

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

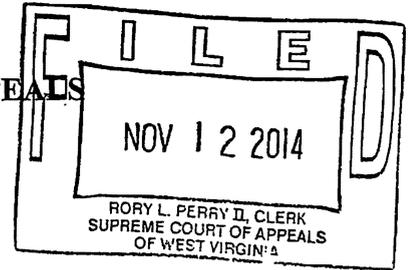
STATE OF WEST VIRGINIA
EX REL SAFE-GUARD PRODUCTS
INTERNATIONAL, LLC

Petitioner,

THE HONORABLE MIKI THOMPSON,
ROBIN L. HINKLE,

Respondents.

Upon Original Jurisdiction
in Prohibition, No. 14-1134



RESPONDENT MIKI THOMPSON'S SUMMARY RESPONSE
TO PETITIONER'S PETITION FOR WRIT OF PROHIBITION

QUESTIONS PRESENTED

1. Whether the Circuit Court clearly erred as a matter of law in finding that the Safe-Guard Guaranteed Asset Protection Plan (“GAP Agreement”) was “insurance” under West Virginia Code § 33-1-1 *et seq.*

STANDARD

Article VIII, § 3 of the West Virginia Constitution grants the Supreme Court of Appeals original jurisdiction in prohibition. Pursuant to West Virginia Code § 53-1-1, “The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.”

Traditionally, writs of prohibition are used primarily to challenge jurisdiction of lower courts, and are used as an extraordinary remedy, to be rarely granted only when a lower court abuses its legitimate powers. *See, generally, State ex rel. State Of West Virginia Dept. of Transp., Div. Of Highways v. Cookman*, 639 S.E.2d 693, 219 W.Va. 601 (2006), *State ex rel. Sexton v. Vickers*, 619 S.E.2d 215, 217 W.Va. 702 (2005), and *State ex rel. Bell & Bands, PLLC v. Kaufman*, 584 S.E.2d 574, 213 W.Va. 718 (2003).

Finally, “A writ of prohibition may not be used as a substitute for writ of error, appeal, or certiorari.” *State ex rel. Brooks v. Zakaib*, 609 S.E.2d 861, 216 W.Va. 600 (2004).

ARGUMENT

Pursuant to Rule 16(h) R.A.P., Respondent respectfully requests this Honorable Court dismiss Petitioner’s Writ of Prohibition without oral argument. Specifically, the Petition is not appropriate for review and the lower court did not clearly err as a matter of law in its October 16, 2014 order (attached hereto and incorporated as Exhibit A). Petitioner erroneously states in its

Petition that Respondent, in the October 16, 2014 order, ruled that all debt cancellation agreements are to be regulated as “insurance” under West Virginia law. This order clearly states that GAP Agreements, not all debt cancellation agreements, are to be regulated as “insurance” in West Virginia.

A. Petitioner’s Petition for Writ of Prohibition request for relief is premature.

The case related to the instant Petition is currently set for trial in the Circuit Court of Mingo County for the 4th day of December, 2014. The Petitioner admits on pages twenty-six (26) and twenty-seven (27) of its Petition that it seeks a ruling by your Court on this issue before trial so that it will not have to appeal an adverse decision after trial in the future. The Supreme Court in *State ex. Rel Brooks v. Zakaib*, supra, ruled that a writ of prohibition may not be used as a substitute for an appeal. The Petitioner, thus, is inappropriately and prematurely attempting have the highest court in West Virginia resolve the issue of whether Safe-Guard’s GAP Agreement is “insurance” under West Virginia law.

Under the five factor test outlined in *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996),¹ only factor five has any apparent relevance to the issue raised by the Petitioner. Regarding the first factor of the *Berger* test, the Petitioner, should it have an adverse judgment at trial, would have adequate means to obtain its requested relief. Further, if the Petitioner’s outcome at trial is favorable, they have no reason to appeal.

¹ “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Regarding the second factor, the Petitioner argues that it will be damaged and/or prejudiced. In this instance, the Petitioner prematurely decides it will be damaged or prejudiced. In doing so, the Petitioner assumes that it will receive an adverse judgment at trial. While it is not required that the Petitioner first go through trial before seeking a writ of prohibition,² Petitioner's prediction is inappropriate given the lack of factual findings on the record in the related case, a role reserved for the jury at trial.

B. Safe-Guard's GAP Agreement is "Insurance" Under West Virginia Law.

Under the *Berger* test, the third factor, whether the lower court's order is clearly erroneous as a matter of law, is given the most weight. The Petitioner admits there is no clear guidance from your Honorable Court regarding the issue. It also attempts to mischaracterize the lower court's October 16, 2014 order as applying to *all* debt cancellation agreements. While courts in several states have found that debt cancellation agreements should not be regulated as "insurance," the Southern District of West Virginia in *Justice v. BB&T*, 2009 U.S. Dist. LEXIS 24668 (S.D.W. Va. 2009) found that nothing in either federal law or the law of West Virginia precludes a finding that certain debt cancellation agreements constitute an insurance product.

Further, no cases throughout other states the deal specifically with the issue of whether GAP Agreements should be regulated as insurance. The Petitioner, without providing the relevant cases in its briefs to the lower court or the instant Petition, argues that the majority of states do not regulate debt cancellation agreements as insurance. It does, however, assert that the West Virginia Office of the Insurance Commissioner, in informational letter no. 171, finds that debt cancellation agreements are not insurance. This is incorrect. The informational letter refers

² "A party seeking relief by prohibition is not required, as a prerequisite to his right to proceed by prohibition, first to go through a trial or hearing in the lower court or tribunal." *State ex rel. City of Huntington v. Lombardo*, 143 S.E.2d 535, 541, 149 W. Va. 671, 679, (1965), citing *State, etc. v. Muntzing*, 146 W.Va. 349, 359, 120 S.E.2d 260, 266 (1961).

specifically to financial services relating to the banking industry. It in no way contemplates GAP Agreements sold to purchasers of automobiles, such as the one at issue in the instant Petition.

The lower court's October 16, 2014 order makes several conclusions of law, none of which meet the "clearly erroneous" standard required for review of the instant Petition. Specifically, the lower court found:

24. West Virginia Code § 33-1-1 defines insurance as "a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies."

25. "Indemnity" is defined as "a duty to make good any loss, damage, or liability incurred by another." Black's Law Dictionary, 9th Ed. 2009. Likewise, "indemnify" means: (a) to reimburse for a loss suffered because of a third party's or one's own act or default, (b) to promise to reimburse for such a loss, and (3) to give security against such a loss. Black's Law Dictionary, 9th Ed. 2009.

26. "Generally, an insurance policy sets forth an agreement between parties whereby the insured agrees to pay a specified premium, and, in exchange, the insurer agrees to indemnify the insured against the type of losses contemplated within the terms of the policy yet unknowable at its issuance." *McDaniel v. Kleiss*, 503 S.E.2d 840, 846 (W.Va. 1998).

27. "In construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the parties." Syl. Pt. 2, *Sellers v. Owens-Illinois Glass Co.*, 191 S.E.2d 166 (W.Va. 1972).

28. The Court **FINDS** that the “GAP Insurance” agreement describes itself as a Safe-Gap Total Loss Protection Plan and does not state that it is insurance. However, the agreement operates as insurance and was represented by Mr. Waugh to be insurance. Moreover, the parties in the hearing acquiesced to and/or adopted the terms “GAP Insurance” and/or “GAP Plan” in attributing a name to the agreement at issue.

29. The Court **FINDS** that in exchange for the four-hundred ninety-five dollar (\$495) premium, the “dealer/assignee” would indemnify the Plaintiff upon the event her vehicle would be rendered a total loss.

30. The Court **FINDS** that “reimbursement” or “compensation” includes more than just a payment of moneys. It includes a waiver of debt in the “GAP Insurance” agreement at issue.

31. The Court further **FINDS** that the “GAP Insurance” agreement constitutes “insurance” under W. Va. Code § 33-1-1 et seq.

See Exhibit A, p. 11-12.

In making these findings, the lower court in no way ignores constitutional, statutory, or case law, usurps power, or abuses its power. The Petitioner, thus, has not shown that the lower court’s October 16, 2014 order is clearly erroneous as a matter of law.

C. Factors Four and Five of the Berger Test Do Not Warrant Review of Petitioner’s Petition for Writ of Prohibition.

The lower court’s October 16, 2014 order finding that Safe-Guard’s GAP Agreement is insurance under West Virginia law is not an oft-repeated error, nor does it manifest persistent disregard for procedural or substantive law. The lack of legal guidance regarding debt cancellation agreements, the vast majority of which are not GAP Agreements, such as the one at

issue, is indicative of the rarity such agreements become an issue under West Virginia law. One can speculate why GAP Agreements do not regularly present legal issues, but this is not the appropriate forum for such speculation.

Finally, the only factor in the *Berger* test that may have any bearing on your Honorable Court's decision is factor five: whether the lower court's order raises new and important problems or issues of law of first impression. It is true that the question presented in the instant Petition is one of first impression. Because consideration of the other four factors suggests that the instant Petition does not merit review by your Honorable Court, however, the Respondent requests that this Court denies the instant Petition.

CONCLUSION

WHEREFORE, Respondent Miki Thompson prays that this Court denies Petitioner's Petition for Writ of Prohibition, or, in the alternative, finds that Safe-Guard's GAP Agreement is "Insurance" Under West Virginia Law.

Respectfully submitted on this the 10th day of November, 2014.

Respondent,



Honorable Miki Thompson
Circuit Judge, 30th Judicial Circuit
P.O. Box 1198
Williamson, WV 25661
Phone: (304) 235-0343
Fax: (304) 235-0342

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

ROBIN L. HINKLE,

Plaintiff,

v.

CASEY JOE MATTHEWS, et al.,

Defendants.

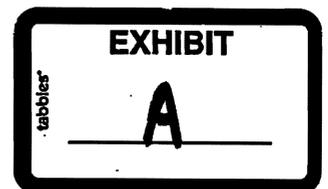
Civil Action No.: 12-C-202
Judge Miki Thompson

2014 OCT 16 P 4:23
COURT REPORTER

ORDER

On the 21st day of August 2014, came the Defendant, Santander Consumer, USA, Inc. (“Defendant Santander”), by and through counsel, Daniel J. Konrad, and the Plaintiff, Robin L. Hinkle, by and through counsel, Howard M. Persinger, III, for arguments on Defendant Santander’s Motion for Summary Judgment and Plaintiff’s Motion for Partial Summary Judgment, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, pertaining to Plaintiff’s claims for breach of contract, violation of West Virginia’s Unfair Trade Practices Act, WV Code § 33-11-1 *et seq.*, common law bad faith, declaratory judgment, and punitive damages.

The Motions have been fully briefed and after hearing the arguments of the parties, by counsel, and reviewing the record in this case, relevant statutory authority, and case law, the Court hereby **DENIES IN PART** and **GRANTS IN PART** Defendant’s Motion and **GRANTS** Plaintiff’s Motion, based on the following findings of fact and conclusions of law, to-wit:



I. Findings of Fact

1. On July 14, 2006, Plaintiff and the Defendant, Johnny L. Hinkle (“Defendant Hinkle” and Plaintiff’s former husband), purchased a 2006 Monte Carlo (the “vehicle”) from C&O Motors, Inc. (the “dealership”) in St. Albans, West Virginia. The Hinkles financed the purchase of said vehicle by entering into a Retail Installment Contract and Security Agreement with the dealership, which provided for a total vehicle price of twenty-thousand five-hundred fifty-two dollars and seventy cents (\$20,552.70) with nineteen-thousand seven-hundred eighteen dollars and twenty cents (\$19,718.20) to be financed over a period of seventy-two (72) months at a yearly annual percentage rate of fourteen and one-quarter percent (14.25%) with monthly payments of four-hundred eleven dollars and seventy-eight cents (\$411.78).

2. The name of the salesman employed by the dealership who sold the Hinkles the vehicle was Paul L. Waugh.

3. During the course of the purchase, the Hinkles were asked by Mr. Waugh if they wanted to purchase “GAP Insurance” (AKA a “Safe-Gap Total Loss Protection Plan”) for an additional four-hundred ninety-five dollars (\$495) and the Hinkles purchased said “GAP Insurance” on July 14, 2006.

4. The “GAP Insurance” was marketed by Defendant Safe-Guard Products International, LLC (“Defendant Safe-Guard”).

5. “GAP Insurance” is also known as a “Guaranteed Asset Protection Plan” or a “deficiency waiver addendum.”

6. The general purpose of “GAP Insurance” is to relieve payment of the amount owed on a vehicle if it is ever totaled and more was owed for the vehicle than its value.

7. The Plaintiff testified that, at the time of the sale, Mr. Waugh was rushing her and her husband by “throwing all these documents at us and saying . . . here read them . . .” She further stated, “it was late in the day, it was raining, it was time to close, and if I remember correctly I looked over [the GAP Insurance Agreement] really quick and that’s all.” Plaintiff also testified that she asked questions of Mr. Waugh, including asking for clarification on the point of “if there was an accident . . . whatever the insurance didn’t pay, we wouldn’t owe any more money on the loan,” to which Mr. Waugh responded to her, “yes, that is what it does.”

8. On the first page of the “Gap Insurance” agreement, under “Coverage,” the contract provides:

The named Customer is responsible to the named Dealer/Assignee under the terms of the described Installment Sales Contract/Loan/Lease Agreement for the amount of any early termination liability resulting from a Total Loss of the Vehicle. Due to this Addendum being in effect, the Dealer/Assignee agrees to cancel a portion of the Customer’s indebtedness in the event of a Total Loss of the Vehicle as defined herein.

The Deficiency Waiver Addendum will waive the amount equal to the Unpaid Net Balance less the Actual Cash Value (ACV) of the Vehicle, both as defined herein, subject to the ACV not having been reduced by more than \$1,000 as a result of the application of the Customer’s primary insurance deductible. Any deductible amount in excess of \$1,000 remains the Customer’s responsibility. There is no deductible coverage available for (a) vehicles financed or leased in Arkansas or (b) vehicles leased in Illinois. It is further agreed that the maximum claim payment is limited to \$50,000.

9. The Definitions section of the “GAP Insurance” agreement defines Actual Cash Value to mean “. . .the retail value of the covered vehicle on the Date of Loss, prior to its physical damage or theft, as determined by the primary insurance carrier. . .”

10. The Definitions section of the “GAP Insurance” agreement defines Total Loss to mean “[] a total or constructive total loss as defined by the individual Customer’s primary automobile physical damage carrier. . .”

11. The Definitions section of the “GAP Insurance” agreement defines Unpaid Net Balance to mean:

[T]he amount owed by the Customer to clear the outstanding Installment Sales Contract/Loan/Lease account as of Date of Loss subject to Paragraph 2(b). This Amount shall not include any and all unearned and/or future interest or rental charges, finance or lease charges, late charges, delinquent payments, deferred payments, uncollected service charges, refundable prepaid taxes and fees, disposition fees, termination fees, penalty fees or any proceeds which may be recovered by canceling any insurance coverages, service contracts and/or warranties, credit life, accident and health insurance or other cancelable items.

12. The Plaintiff testified that when she later looked over the documents she had signed, she was unable to comprehend the undefined technical language terms contained in the definition of Unpaid Net Balance.

13. On April 23, 2013, Plaintiff’s counsel took the deposition of Gary W. Volino, the Chief Operating Officer of Defendant Safe-Guard, who was offered by Safe-Guard as its corporate representative in response to Plaintiff’s Notice of Deposition.

14. Mr. Volino testified that, generally, following a financed sale of a vehicle, the dealer assigns or transfers the “loan package,” which would include a purchased Safe GAP Total Loss Protection Plan (AKA “GAP Insurance”) to a third-party lender who then assumes the loan in turn for a cash payment to the dealer.

15. The “GAP Insurance” amount was added to the total amount financed by the Hinkles and thus became part of the “loan package.”

16. Upon the execution of the Retail Installment and Security Agreement (the “note” and part of the “loan package”), City Financial Auto Credit, Inc. (“Citi”) was to become the holder of the note.

17. Subsequently, Citi assigned its right in the Note to Defendant Santander, and Defendant Santander began servicing the note.

18. On June 1, 2011, Plaintiff was involved in an automobile accident with Defendant Casey Matthews (“Defendant Matthews”), in which the Vehicle was rendered a total loss by State Farm Mutual Automobile Insurance Company (“State Farm”), Plaintiff’s primary automobile insurance carrier.

19. At the time of Plaintiff’s accident, Plaintiff owed a balance on the vehicle in the amount of eleven-thousand nine-hundred eighty-three and eighty-one cents (\$11,983.81).

20. As a result of the vehicle being totaled, State Farm remitted the amount of seven-thousand two-hundred eighty-five and fifty cents (\$7,285.50) to Defendant Santander in satisfaction of the insurance claim for loss of property, leaving a deficiency balance on the note of four-thousand six-hundred ninety-eight and thirty-one cents (\$4,698.31)(the “deficiency”).

21. The Plaintiff subsequently contacted Defendant Safe-Guard and submitted a claim to cover the deficiency. Coverage under the “GAP Insurance” agreement was denied by Defendant Safe-Guard due to delinquent payments, deferred payments, and late charges she incurred during the life of the note.

22. The note was later re-amortized to five-thousand two-hundred eighty-three and sixty-eight cents (\$5,283.68) to reflect what the balance of the note would have been had there been no delinquent payments, deferred payments, or late charges.

23. Defendant Santander subsequently denied coverage under the “GAP Insurance” agreement.

24. In its Motion for Summary Judgment, Defendant Santander argues, *inter alia*, that it is not obligated or bound by the terms of the “GAP Insurance” agreement because it is a subsequent assignee of the original Installment Sales Contract. Defendant Santander cited section 2(d) of the “GAP Insurance” agreement to justify its position that it is not obligated to honor the terms of the agreement.

25. Section 2(d) of the “GAP Insurance” agreement states:

This Deficiency Waiver Addendum is transferable if there is a transfer of the Vehicle. However, this Addendum is valid only while payments are due to the original Assignee lender under the original Installment Sales Contract. This Addendum terminates upon (a) refinancing the Vehicle’s Installment Sales Contract with an Assignee lender who is not the original one or (b) payment in full of the original Installment Sales Contract.

II. Conclusions of Law

A. Standard for Summary Judgment

1. Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate “when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 133 S.E.2d 770, 777 (W.Va. 1963).

2. Summary judgment under Rule 56 is “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial if in essence there is no real

dispute as to salient facts or if only a question of law is involved.” *Painter v. Peavy*, 451 S.E.2d 755, 758 (W.Va. 1994).

3. In determining whether a genuine issue of fact exists, the court should construe the facts in a light most favorable to the non-moving party. *See Alpine Property Owners Ass’n v. Mountaintop Dev. Co.*, 365 S.E.2d 57 (W.Va. 1987).

4. For a party against whom multiple claims exist, the Court is free to grant summary judgment in that party’s favor “as to all or any part thereof.” W.Va. R. Civ. P. 56(b).

5. W.Va. R.Civ.P.56(d) provides:

(d) Case not fully adjudicated on motion. – If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

B. Breach of Contract Claim

6. The Court **FINDS** that the “GAP Insurance” agreement is signed by both Defendant Hinkle and an agent of the dealership, appearing to be one “Jason Witt,” and is a valid and binding contractual agreement.

7. “One of the essential elements of an agency relationship is the existence of some degree of control by the principal over the conduct and activities of the agent.” Syl. Pt. 3, *Teter v. Old Colony Co.*, 441 S.E.2d 728 (W.Va. 1994).

8. The Court **FINDS** that Paul L. Waugh was, at the time of the sale of the vehicle from the dealership to the Hinkles, an agent of the dealership.

9. The Court **FINDS** that the dealership is a party to the Safe-Gap Total Loss Protection Plan (AKA the “GAP Insurance” agreement) by its terms and under the principals of contract and agency.

10. “Ordinarily an assignee acquires no greater right than that possessed by his assignor, and he stands in his shoes; and an assignee takes subject to all defenses and all equities which could have been set up against an instrument in the hands of an assignor at the time of the assignment.” Syl. Pt. 10, *Lightner v. Lightner*, 124 S.E.2d 355 (W.Va. 1962).

11. The Court **FINDS** that the factual issue of whether the Hinkles decided to purchase “GAP Insurance” based on the representations of Mr. Waugh that it would cover the gap between the amount owed and the value of the car, should the car be totaled, under any circumstances is a disputed factual issue.

12. The Court **FINDS** that Defendant Santander is an assignee of the dealership. The Court, however, **DECLINES** to rule on the issue of whether Defendant Santander is bound by the actions of Mr. Waugh under legal principles of agency until this issue has been fully briefed by all interested parties to this action.

13. In reviewing the terms of a contract, the West Virginia Supreme Court of Appeals (the “West Virginia Supreme Court”) has held that “it is not the right or province of the court to alter, pervert, or destroy the clear meaning and intent that the parties expressed.” Syl. Pt. 1, *Hatfield v. Health Management Assoc. of W.Va. Inc.*, 672 S.E.2d 395 (W.Va. 2008) (*citing Cotiga Development Co.*, 128 S.E.2d 626 (W.Va. 1963)).

14. An “ambiguity” is defined as language that is “‘reasonably susceptible of two different meanings’ or language ‘of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning [.]’” *Payne v. Weston*, 466 S.E.2d 161, 166 (W.Va. 1995) (citing Syl. Pt. 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639 (W.Va. 1985)).

15. Two types of ambiguities exist: (a) patent ambiguities, which are apparent from the face or plain language of the relevant document, and (b) latent ambiguities.

A latent ambiguity, which does not appear upon the face of the document, however, may be created by intrinsic facts or extraneous evidence . . . [when] evidence discloses a latent ambiguity, such, for instance as that there are two objects, to either of which the terms of the writing apply with equal fitness, then prior and contemporaneous transactions and collocations of the parties are admissible for the purpose of identifying the particular object intended. . . . A latent ambiguity arises when the instrument upon its face appears to be clear and unambiguous, but there is some collateral matter which makes the meaning uncertain.”

Energy Development Corp. v. Moss, 591 S.E.2d 135, 143-144 (W.Va. 2003) (citing *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W.Va. 2000), *Snider v. Robinett*, 88 S.E. 599 (W.Va. 1916)).

16. The Court **FINDS** that no terms in the “GAP Insurance” agreement reference a re-amortization of the loan or whether such amounts written off in the re-amortization are to be included as part of the Unpaid Net Balance. The re-amortization of Plaintiff’s loan following the automobile accident is a circumstance that gives rise to a patent ambiguity in the “GAP Insurance” agreement.

17. The Court hereby **FINDS** that this patent ambiguity must be strictly construed against Defendant Santander (“It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance

company and in favor of the insured.” Syl. pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W.Va. 1987)). Although Defendant Santander is not an insurance company, for reasons discussed *infra*, “GAP Insurance” is insurance.

18. The doctrine of reasonable expectations holds that an ambiguity can be created in an insurance policy term by statements made by an agent which creates a reasonable expectation of insurance. This doctrine applies to situations where an insurer attempts to deny coverage based on an exclusion that was not communicated to the insured, or where there is a misconception about the insurance purchased. *See, generally, Keller v. First Nat’l Bank*, 402 S.E.2d 424, 428 (W.Va. 1991) (*quoting Lawson v. Am. Gen. Assurance Co.* 455 F.Supp.2d 526, 530-531 (S.D.W.Va. 2006), *Am. Equity Ins. Co. v. Lignetics, Inc.*, 284 F.Supp.2d 399, 406 (N.D.W.Va. 2003)).

19. The Court **FINDS** that evidence regarding the statements made to Plaintiff by Mr. Waugh may create latent ambiguities, and may give rise to the doctrine of reasonable expectations. This issue is dependent on whether Defendant Santander is bound by the actions of Mr. Waugh and whether Plaintiff did in fact rely on Mr. Waugh’s statements.

20. “A party to a contract has a duty to read the instrument.” Syl. Pt. 4, *Am. States Ins. Co. v. Surbaugh*, 745 S.E.2d 179 (W.Va. 2013).

21. The Court **FINDS** that, based on the evidence contained in the record, Plaintiff did not read the “GAP Insurance” agreement.

22. The Court **FINDS** that this is a harmless error based on the ambiguities in the “GAP Insurance” agreement, listed *supra* and *infra*.

23. The Court **FINDS** that whether refusal by Defendant Santander to honor the “GAP Insurance” agreement, including its ambiguous terms, whether justified or not, is

a breach of contract is a disputed factual issue or is contingent upon sub-issues that have not yet been determined.

C. Violation of the West Virginia Unfair Trade Practices Act Claim

24. West Virginia Code § 33-1-1 defines insurance as “a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.”

25. “Indemnity” is defined as “a duty to make good any loss, damage, or liability incurred by another.” Black’s Law Dictionary, 9th Ed. 2009. Likewise, “indemnify” means: (a) to reimburse for a loss suffered because of a third party’s or one’s own act or default, (b) to promise to reimburse for such a loss, and (3) to give security against such a loss. Black’s Law Dictionary, 9th Ed. 2009.

26. “Generally, an insurance policy sets forth an agreement between parties whereby the insured agrees to pay a specified premium, and, in exchange, the insurer agrees to indemnify the insured against the type of losses contemplated within the terms of the policy yet unknowable at its issuance.” *McDaniel v. Kleiss*, 503 S.E.2d 840, 846 (W.Va. 1998).

27. “In construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the parties.” Syl. Pt. 2, *Sellers v. Owens-Illinois Glass Co.*, 191 S.E.2d 166 (W.Va. 1972).

28. The Court **FINDS** that the “GAP Insurance” agreement describes itself as a Safe-Gap Total Loss Protection Plan and does not state that it is insurance. However, the agreement operates as insurance and was represented by Mr. Waugh to be insurance.

Moreover, the parties in the hearing acquiesced to and/or adopted the terms “GAP Insurance” and/or “GAP Plan” in attributing a name to the agreement at issue.

29. The Court **FINDS** that in exchange for the four-hundred ninety-five dollar (\$495) premium, the “dealer/assignee” would indemnify the Plaintiff upon the event her vehicle would be rendered a total loss.

30. The Court **FINDS** that “reimbursement” or “compensation” includes more than just a payment of moneys. It includes a waiver of debt in the “GAP Insurance” agreement at issue.

31. The Court further **FINDS** that the “GAP Insurance” agreement constitutes “insurance” under W. Va. Code § 33-1-1 *et seq.*

32. The purpose of the West Virginia Unfair Trade Practices Act is “to regulate trade practices in the business of insurance.” W.Va. Code § 33-11-1.

33. The Court **FINDS** that facts are in dispute as to Defendant Safe-Guard and Defendant Santander’s statutory duties set forth in W.Va. Code § 33-11-4.

D. Common Law Bad Faith, Declaratory Judgment, and Punitive Damages Claims

34. In its Motion for Summary Judgment, Defendant Santander argues that it is not obligated or bound by the terms of the “GAP Insurance” agreement because it is a subsequent assignee of the original Installment Sales Contract. Defendant Santander cites section 2(d) of the “GAP Insurance” agreement to justify its position that it is not obligated to honor the terms of the agreement. The Court **FINDS** that section 2(d) of the “GAP Insurance” agreement is ambiguous because it is reasonably susceptible of two different meanings and the language contained therein is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning. Sentence three of

section 2(d) could be interpreted to merely clarify sentence two or could be interpreted to add conditions in addition to sentence two.

35. Due to the ambiguities contained in the “GAP Insurance” agreement, the Court **FINDS** that whether Defendant Santander’s refusal to honor the “GAP Insurance” agreement, whether justified or not, constitutes common law bad faith is a disputed factual issue.

36. Punitive damages are unavailable for failure to settle a disputed claim unless the policyholder can establish a high threshold of actual malice in the settlement process. *See McCormick v. Allstate Ins. Co.*, 505 S.E.2d 454, 458-59 (W.Va. 1998). “Actual malice” means that “the company knew that the policyholder’s claim was proper, but willfully, maliciously and intentionally denied the claim. *Id.*”

37. The Court **FINDS** that whether Defendant Santander’s refusal to honor the “GAP Insurance” agreement, whether justified or not, constitutes actual malice is dependent on disputed factual issues not yet determined.

38. Due to the ambiguities under the “GAP Insurance” agreement, the Court hereby **DENIES** declaratory judgment relief under W.Va. Code §§ 55-13-1 *et seq.*

E. Defendant Santander’s Limitation of Liability

39. West Virginia Code § 46A-2-102(3) and (5) provides:

The following provisions shall be applicable to instruments, contracts or other writings, other than negotiable instruments, evidencing an obligation arising from a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose: (1) Notwithstanding any term or agreement to the contrary or the provisions of article two, chapter forty-six of this code or section two hundred six, article nine of said chapter forty-six, an assignee of any such instrument, contract or other writing shall take and hold such instrument, contract or other writing subject to all claims and defenses of the buyer or lessee against the seller or lessor arising from that specific consumer credit sale or consumer lease of goods

or services but the total of all claims and defenses which may be asserted against the assignee under this subsection or subsection (3) or subsection (4) of this section shall not exceed the amount owing to the assignee at the time of such assignment except (i) as to any claim or defense founded in fraud: Provided, That as to any claim or defense founded in fraud arising on or after the first day of July, one thousand nine hundred ninety the total sought shall not exceed the amount of the original obligation under the instrument, contract or other writing and (ii) for any excess charges and penalties recoverable under section one hundred one, article five of this chapter.

...

(3) A claim or defense which a buyer or lessee may assert against an assignee of such instrument, contract or other writing under the provisions of this section may be asserted only as a matter of defense to or setoff against a claim by the assignee: Provided, That if a buyer or lessee shall have a claim or defense which could be asserted under the provisions of this section as a matter of defense to or setoff against a claim by the assignee were such assignee to assert such claim against the buyer or lessee, then such buyer or lessee shall have the right to institute and maintain an action or proceeding seeking to obtain the cancellation, in whole or in part, of the indebtedness evidenced by such instrument, contract or other writing or the release, in whole or in part, of any lien upon real or personal property securing the payment thereof: Provided, however, That any claim or defense founded in fraud, lack or failure of consideration or a violation of the provisions of this chapter as specified in section one hundred one, article five of this chapter, may be asserted by a buyer or lessee at any time, subject to the provisions of this code relating to limitation of actions.

...

(5) Nothing contained in this section shall be construed as affecting any buyer's or lessee's right of action, claim or defense which is otherwise provided for in this code or at common law.

Further, the West Virginia Supreme Court in *Casillas v. Tuscarora Land Co.* held that “[n]othing within the West Virginia Consumer Credit and Protection Act's limitation of liability provisions provides immunity at common law for the misconduct of a lender, assignee, or holder which results in damages.” Syl. Pt. 2, *Casillas v. Tuscarora Land Co.*, 412 S.E.2d 792 (W.Va. 1991).

40. The Court **FINDS** that whether Defendant Santander's refusal to honor the "GAP Insurance" agreement, whether justified or not, constitutes misconduct is dependent on disputed factual issues not yet determined.

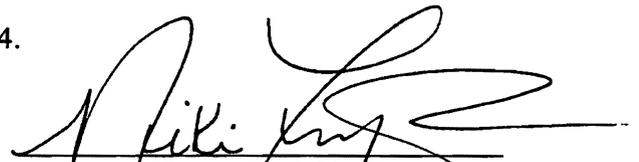
III. Judgment

For the foregoing reasons, Defendant Santander's Motion for Summary Judgment is hereby **GRANTED IN PART** inasmuch that a declaratory judgment under W. Va. Code §§ 55-13-1 *et seq.* declaring that under the express terms of the "GAP Insurance" agreement Plaintiff and Defendant Hinkle are entitled to recover benefits, up to the limits of the deficiency and/or that said deficiency has been waived and Plaintiff and Defendant Hinkle have no further obligations under the note is **DENIED**. Defendant Santander's Motion for Summary Judgment as to the breach of contract claim, violation of the W. Va. Unfair Trade Practices Act claim, common law bad faith claim, and the punitive damages claim is hereby **DENIED**.

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment Pursuant to W.Va. R.Civ.P. 56(d), on the Issue of Whether the "Guaranteed Asset Protection ('GAP') Plan" Sold by Defendant Safe-Guard Product International, LLC, to Plaintiff Robin L. Hinkle Constitutes Insurance Under West Virginia Law is **GRANTED**.

The Clerk is hereby **DIRECTED** to send attested copies of this Order to all counsel of record and any pro se party.

ENTERED this the 16th day of October 2014.


Honorable Miki Thompson
Circuit Judge, 30th Judicial Circuit

STATE OF WEST VIRGINIA

State of West Virginia ex. rel. Safe-Guard
Products International, LLC, Petitioner

vs.) No. 14-1134

The Honorable Miki Thompson, Judge of
The Thirtieth Judicial Circuit, and
Robin L. Hinkle, Respondents

CERTIFICATE OF SERVICE

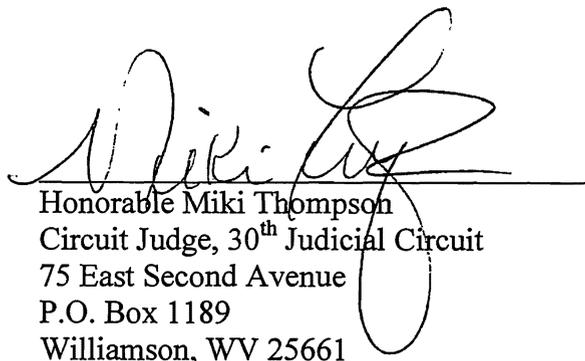
I, Miki Thompson, do hereby certify that the foregoing Summary Response to
Petitioner's Petition for Writ of Prohibition, was served upon the following parties on the 10th
day of November, 2014:

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