No. 24-60013

---

**United States Court of Appeals**
**for the Fifth Circuit**

---

NATIONAL AUTOMOBILE DEALERS ASSOCIATION;
TEXAS AUTOMOBILE DEALERS ASSOCIATION,

*Petitioners*,

v.

FEDERAL TRADE COMMISION,

*Respondent*

ON PETITION FOR REVIEW OF A FINAL TRADE REGULATION RULE OF THE FEDERAL TRADE COMMISSION

# AMICUS CURIAE BRIEF OF THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, CONSUMER CREDIT INDUSTRY ASSOCIATION, SERVICE CONTRACT INDUSTRY COUNCIL, GUARANTEED ASSET PROTECTION ALLIANCE, AND MOTOR VEHICLE PROTECTION PRODUCTS ASSOCIATION IN SUPPORT OF PETITIONERS

David E. Carney
ROBINSON & COLE LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
771-213-5650
dcarney@rc.com

March 22, 2024

# SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

1. No. 24-60013, *Nat'l Automobile Dealers Ass'n v. FTC*

2. The undersigned counsel of record certifies that, in addition to those persons listed in the parties' certificates of interested persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

American Property Casualty Insurance Association (Amicus)

Kenneth A. Stoller (Assistant General Counsel & Amicus Counsel for American Property Casualty Insurance Association)

Consumer Credit Industry Association (Amicus)

John Euwema (VP-Legislative/Regulatory Counsel for Consumer Credit Industry Association)

Service Contract Industry Council (Amicus)

Motor Vehicle Protection Products Association (Amicus)

Guaranteed Asset Protection Alliance (Amicus)

Tom Keepers (Executive Director of Service Contract Industry Council, Motor Vehicle Protection Products Association, and Guaranteed Asset Protection Alliance)

Robinson & Cole LLP (Counsel of Record for Amici)

David E. Carney (Counsel of Record for Amici)

# CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 28.2.1 and Fed. R. App. P. 26, undersigned counsel of record certifies that:

- American Property Casualty Insurance Association has no parent corporation, and no publicly held corporation own 10% of more of its stock.

- Consumer Credit Industry Association has no parent corporation, and no publicly held corporation own 10% of more of its stock.

- Service Contract Industry Council has no parent corporation, and no publicly held corporation own 10% of more of its stock.

- Motor Vehicle Protection Products Association has no parent corporation, and no publicly held corporation own 10% of more of its stock.

- Guaranteed Asset Protection Alliance has no parent corporation, and no publicly held corporation own 10% of more of its stock.

David E. Carney
ROBINSON & COLE LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Tel. (771) 213-5650
Fax (771) 213-5651
dcarney@rc.com

Counsel for Amici Curiae American Property Casualty Insurance Association, Consumer Credit Industry Association, Service Contract Industry Council, Guaranteed Asset Protection Alliance, and Motor Vehicle Protection Products Association

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

## Cases



## Statutes

**Rules**



**Other Authorities**

## INTEREST OF *AMICI CURIAE*

The American Property Casualty Insurance Association ("APCIA"), Consumer Credit Industry Association ("CCIA"), Service Contract Industry Council ("SCIC"), Guaranteed Asset Protection Alliance ("GAPA"), and Motor Vehicle Protection Products Association ("MVPPA" and, collectively, "Amici") are the leading national trade associations whose members engage in the market for voluntary protection products ("VPPs") in the motor vehicle industry. The recently finalized Combating Auto Retail Scams Trade Regulation Rule (the "CARS Rule"), 89 Fed. Reg. 590, seeks to regulate VPPs.

APCIA is the primary national trade association for home, auto, and business insurers. APCIA's member companies represent approximately 65% of the total U.S. property-casualty insurance market and approximately 62% of the automobile insurance market.

CCIA represents providers that distribute and service consumer asset and credit protection products to consumers, including VPPs.

SCIC is a national trade association comprised of manufacturers, service contract providers, administrators, and retailers offering service contracts for motor vehicles, homes, and consumer goods. Its members constitute a significant share of the service contract market and are key stakeholders in the VPP space.

GAPA is comprised of companies offering guaranteed asset protection ("GAP") waiver products ("GAP Waivers") throughout the country. Its members include prominent automotive finance companies and administrators that represent a significant portion of the GAP Waiver market.

MVPPA is a national trade association whose members represent the leading companies in the VPP industry. Its members include providers, retailers, administrators, and insurers of motor vehicle optional products, and account for a considerable portion of the VPP market.

Amici's perspective regarding the CARS Rule may be useful to the Court. Amici respectfully submit that the Federal Trade Commission (the "FTC" or "Commission") hastily adopted a regulation that mischaracterizes the perceived issues it seeks to address with respect to VPPs, creates purported solutions that do not actually solve the perceived issues, and will ultimately harm consumers by adding new barriers that are inconsistent with extant regulation and reducing market competition for VPPs. The CARS Rule will result in higher prices, greater confusion, and less consumer choice, all of which are outcomes contrary to the FTC's mission of protecting consumers.

Consistent with Federal Rule of Appellate Procedure 29(a)(2), this brief is submitted without a motion because all parties have consented to Amici filing this brief. Pursuant to Rule 29(a)(4)(E), Amici state that no party or its counsel authored this brief in whole or in part, or contributed money intended to fund preparing or submitting this brief. No other person contributed money intended to fund preparing or submitting this brief other than Amici and their counsel.

## SUMMARY OF ARGUMENT

To assist the Court's consideration of the National Automobile Dealers Association ("NADA") and the Texas Automobile Dealers Association ("TADA") petition for review of the CARS Rule, Amici set forth facts about the VPPs targeted by the CARS Rule and how the CARS Rule will affect the market for, and consumers of, these products. First, Amici provide a brief overview of the different types of VPPs and the protections they offer, as well as the requirements imposed by the CARS Rule. Second, Amici explain the benefits—financial and otherwise—that consumers derive from VPPs. Third, Amici briefly clarify that VPPs are, by design, optional, cancellable, and refundable. Fourth, Amici highlight consumer satisfaction with VPPs. Fifth, Amici discuss the substantial regulation to which VPPs are already subject, underscoring the fact that the hastily adopted CARS Rule should undergo more thoughtful and thorough consideration. Sixth, Amici explain how the Rule, if enforced as currently drafted, will adversely impact consumers by creating confusion and inefficiency, decreasing competition in the market for VPPs, and leading to higher prices and less consumer choice.

Amici respectfully request that the Court set aside the CARS Rule, or in the alternative, remand the CARS Rule to the FTC for consideration of additional evidence.

## ARGUMENT

### I. Overview of Voluntary Protection Products

The FTC predicated the CARS Rule upon inaccurate assumptions regarding VPPs, including the implication that VPPs are not legitimate products or are the subject of inherently deceptive sales practices. These assumptions could not be further from the truth, and Amici provide the following overview of VPPs.

Motor vehicle dealers sell four primary types of VPPs: (a) vehicle service contracts ("VSCs"); (b) GAP Waivers; (c) credit insurance; and (d) other VPPs not constituting VSCs, GAP Waivers, or credit insurance. Each type of VPP protects the consumer against a separate risk, and each provides value to the consumer. The CARS Rule seeks to impose additional regulation on VPPs provided by third parties in sales transactions between dealers and consumers.

A. Vehicle Service Contracts

VSCs provide vehicle owners protection from unexpected and costly repairs. Traditional VSCs provide coverage for operational or structural failure due to defects in materials and workmanship or normal wear and tear. Such VSCs may also provide incidental payment of indemnity benefits. VSCs that provide "core coverage" can be analogized to an original equipment manufacturer ("OEM") warranty. However, unlike an OEM warranty, a VSC is sold for separate consideration and is optional to the consumer as an "add-on" from an underlying purchase of a motor vehicle. (By comparison, the OEM warranty is included as part of the motor vehicle's purchase price.)

Consumers benefit from VSCs even while the OEM warranty is in effect because the VSC provides coverage beyond the OEM warranty coverage. For this reason, VSCs are often referred to as "extended warranties." VSCs often cover additional items or parts not otherwise covered by the OEM warranty. A VSC providing core mechanical coverage may commonly offer additional incidental indemnity benefits, such as towing, emergency road service, and rental car reimbursement, that are not part of the OEM warranty. Other VSCs offer a tiered structure, meaning that the consumer can purchase from an a la carte menu specific parts or components to protect or the coverage levels that the consumer wants. These nuances demonstrate the error in the FTC's assumption that VPPs that are "duplicative" of warranty coverage and "provide no benefit." See 16 CFR § 463.5(a).

Nearly all states require VSC providers to comply with state regulation through (a) licensure, (b) demonstration of financial responsibility (which often takes the form of the provider securing a contractual liability insurance policy to guarantee performance of its VSC obligations to consumers), (c) filing of the VSC with that state for its review and approval of VSC terms, or (d) some combination of the three.[1] Additionally, many creditors that finance motor vehicle purchases require their prior review and approval of the VSC form along with proof of the VSC provider's financial responsibility for its performance of its contractual obligations (including verification of an in-force contractual liability insurance policy along with the AM Best rating of the insurer providing this policy) before that creditor will provide its financing and approval of both the particular VSC form and the associated provider.

### B. Guaranteed Asset Protection Waivers

A GAP Waiver is a type of debt-cancellation agreement that protects an owner of a financed vehicle in the event the vehicle is totaled or stolen. A GAP Waiver is an agreement between the creditor and the borrowing vehicle owner to waive all or part of the debt that exceeds the value of the vehicle at the time of loss. Often, when a vehicle is totaled,

[1] *E.g.*, Minn. Stat. Ann. § 59B.03; La. Stat. Ann. § 51:3163, *et. seq.*; *see also* Secretary of the FTC's Certified List Describing the Record dated February 14, 2024, filed at Document 46 (the "Certified List"), at Doc. No. 145, *GAPA SCIC MVPPA FTC Comment Letter Draft 9.12.22*, at p. 4, available at https://www.regulations.gov/comment/FTC-2022-0046-8113. The documents in the record are cited by the document number assigned to them in the Certified List (i.e., "Certified List Doc. No. ___").

the insurance payout—which is based on the insurer's valuation of the vehicle—does not cover the balance of the loan the vehicle owner owes. A GAP Waiver protects a vehicle owner by waiving liability for the "gap" between the amount recouped from an insurer and the outstanding balance of the debt the vehicle owner owes. Most dealer-originated GAP Waivers utilize a contractual liability insurance policy that insures the creditor (initially, the dealer) for any amount the creditor is obligated to waive under the corresponding GAP Waiver.

The vast majority of states statutorily authorize or recognize issuance of GAP Waivers as non-insurance products with varying degrees of regulation, including recordkeeping requirements, demonstrating financial responsibility, and/or GAP Waiver form filings with state regulators.[2] For the remaining states, no statute or regulation expressly authorizes GAP Waivers as non-insurance products; however, each governing state regulator has issued guidance indicating informal authorization via bulletins, memoranda, attorney general opinions, or

[2] *E.g.*, N.Y. Ins. Law § 1101(b)(3) (providing that GAP Waivers do not constitute insurance products provided certain criteria are met); Md. Code Ann., Com. Law § 12-609(b)(4); Minn. Stat. Ann. § 59D.04; La. Stat. Ann. § 6:969.51; *see also* Certified List Doc. No. 145, *GAPA SCIC MVPPA FTC Comment Letter Draft 9.12.22*, at p. 5, *available at* https://www.regulations.gov/comment/FTC-2022-0046-8113.

informal correspondence.[3] Additionally, many creditors require their prior review and approval of a GAP Waiver form (including the policy proving coverage for waivers along with the rating of the insurer providing the policy) before that creditor will provide its financing and approval of both a particular GAP Waiver form and the associated administrator.

C. Credit Insurance

Credit life insurance and credit disability insurance meet the specific needs associated with consumer credit. In general, credit life insurance pays off a borrower's debt if the insured borrower or co-borrower dies. Credit disability insurance provides a monthly benefit equal to the monthly payment obligation if the primary borrower is disabled. Policy provisions and benefits are similar to those found in traditional insurance products. Optional credit insurance is not a cost of

---

[3] *E.g.*, New Mexico Office of Superintendent of Insurance, Bulletin 2018-011 (July 31, 2018) *available at* https://www.osi.state.nm.us/wp-content/uploads/2019/06/Bulletin2018-011.pdf; Massachusetts Division of Banks, Selected Opinion No. 03-133 (Apr. 1, 2014) *available at* https://www.mass.gov/opinion/selected-opinion-03-133#:~:text=Following%20extensive%20review%20and%20discussion,authorized%20for%20purposes%20of%20G.L.); Kansas Office of the State Bank Commissioner, Amended Administrative Interpretation No. 1004 "Guaranteed Asset Protection" (Vol. 38, No. 19, May 9, 2019); Arkansas Dep't of Commerce, Community and Economic Dev't Division of Insurance, Bulletin B 13-05 (Apr. 12, 2013) *available at* (https://www.commerce.alaska.gov/web/portals/11/pub/Bulletins/B13-05.pdf).

credit or included as a fee or finance charge in the calculation of the annual percentage rate of the loan. Consumer disclosures on the insurance application must provide that the purchase of credit insurance is not required to obtain credit, and that the borrower must make an affirmative written election.

D. Other Vehicle Protection Products

Other VPPs–separate from GAP Waivers, credit insurance, and VSCs—include coverage for tire and wheel repair/replacement, windshield repair/replacement, paintless dent repair, lost or damaged key fob replacement, and other products such as theft-deterrent products and chemical appearance-care products. While there are other VPPs not mentioned here, these named products represent those most purchased.

Tire and wheel products cover the repair or replacement of the vehicle's tires and wheels that are damaged by detrimental contact with a road hazards, such as potholes, glass, and curbs. Windshield products cover the repair of chips or cracks or the replacement of a windshield damaged by a road hazard. Paintless dent repair provides for the removal of dents, dings, or creases on a motor vehicle without affecting the existing paint finish and without replacing vehicle body panels, sanding, bonding, or painting. Key fob replacement replaces key fobs that have been lost, stolen, or damaged. This product is more prevalent now than previously because the prices of key fobs have increased with technological improvements. Theft products are applied to a vehicle for the purpose of deterring theft of the vehicle or providing recovery assistance to the owner if the vehicle is stolen. Chemical appearance-care products involve protective chemicals applied to the interior or exterior of a vehicle to protect against damage.

Generally, these products are subject to the same regulation as VSCs. However, some states subject anti-theft products and appearance-care products to additional regulation, with regulatory frameworks varying among (a) regulation of both appearance and anti-theft products, (b) regulation of only anti-theft products (with appearance-care products being subject to only the Magnusson-Moss Warranty Act, 15 USC § 2301 *et seq.*), (c) no separate regulation, with both appearance and anti-theft products governed by the Magnusson-Moss Warranty Act, and (d) regulation of vehicle protection products as insurance.[4]

---

[4] *E.g.*, Ops Gen Counsel N.Y. Ins. Dep't No. 02-03-22 (Mar. 25, 2002) (informal opinion), *available at* https://www.dfs.ny.gov/insurance/ogco2002/rg203251.htm; Cal. Civ. § 2982.

As is the case with VSCs and GAP Waivers, many creditors require their prior review and approval of optional products along with proof that the provider is financially responsible for the performance of the contractual obligations and financially reliable (which can be shown with verification of an in-force contractual liability insurance policy along with the AM Best rating of the insurer providing this policy) before the creditor will provide its financing and approval of the optional product along with the associated provider.

E. The CARS Rule

The CARS Rule purports to regulate "Add-on product(s) or Service(s)." 16 CFR § 463.2(a). Such products and services are those "product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer in connection with a Vehicle sale, lease, or financing transaction." *Id.* VPPs are "Add-on product(s) or service(s)" within the meaning of the CARS Rule, and by its terms, the CARS Rule governs VPPS provided by third parties but not those provided by a vehicle manufacturer. The CARS Rule prohibits misrepresentation of "Material information about" "[a]ny cost, limitation, benefit, or any other aspect of an

Add-on Product or Service." 16 CFR § 463.3(b). In addition to this prohibition on certain conduct (which is largely prohibited by other federal and state laws, *see infra,* Section V), the CARS Rule imposes affirmative disclosure obligations. Specifically, a dealer "must disclose that the Add-on is not required and the consumer can purchase or lease the Vehicle without the Add-on, if true." 16 CFR § 463.4(c). The CARS Rule prohibits a dealer from "charg[ing] for an Add-on Product of Service if the consumer would not benefit from such an Add-on Product or Service." 16 CFR § 463.5(a). The CARS Rule, though, does not define "benefit" but appears to suggest "benefit" is solely determined by financial impact of the product or service. Finally, the CARS Rule imposes affirmative recordkeeping obligations on dealers with respect to VPPs. 16 CFR § 463.6. Specifically, a dealer must retain "[r]ecords demonstrating that Add-ons in customers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements." 16 CFR § 463.6(a)(4).

## II. VPPs Provide Real Consumer Benefits

VPPs are vitally important products for many consumers' financial security. VPPs provide monetary benefits to consumers who make valid claims. Just as important, before any claim is filed, VPPs provide financial security and peace of mind in connection with a large purchase. American household finances are in a fragile state, especially with inflation increasing the cost of necessities. Many American families could not reasonably withstand the financial impact of a significant vehicle-related event—like an accident, theft-caused loss, or a major system repair—that a VPP covers and is not covered by ordinary motor vehicle insurance.

- Only 37% of American households could cover a hypothetical $400 emergency expense using their savings. Board of Governors of the Federal Reserve, *Economic Well-Being of U.S. Households in 2022*, at p. 31 (May 2023).[5]
- Only 39% percent of Americans believe they could comfortably cover an unexpected expense of $1,000. Bankrate, *Bankrate's January Financial Security Index* (Jan. 1, 2021).[6]
- Only 50% of American adults believe they have enough savings to cover three months of living expenses in the event they are not

[5] *Available at* https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf.
[6] *Available at* https://www.bankrate.com/pdfs/pr/20210111-january-fsp.pdf.

earning any income. Lane Gillepsie, *Bankrate's 2024 Annual Emergency Savings Report* (Feb. 22, 2024).[7]

- Seventy-eight percent of Americans would find it very difficult or somewhat difficult to meet their current financial obligations if their paycheck was delayed for one week. PayrollOrg, *2023 Getting Paid in America survey*, at p. 3 (Sept. 2023).[8]

In this context, VPPs provide tangible benefits when triggered. Approximately 28 million U.S. households hold some form of VPP and received $1.2 billion in benefits in 2020.[9] One survey found that 28% of purchasers of VSCs indicated that they had filed a claim of some kind at some time, and these claimants generally reported that their claim experiences were easy and yielded the expected results. Thomas A. Durkin, *et. al., Service Contracts on Vehicle Purchases: Findings from a New Survey*, at p. 8 (June 22, 2023).[10] Some states, such as Louisiana, explicitly recognize the value of GAP Waivers, by *requiring* dealers to offer GAP

---

[7] *Available at* https://www.bankrate.com/banking/savings/emergency-savings-report/.
[8] *Available at* https://info.payroll.org/pdfs/npw/2023_Getting_Paid_In_America_survey_results.pdf
[9] See Certified List Doc. No. 145, *CCIA 9.9.22 Comments to FTC Motor Vehicle Dealers Trade Regulation Proposed Rule*, p. 9, *available at* https://www.regulations.gov/comment/FTC-2022-0046-9033
[10] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4488268.

Waivers to all purchasers. La. Admin. Code tit. 46, § V-7705. For that reason, the CARS Rule could interfere with both consumer choice and the ability of state governments to formulate their own regulation and policies regarding VPPs.

The primary reason consumers opt to purchase VPPs when buying a motor vehicle is for the financial security and peace of mind the products offer. Although a minority of consumers who buy VPPs are confident they will use the product (for example, in the case of VPPs that cover repair of leather seats after heavy use by children), a substantial population of consumers derive intangible value from knowing that if a problem were to occur, the financial responsibility would not fall upon them. Not surprisingly, many consumers would prefer to not experience such harm or loss. These consumers recognize that the coverage provided through VPPs provides benefits, if nothing more than assurance that their vehicles will be serviced if claims are covered under the terms of the agreements. Primary research of more than 1,000 consumers shows that the two most popular motivations behind purchasing a VPP is the peace of mind from having a financial safety net and saving money by covering the expense of unforeseen problems.[11]

These motivations are not surprising given (a) the rising prices of vehicles, parts, and repairs and (b) changes in the vehicle financing marketplace. For example, GAP Waivers are more likely to be purchased, reasonably so, when the amount financed is greater, loan terms are longer, existing loan balances are rolled into a new loan balance, and/or a purchaser's income is lower.

The efficacy of GAP Waivers is underscored by data documenting rising vehicle prices. Vehicle prices have been continuously increasing as new vehicle technologies emerge and customer preference for CUVs, SUVs and light-duty trucks grows. In June 2022, the average transaction price for a new light vehicle was the highest on record at $45,844. Press Release, J.D. Power, *New-Vehicle Transaction Prices Hit All-Time High Despite Rising Interest Rates; Sales Volume Constrained as Inventory Stays Flat*

[11] See Certified List Doc. No. 145, *GAPA SCIC MVPPA FTC Comment Letter Draft 9.12.22*, at pp. 36-37, available at https://www.regulations.gov/comment/FTC-2022-0046-8113.

(June 24, 2022)[12]; *see also* Certified List[13] Doc. No. 226, p.8. Consumers are taking out longer-term loans which means it takes longer to build equity in the purchased vehicle. Of consumers who financed a new car purchase in June 2022, 36.1% opted for a loan term of between 73 and 84 months, compared to 32.8% in June 2021. Edmunds.com, *Record Share of New-Car Shoppers Jumped Into a $1,000+ Monthly Payment in June, According to Edmunds* (June 20, 2022).[14] In 2020, the share of new sales with a trade-in involving negative equity hit 44%, an all-time high. Ivan Dury, Edmunds.com, *Negative Equity Is Surging During Coronavirus* (May 2020).[15] In this context, consumers, including lower-income consumers, may feel unsuited to take on financial risks without protection and, consequently, may become candidates for the financial protection GAP Waivers offer.

---

[12] *Available at* https://www.businesswire.com/news/home/20220624005073/en/New-Vehicle-Transaction-Prices-Hit-All-Time-High-Despite-Rising-Interest-Rates-Sales-Volume-Constrained-as-Inventory-Stays-Flat.

[13] Refers to the Secretary of the FTC's Certified List Describing the Record dated February 14, 2024, filed at Document 46.

[14] *Available at* https://www.edmunds.com/industry/press/record-share-of-new-car-shoppers-jumped-into-a-1000-monthly-payment-in-june-according-to-edmunds.html.

[15] *Available at* https://www.edmunds.com/industry/insights/negative-equity-is-surging-during-coronavirus.html.

Similarly, the financial and peace of mind benefits of VSCs and other VPPs are clear. Vehicle repairs can cost $7,000-$10,000 for engines, $4,000-$5,000 for transmissions, $2,500-$4,000 for airbag replacement, and $2,500-$3,500 for suspension systems.[16] According to a 2022 survey, the most common reasons for purchasing a VSC include the higher expense of repairing today's more sophisticated cars (43%), peace of mind knowing repairs will be covered (40%), lack of funds to cover the cost of repairs (21%), belief that service contracts are generally a good deal (18%), and the tendency to buy products that minimize risk (12%). SCIC, *Vehicle Service Contracts Can Save You Thousands of Dollars* (Aug. 30, 2022).[17]

Thus, contrary to the Commission's stated reasons for the CARS Rule, each type of VPP provides legitimate benefits to the consumers who choose to purchase them. The benefits of VPPs are even more significant given the tenuous financial status of many American households and trends in vehicle prices, repairs, and financing. By introducing new barriers to consumers' access to VPPs, the CARS Rule impairs consumers'

---

[16] See Certified List Doc. No. 145, *CCIA 9.9.22 Comments to FTC Motor Vehicle Dealers Trade Regulation Proposed Rule*, p. 11, *available at* https://www.regulations.gov/comment/FTC-2022-0046-9033

[17] *Available at* https://go-scic.com/2022/08/vehicle-service-contracts-can-save-you-thousands-of-dollars/.

ability to manage the inherent risks of vehicle ownership and financing arrangements.

As further explained below, the CARS Rule's burdensome restrictions on the sale of VPPs by dealers will have the practical effect of discouraging dealers from offering these products at all. The result of the CARS Rule will be to deny consumers an opportunity to purchase VPPs and obtain the real value they provide. The paternalistic approach of the CARS Rule does not aid consumers because they understand VPPs and can make their own assessment of whether the products are personally suitable, just as consumers do with a host of considerably more complex and expensive insurance and insurance-related products.

## III. VPPs Are Optional, Fair, Cancellable, and Refundable

Implicit in the CARS Rule's heavy-handed disclosure requirements is the inaccurate assumption that VPPs are sold through deceptive practices or undue pressure—or worse, that VPPs are inherently deceptive. The uniform features of VPPs plainly show that this assumption is false: VPPs are entirely optional and most[18] VPPs can be cancelled with fee or premium refunds at the consumer's request.

[18] Some VPPs that involve a physical alteration of the vehicle cannot be cancelled.

Regulation requires consumers to be told orally and in writing that they are not required to purchase VPPs when purchasing and financing a vehicle. A 2022 survey of VSC purchasers, for example, found that almost all purchasers—96%—understood the voluntary nature of the purchase. Thomas A. Durkin, *et. al., Service Contracts on Vehicle Purchases: Findings from a New Survey*, at p. 7 (June 22, 2023).[19] Consumers are also entitled to cancel a VPP after a vehicle purchase transaction for a refund. Most, if not all, of the states that regulate VPPs provide that consumers must receive a full refund if they cancel the VPP within the first 30 days and a pro-rated refund thereafter.[20] These state regulations reflect the National Association of Insurance Commissioners Service Contract Model Act,[21] the Guaranteed Asset Protection Alliance Model Act,[22] and/or the Service Contract Industry Council Model Act ("Model Acts").

Data surrounding cancellation of VPPs lends further support to their fairness and legitimacy. Primary consumer research has shown that

---

[19] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4488268.
[20] *E.g.*, Minn. Stat. Ann. §§ 59D.06(a)(3), 59D.07(2); La. Stat. Ann. § 6:969.53(A); *see also* Certified List Doc. No. 145, *GAPA SCIC MVPPA FTC Comment Letter Draft 9.12.22*, at p. 38, available at https://www.regulations.gov/comment/FTC-2022-0046-8113.
[21] *Available at* https://content.naic.org/sites/default/files/inline-files/MDL-685.pdf
[22] *Available at* https://www.cga.ct.gov/2019/insdata/tmy/2019SB-00980-R000307-GAPA%20CT-TMY.PDF

approximately 30% of VPP purchasers reported that they ended up canceling the product at some point during the term of protection, and 75% of these purchasers found the process to be easy and satisfying.[23]

These data points—apparently not adequately considered by the FTC either because the FTC ignored submitted comments to the proposed rule or because the FTC's rushed process did not permit time for full development of the record—undermine the Commission's implications that VPPs are perceived as mandatory or that they are unfair. The FTC failed to engage in "reasoned decision-making" by inferring a problem in the industry without showing such a problem actually exists. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 52 (1983).

## IV. Consumers Hold Highly Favorable Views of VPPs

In light of the benefits of VPPs, it is unsurprising that consumers appreciate and find value in VPPs. Nevertheless, in the name of protecting those very consumers, the FTC peculiarly seeks to restrict access to VPPs and upend sales processes that pointedly have *not* been a source of

---

[23] See Certified List Doc. No. 145, *GAPA SCIC MVPPA FTC Comment Letter Draft 9.12.22*, at p. 37, available at https://www.regulations.gov/comment/FTC-2022-0046-8113.

dissatisfaction. The FTC appears motivated, in part, by the results of an outdated anecdotal study of limited import, and other evidence of dubious worth. Pet'rs' Op. Br. at pp. 27-30. More reliable studies counter the FTC's irrational perception that consumers need protection from VPPs.

1. In a 2023 survey, researchers found that three quarters of VSC purchasers would purchase a VSC again. Thomas A. Durkin, *et. al., Service Contracts on Vehicle Purchases: Findings from a New Survey*, at p. 8 (June 22, 2023).[24]

2. Research by the University of Michigan Survey Research Center shows that 85% of installment loan borrowers indicated VPPs, credit insurance, and debt protection are good ideas. Thomas A. Durkin, *et ano.*, *New Evidence on an Old Unanswered Question: Why Some Borrowers Purchase Credit Insurance and Other Debt Protection and Some Do Not*, at p. 6, Board of Governors of the Federal Reserve System Finance and Economics Discussion Series 2017-122 (2017).[25] In fact, during

[24] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4488268.
[25] *Available at* https://doi.org/10.17016/FEDS.2017.122.

a 40-year span of similar surveys, researchers found a consistently high rating for VPPs. *Id.*

3. In a 2022 Federal Reserve survey, it was observed that purchases of GAP Waiver coverage for vehicle financing have "become fairly common since its introduction about three decades or so ago." Thomas A. Durkin, *et. al.*, *Consumers and Guaranteed Asset Protection (GAP Protection) on Vehicle Financing Contracts: A First Look*, at p. 14, Board of Governors of the Federal Reserve System Finance and Economics Discussion Series 2022-062 (2022).[26] The survey further notes that more than 93% of GAP Waiver purchasers reported that the product is a good idea and that they would purchase one again. *Id.* at 9. Indeed, even many of those who declined to purchase GAP Waivers perceive them as useful products—43% of buyers who declined GAP Waiver coverage agreed that the voluntary product is useful. *Id.*

4. In a more recent survey, only 6% of VSC purchasers reported any dissatisfaction with their purchase. Thomas A. Durkin *et.*

[26] *Available at* https://doi.org/10.17016/FEDS.2022.062.

*al., Service Contracts on Vehicle Purchases: Findings from a New Survey*, at. p. 7 (June 22, 2023).[27]

Against this backdrop, in which VPPs are the subject of such positive perceptions, the CARS Rule aimed at restricting VPPs is irrational and misplaced. The FTC's reliance on "relatively unpersuasive studies" and its "completely discounting" more reliable data proffered by commenters on proposed rules violates the Administrative Procedures Act and merits vacation of the CARS Rule. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150-51 (D.C. Cir. 2011).

## V. VPPs Are Already Subject to Substantial Regulation

The CARS Rule must be the subject of additional consideration and research because it would unnecessarily overlap, duplicate, and conflict with existing federal and state laws. The consequences of the slipshod composition of the CARS Rule are (a) duplicative regulation that adds the burden of compliance without adding corresponding value to consumers or the industry, and (b) inconsistencies between the CARS Rule and the substantial existing regulation applicable to VPPs. Pet'rs' Op. Br. At pp. 31-35.

---

[27] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4488268.

Extant federal laws and rules adequately regulate VPPs and the purported unfair and deceptive conduct the FTC asserts the CARS Rule is designed to address.

1. The Used Motor Vehicle Trade Regulation Rule prohibits unfair and deceptive acts and practices by used vehicle dealers. 16 CFR Part 455.

2. The Truth in Lending Act and its Regulation Z require disclosures for credit insurance and credit-related products to be excluded from the calculation of the interest rate, and for finance charges to be disclosed to consumers clearly and conspicuously in writing. 12 CFR § 226.4(b)-(d).

3. The FTC's Bureau of Consumer Protection currently plays an active role in stopping unfair, deceptive, and fraudulent practices by investigating companies, bringing lawsuits against those companies that break the law, and developing appropriate rules.

4. The FTC's authorizing statute, the Federal Trade Commission Act, 15 USC §§ 41-58, provides another means by which the

FTC already may regulate unfair or deceptive acts or practices affecting commerce generally and VPPs specifically.

Beyond duplication, the CARS Rule also conflicts with existing federal regulations, including by setting forth conflicting definitions of terms that are already defined by federal law. For example, the definition of "clear and conspicuous" in 16 CFR § 463.2(d) conflicts with the definition set forth in 17 CFR § 162.2(b).

Further, the CARS Rule would duplicate existing state regulations of VPPs and the purported conduct the CARS Rule is designed to address. As noted above, numerous states have adopted Model Acts, crafted in part by Amici, that require (a) the disclosure of the purchase price of the VPP and the voluntary nature of the transaction to consumers and (b) separate recordkeeping. *Supra,* p. 21 n. 19-20. Many of these states also require that a VPP provider obtain a license from a state regulator, demonstrate financial responsibility to back the obligations of the VPP, and require certain contractual disclosures and cancellation policies. *Supra,* p. 6-7, n. 1. Further, as of November 2023, nearly every state regulates GAP

Waivers through statute or regulations. *Supra,* p. 8 n. 2. Most states regulate VSCs, *supra* p. 6-7, n. 1, and all states regulate credit insurance.[28]

Some states also have enacted their own laws and regulations governing motor vehicle dealers via licensing and ongoing compliance requirements that impact the offering of VPPs. For example:

1. Alaska regulates dealer advertising practices and maintains, *inter alia*, requirements specific to VSCs, mandating that they be clearly and conspicuously described and not disclaim implied warranties. Alaska Stat. § 45.25.400.

2. California enacted the Car Buyer's Bill of Rights specific to VPPs, which requires, *inter alia*, written disclosures of the price for specific items and their impact on the consumer's monthly/installment payments. Cal. Civ. § 2982.

3. Florida requires that most applicants seeking a motor vehicle dealer license complete a pre-licensing dealer training course that covers, *inter alia*, laws relating to unfair and deceptive trade practices. Fla. Stat. § 320.27(4)(b).

[28] *E.g.*, N.Y. Ins. L. § 1113(a)(17) (defining credit insurance); Cal. Ins. Code § 779.1 *et seq.*; *see also* 15 U.S.C. §§ 1011 *et seq.* (leaving regulation of insurance to the states).

4. Indiana's Auto-Buyer's Bill of Rights outlines consumers' rights when purchasing vehicles and advises consumers that they have the right to file a complaint with the Indiana Attorney General's Office should they feel that any of their rights were violated throughout the purchasing process. Ind. Code § 24-5-13-1 *et. seq.*; § 24-5-13-21.

5. Many states, including, but not limited to, Arizona, Georgia, Illinois, Maine, Massachusetts, Michigan, New York, Oklahoma, Oregon, Texas, Vermont, and Washington, have advertising and other consumer-protection statements and guides under the auspices of the state's attorney general, department of consumer affairs, or motor vehicle commission.[29]

In light of the extensive extant federal and state regulation of VPPs, and without any indication that these regulations are ineffective in addressing purported deceptive practices, the CARS Rule is an unneeded

[29] *E.g.*, Arizona Attorney General, "Auto Purchases," *available at* https://www.azag.gov/consumer/auto; Georgia Attorney General's Consumer Protection Division, "Buying a New or Used Vehicle," *available at* https://consumer.georgia.gov/buying-new-or-used-vehicle; Office of the Illinois Attorney General, "Auto Buying, Financing, and Repairs," *available at* https://illinoisattorneygeneral.gov/consumer-protection/auto-sales-and-repairs/.

complication that does not add to consumer protection. The FTC failed to adequately consider the existing regulatory regimes and "explain[] what problems with the existing regulatory requirements it meant for the [CARS] Rule to correct." *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020); *also Bus. Roundtable*, 647 F.3d at 1154 (finding rule arbitrary and capricious where agency did not consider whether existing regime reduced need for rule); *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178-79 (D.C. Cir. 2010) (holding rule arbitrary and capricious where agency "fail[ed] to determine whether, under the existing regime, sufficient protections existed" to make additional disclosure duplicative). This FTC failure merits vacation of the CARS Rule.

## VI. The CARS Rule Will Adversely Impact Consumers

The Rule will adversely impact consumers in several ways. By imposing burdensome requirements on VPP offerings by third-party providers, the CARS Rule will result in (a) dealers disfavoring such products and reduced consumer access to VPPs that they like, (b) reduced competition in the VPP market and higher prices, and (c) additional time, confusion, and "red tape" hampering vehicle transactions.

First, the CARS Rule will reduce consumer access to VPPs they like. As discussed above, VPPs are very popular with consumers who see real value in the products. The CARS Rule will increase dealers' transaction cost, friction cost, and compliance risk. Dealers will need to incur costs to comply with the CARS Rule's new disclosure and recordkeeping requirements, to assess how to revamp their processes to comply with both existing state laws and the CARS Rule, and to determine how best to comply with the CARS Rule's amorphous definition of "express, informed consent." These increased impediments will lead to dealers offering fewer—and, perhaps, forgoing completely—VPPs to consumers. This reduction in consumer choice harms rather than helps consumers.

Second, the CARS Rule will make VPPs more expensive for consumers by decreasing competition in the market. The CARS Rule creates an uneven playing field for participants in the VPP market. The CARS Rule regulates the sale of VPPs provided by third-parties only and not those provided by vehicle manufacturers. By imposing unduly burdensome requirements solely upon VPPs provided by third parties, the CARS Rule will have the practical effect of forcing dealers to limit or eliminate the third-party VPPs they offer to consumers. For example, the

CARS Rule requires dealers to independently determine whether any specific VPP provides "benefit" to a consumer and prohibits dealers from selling a VPP that allegedly provides "no benefit." 16 CFR § 463.5(a). Thus, it forces dealers to make a subjective assessment of "benefit" that can then open them up to liability. Reasonable dealers will likely not be willing to continue to sell third-party VPPs if they are concerned with meeting the burdensome requirements of the CARS Rule and facing increased risk of liability arising therefrom. The result will be reduced competition in the market, reduced customer choice, and likely higher prices.

Third, the Rule's burdensome requirements will overwhelm and confuse consumers and foster feelings of resentment. The CARS Rule imposes additional disclosures, paperwork, and recordkeeping on an already disclosure- and paperwork-heavy transaction. By adding more disclosures and paperwork, the CARS Rule would extend the time associated with the transaction, an outcome that is directly contrary to FTC's stated purpose of streamlining automobile purchase transactions. Pet'rs' Op. Br. at pp. 35-42. Moreover, the CARS Rule injects awkward, formulaic, and patronizing pronouncements into what are often personal and valued relationships between consumers and their salesperson. For example, the CARS Rule requires dealers to obtain "Express, Informed Consent" to any charge made to the consumer, which term is defined as "an affirmative act communicating unambiguous assent," but specifically excludes the act of signing or initialing documents as such assent. 16 CFR § 463.2(g). Similarly, the CARS Rule would force dealers to adopt a patronizing stance toward their customers because it requires disclosing that a "lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle," *id.* § 463.4(e), regardless of the customer's sophistication or prior experience.

While Amici commend the FTC's goal of protecting consumers and reducing any deceptive practices, the CARS Rule will not achieve that goal. To the contrary, the CARS Rule will only "achieve" added complexity and burden without any corresponding benefit to consumers or the VPP market. In sum, the costs appear higher than the FTC acknowledged, and the benefits appear less than what the FTC claimed, necessitating vacation of the CARS Rule. *Chamber of Commerce v. SEC*, 85 F.4th 760, 777 (5th Cir. 2023).

## CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to set aside the Rule or, in the alternative, remand the Rule to the FTC for consideration of additional evidence.

Dated: March 22, 2024

Respectfully submitted,

*/s/ David E. Carney*

David E. Carney
ROBINSON & COLE LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Tel. (771) 213-5650
Fax (771) 213-5651
dcarney@rc.com

*Counsel for Amici Curiae American Property Casualty Insurance Association, Consumer Credit Industry Association, Service Contract Industry Council, Guaranteed Asset Protection Alliance, and Motor Vehicle Protection Products Association*

Of Counsel:

Janet Kljyan

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and 5th Cir. R. 32, the undersigned hereby certifies that:

1. This document complies with Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P.29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

■ this document contains 6,142 words, **or**

☐ this brief uses a monospaced typeface and contains __________ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

■ this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook, **or**

☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

*/s/ David E. Carney*

## CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2024, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ David E. Carney*

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

**TEL. 504-310-7700**
**600 S. MAESTRI PLACE,**
**Suite 115**
**NEW ORLEANS, LA 70130**

March 26, 2024

Mr. David E. Carney
Robinson & Cole, L.L.P.
1201 Pennsylvania Avenue, N.W.
Suite 820
Washington, DC 20004

No. 24-60013 National Automobile Assoc v. FTC
USDC No. P204800, RIN 3084-AB72

Dear Mr. Carney,

You must submit 7 paper copies of your amicus brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

The covers of your documents must be the following colors: Amicus briefs must be green. **DO NOT INCLUDE ANY NOTICES WITHIN THE PAPER COPIES.**

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

By: ______________________
Roeshawn Johnson, Deputy Clerk
504-310-7998

cc: Mr. Benjamin Aiken
Ms. Anisha Sasheen Dasgupta
Mr. Jeffrey Matthew Harris
Ms. Tara Helfman
Mr. Matthew Michael Hoffman
Mr. Steffen Nathanael Johnson
Mrs. Marci V. Kawski
Ms. Lina M. Khan
Ms. Lisa Lawless
Mr. Duane Charles Pozza
Ms. April J. Tabor
Mr. Seanhenry Nathaniel VanDyke
Ms. Julia Kim Whitelock