PURSUANT TO THE TERMS OF A WRITTEN AGREEMENT MUST BE HELD BY SUCH CREDITOR OR ADMINISTRATOR IN A FIDUCIARY CAPACITY.

9. A RETAIL SELLER MUST, AT THE TIME OF OFFERING ANY GAP WAIVER, ALSO DISCLOSE ALTERNATIVE PRODUCTS INCLUDING PRODUCTS OFFERED UNDER SECTION THREE THOUSAND FOUR HUNDRED TWENTY-SEVEN OF THE INSURANCE LAW. THE RETAIL SELLER IS NOT REQUIRED TO BE LICENSED UNDER THE INSURANCE LAWS, RULES, OR REGULATIONS IN ORDER TO DISCLOSE SUCH ALTERNATIVE PRODUCTS.

S 558. CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICIES.

1. CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICIES INSURING GAP WAIVERS MUST STATE THE OBLIGATION OF THE AUTHORIZED INSURER TO REIMBURSE OR PAY TO THE CREDITOR ANY SUMS THE CREDITOR IS LEGALLY OBLIGATED TO WAIVE UNDER THE GAP WAIVERS ISSUED BY THE CREDITOR AND PURCHASED OR HELD BY THE BORROWER.

2. COVERAGE UNDER A CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICY INSURING A GAP WAIVER MUST ALSO COVER ANY SUBSEQUENT ASSIGNEE UPON THE ASSIGNMENT, SALE OR TRANSFER OF THE FINANCE AGREEMENT.

3. COVERAGE UNDER A CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICY INSURING A GAP WAIVER MUST REMAIN IN EFFECT UNLESS CANCELLED OR TERMINATED IN COMPLIANCE WITH APPLICABLE INSURANCE LAWS OF THIS STATE.

4. THE CANCELLATION OR TERMINATION OF A CONTRACTUAL LIABILITY OR OTHER INSURANCE POLICY MUST NOT REDUCE THE AUTHORIZED INSURER'S RESPONSIBILITY FOR GAP WAIVERS ISSUED BY THE CREDITOR PRIOR TO THE DATE OF CANCELLATION

OR TERMINATION AND FOR WHICH PREMIUM HAS BEEN RECEIVED BY THE AUTHORIZED INSURER.

S 559. DISCLOSURES. GUARANTEED ASSET PROTECTION WAIVERS MUST DISCLOSE, AS APPLICABLE, IN WRITING AND IN CLEAR, UNDERSTANDABLE LANGUAGE THAT IS EASY TO READ, THE FOLLOWING:

1. THE NAME AND ADDRESS OF THE INITIAL CREDITOR AND THE BORROWER AT THE TIME OF SALE, AND THE IDENTITY OF ANY ADMINISTRATOR IF DIFFERENT FROM THE CREDITOR.

2. THE PURCHASE PRICE AND THE TERMS OF THE GAP WAIVER, INCLUDING WITHOUT LIMITATION, THE REQUIREMENTS FOR PROTECTION, CONDITIONS, OR EXCLUSIONS ASSOCIATED WITH THE GAP WAIVER.

3. THAT THE BORROWER MAY CANCEL THE GAP WAIVER WITHIN A FREE LOOK PERIOD AS SPECIFIED IN THE WAIVER, AND WILL BE ENTITLED TO A FULL REFUND OF THE PURCHASE PRICE, SO LONG AS NO BENEFITS HAVE BEEN PROVIDED; OR IN THE EVENT BENEFITS HAVE BEEN PROVIDED, THE BORROWER MAY RECEIVE A FULL OR PARTIAL REFUND PURSUANT TO THE TERMS OF THE WAIVER.

4. THE PROCEDURE THE BORROWER MUST FOLLOW, IF ANY, TO OBTAIN GAP WAIVER BENEFITS UNDER THE TERMS AND CONDITIONS OF THE WAIVER, INCLUDING A TELEPHONE NUMBER AND ADDRESS WHERE THE BORROWER MAY APPLY FOR WAIVER BENEFITS.

5. WHETHER OR NOT THE GAP WAIVER IS CANCELLABLE AFTER THE FREE LOOK PERIOD AND THE CONDITIONS UNDER WHICH IT MAY BE CANCELLED OR TERMINATED INCLUDING THE PROCEDURES FOR REQUESTING ANY REFUND DUE.

6. THAT IN ORDER TO RECEIVE ANY REFUND DUE IN THE EVENT OF A BORROWER'S CANCELLATION OF THE GAP WAIVER AGREEMENT OR EARLY TERMINATION OF THE FINANCE AGREEMENT AFTER THE FREE LOOK PERIOD OF THE GAP WAIVER, THE BORROWER, IN ACCORDANCE WITH TERMS OF THE WAIVER, MUST PROVIDE A WRITTEN REQUEST TO CANCEL TO THE CREDITOR, ADMINISTRATOR OR SUCH OTHER PARTY, WITHIN NINETY DAYS OF THE OCCURRENCE OF THE EVENT TERMINATING THE FINANCE AGREEMENT.

7. THE METHODOLOGY FOR CALCULATING ANY REFUND OF THE UNEARNED PURCHASE PRICE OF THE GAP WAIVER DUE, IN THE EVENT OF CANCELLATION OF THE GAP WAIVER OR EARLY TERMINATION OF THE FINANCE AGREEMENT.

8. THAT NEITHER THE EXTENSION OF CREDIT, THE TERMS OF THE CREDIT, NOR THE TERMS OF THE RELATED MOTOR VEHICLE SALE OR LEASE, MAY BE CONDITIONED UPON THE PURCHASE OF THE GAP WAIVER.

S 560. CANCELLATION. 1. GUARANTEED ASSET PROTECTION WAIVER AGREEMENTS MAY BE CANCELLABLE OR NON-CANCELLABLE AFTER THE FREE LOOK PERIOD. GAP WAIVERS MUST PROVIDE THAT IF A BORROWER CANCELS A WAIVER WITHIN THE FREE LOOK PERIOD, THE BORROWER WILL BE ENTITLED TO A FULL REFUND OF THE PURCHASE PRICE, SO LONG AS NO BENEFITS HAVE BEEN PROVIDED; OR IN THE EVENT BENEFITS HAVE BEEN PROVIDED, THE BORROWER MAY RECEIVE A FULL OR PARTIAL REFUND PURSUANT TO THE TERMS OF THE WAIVER.

2. IN THE EVENT OF A BORROWER'S CANCELLATION OF THE GAP WAIVER OR EARLY TERMINATION OF THE FINANCE AGREEMENT, AFTER THE AGREEMENT HAS BEEN IN EFFECT BEYOND THE FREE LOOK PERIOD, THE BORROWER MAY BE ENTITLED TO A REFUND OF ANY UNEARNED PORTION OF THE PURCHASE PRICE OF THE WAIVER UNLESS THE WAIVER PROVIDES OTHERWISE. IN ORDER TO RECEIVE A REFUND, THE BORROWER, IN ACCORDANCE WITH ANY APPLICABLE TERMS OF THE WAIVER, MUST PROVIDE A WRITTEN REQUEST TO THE CREDITOR, ADMINISTRATOR OR OTHER PARTY, WITHIN NINETY DAYS OF THE EVENT TERMINATING THE FINANCE AGREEMENT.

3. IF THE CANCELLATION OF A GAP WAIVER OCCURS AS A RESULT OF A DEFAULT UNDER THE FINANCE AGREEMENT OR THE REPOSSESSION OF THE MOTOR VEHICLE ASSOCIATED WITH THE FINANCE AGREEMENT, OR ANY OTHER TERMINATION OF THE FINANCE AGREEMENT, ANY REFUND DUE MAY BE PAID DIRECTLY TO THE CREDITOR OR ADMINISTRATOR AND APPLIED AS SET FORTH IN SUBDIVISION FOUR.

4. ANY CANCELLATION REFUND UNDER SUBDIVISIONS ONE, TWO OR THREE OF THIS SUBDIVISION, MAY BE APPLIED BY THE CREDITOR AS A REDUCTION OF THE AMOUNT OWED UNDER THE FINANCE AGREEMENT, UNLESS THE BORROWER CAN SHOW THAT THE FINANCE AGREEMENT HAS BEEN PAID IN FULL.

S 561. COMMERCIAL TRANSACTIONS EXEMPTED. SUBDIVISION THREE OF SECTION FIVE HUNDRED FIFTY-SEVEN AND SECTIONS FIVE HUNDRED FIFTY-NINE AND FIVE HUNDRED SIXTY-TWO OF THIS ARTICLE ARE NOT APPLICABLE TO A GUARANTEED ASSET PROTECTION WAIVER OFFERED IN CONNECTION WITH A LEASE OR RETAIL INSTALLMENT SALE ASSOCIATED WITH A COMMERCIAL TRANSACTION.

S 562. ENFORCEMENT. THE SUPERINTENDENT OF FINANCIAL SERVICES MAY TAKE ACTION WHICH IS NECESSARY OR APPROPRIATE TO ENFORCE THE PROVISIONS OF THIS SECTION AND TO PROTECT GUARANTEED ASSET PROTECTION WAIVER HOLDERS IN THIS STATE. AFTER PROPER NOTICE AND OPPORTUNITY FOR HEARING, SUCH SUPERINTENDENT MAY:

1. ORDER THE CREDITOR, ADMINISTRATOR OR ANY OTHER PERSON NOT IN COMPLIANCE WITH THIS SECTION TO CEASE AND DESIST FROM FURTHER GUARANTEED ASSET PROTECTION WAIVER-RELATED OPERATIONS WHICH ARE IN VIOLATION OF THIS SECTION.

2. IMPOSE A PENALTY OF NOT MORE THAN FIVE HUNDRED DOLLARS ($500.00) PER VIOLATION AND NO MORE THAN TEN THOUSAND DOLLARS ($10,000) IN THE AGGREGATE FOR ALL VIOLATIONS OF SIMILAR NATURE. FOR PURPOSES OF THIS SECTION, VIOLATIONS MUST BE OF A SIMILAR NATURE IF THE VIOLATION CONSISTS OF THE SAME OR SIMILAR COURSE OF CONDUCT, ACTION OR PRACTICE, IRRESPECTIVE OF THE NUMBER OF TIMES THE SECTION, CONDUCT OR PRACTICE WHICH IS DETERMINED TO BE A VIOLATION OF THE SECTION OCCURRED.

S 563. INTENT. THE LEGISLATURE FINDS THAT GUARANTEED ASSET PROTECTION WAIVERS ARE NOT INSURANCE. ALL GUARANTEED ASSET PROTECTION WAIVERS ISSUED PRIOR TO AND AFTER THE DATE OF ENACTMENT OF THIS SECTION SHALL NOT BE CONSTRUED AS INSURANCE.

S 564. SEVERABILITY. IF ANY PROVISION OF THIS SECTION, OR THE APPLICATION OF THE PROVISION TO ANY PERSON OR CIRCUMSTANCES, IS HELD INVALID, THE REMAINDER OF THE SECTION, AND THE APPLICATION OF THE PROVISION TO ANY PERSON OR CIRCUMSTANCES OTHER THAN THOSE AS TO WHICH IT IS HELD INVALID, IS NOT TO BE AFFECTED.

S 2. Section 357 of the banking law is amended by adding a new subdivision 8 to read as follows:

8. A LICENSEE MAY OFFER TO A BORROWER A GUARANTEED ASSET PROTECTION WAIVER AS DEFINED IN ARTICLE THIRTEEN OF THE PERSONAL PROPERTY LAW.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.