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Office of  
Consumer  
Credit  
Commissioner

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Leslie L. Pettijohn  
Commissioner

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August 16, 2002

Interpretation Letter Request: 2002-001

Mr. John E. Wacholtz  
5215 N. O'Connor Blvd.  
Irving, TX 75039

Re: Your request for an official interpretation from the Office of Consumer Credit  
Commissioner

Dear Mr. Wacholtz:

You have requested an interpretation, approved by the Finance Commission, as to whether a separate insurance charge for insurance under Texas Finance Code, §348.208(b)(4) ("gap insurance") can be included in a motor vehicle retail installment contract if the gap insurance is provided by an authorized surplus lines carrier. In summary, you ask:

If a surplus lines of insurance is provided by an approved surplus lines carrier (e.g., eligible surplus lines insurer under Texas Insurance Code, §1.14-2(8)) but not filed with and approved by Texas Department of Insurance, can the insurance premium be included as a separate charge in the motor vehicle retail installment contract?

For the following reasons, the answer to your question is no.

The Texas Finance Code permits a retail seller to include, as a separate charge in a motor vehicle retail installment contract, an amount for:

"insurance to reimburse the retail buyer for the amount computed by subtracting the proceeds of the buyer's basic collision policy on the motor vehicle from the amount owed on the vehicle if the vehicle has been rendered a total loss."

Mr. John E. Wacholtz  
August 16, 2002

Interpretation Letter Request 2002-01  
Page 2 of 3

Texas Finance Code, §348.208(b)(4). Additionally, the Texas Finance Code requires gap insurance to meet the provisions of §348.209(a) which state in pertinent part:

- (a) If insurance is included as an itemized charge in a retail installment contract:
  - (1) the insurance must be written:
    - (A) at lawful rates;
    - (B) in accordance with the Insurance Code; and
    - (C) by a company authorized to do business in this state....

Currently, the Department of Insurance is approving the forms and rates for gap insurance.<sup>1</sup> Only authorized insurers may submit their forms and rates for approval. Because surplus lines insurers are not authorized insurers as that term is defined in the Texas Insurance Code, and because several authorized insurers have been approved to write gap insurance, surplus lines insurers are not authorized to write gap insurance.

Provisions relating to surplus lines insurance may be found in the Texas Insurance Code, article 1.14-2. Generally, section 3 of that article authorizes surplus lines insurers to procure insurance coverage when the insurance coverage cannot be obtained from licensed insurers. Before procurement, the surplus lines agent must ensure that the insurance is unavailable from an authorized insurer. Texas Insurance Code, article 1.14-2, §5 states in full:

- (a) No insurance coverage shall be eligible for surplus lines unless the full amount of insurance required is not procurable, after a diligent effort has been made to do so, from among the insurers licensed to transact and actually writing that kind and class of insurance in this state, and the amount of insurance eligible for surplus lines shall be only the amount in excess of the amount so procurable from licensed insurers.
- (b) Policy or contract forms shall not be eligible unless the use is reasonably necessary for the principal purposes of the coverage or unless the use would not be contrary to the purposes of this Article with respect to the reasonable

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<sup>1</sup> The Texas Department of Insurance requires prior approval of the forms and rates for personal gap insurance (dual interest coverage) under the Texas Insurance Code §5.15. The Department of Insurance also approves commercial gap insurance (single interest coverage) however, single interest coverage is not permissible for use in motor vehicle retail installment sales contracts.

Mr. John E. Wacholtz  
August 16, 2002

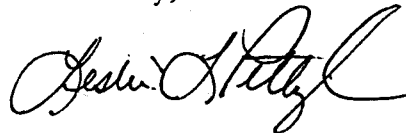
Interpretation Letter Request 2002-01  
Page 3 of 3

protection of authorized insurers from unwarranted competition by unauthorized insurers.

As discussed above, Texas Finance Code, §348.209 requires the gap insurance to be written in accordance with the Insurance Code and by a company authorized to do business in Texas. Surplus lines insurers do not meet either of those requirements. Consequently, surplus lines insurers cannot write gap insurance.

In conclusion, neither the Texas Insurance Code nor the Texas Finance Code provides legal support for the proposition that surplus lines carriers can write gap insurance.

Sincerely,



Leslie L. Pettijohn

LLP:jjm

Approved by the Finance Commission on August 16, 2002.