

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0124 CAF**

**DENNIS E. SMITH,
Complainant**

v.

**LEXUS A DIVISION OF TOYOTA
MOTOR SALES, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Dennis E. Smith (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects. The Complainant claimed that the vehicle leaned and emitted a musty odor. Lexus a Division of Toyota Motor Sales, Inc. (Respondent) argued that Lexus of Austin (Dealer) corrected the issues described by the Complainant. The hearings examiner concludes that the Complainant did not show a reasonable number of repair attempts. Accordingly, the Complainant's vehicle does not qualify for repurchase/replacement relief.

I. Procedural History, Notice, and Jurisdiction

Matters of notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on May 20, 2015, in Victoria, Texas, before Hearings Examiner Andrew Kang. Complainant, Dennis E. Smith, represented himself. Rita Smith and Mary McCurley appeared as witnesses for the Complainant. Cary Slobin, attorney, represented Respondent. Michael Bell, a Field Technical Specialist for Lexus, and Jennifer Gehler, a Field Service and Parts Manager for Lexus, appeared as witnesses for Respondent. The hearing record was closed on May 20, 2015, at the conclusion of the hearing on the merits.

II. Discussion

A. Applicable Law

To allow repurchase or replacement relief, the Lemon Law requires, in part, that the vehicle must have a warrantable defect or condition that either (1) creates a serious safety hazard or (2) substantially impairs the use or market value of the motor vehicle, despite a reasonable number of attempts at repair.¹ The Occupations Code defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.² A rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.³

B. Complainant’s Evidence and Arguments

On February 18, 2014, the Complainant purchased a new 2014 Lexus GX460 from Lexus of Austin (Dealer) in Austin, Texas.⁴ The Complainant estimated that the vehicle had 200 miles at the time of sale. Repair orders showed that the vehicle had 24 miles at the time of delivery.⁵ The parties stipulated that the vehicle came with a basic manufacturer’s warranty providing coverage for 48 months or 50,000 miles.

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.601(4).

³ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁴ Complainant’s Ex. 3, Lemon Law Complaint Form.

⁵ Complainant’s Ex. 9, Service Invoice 35279 dated September 9, 2014; Complainant’s Ex. 10, copy of correspondence received by the Texas Department of Motor Vehicles from Respondent.

The Complainant took the vehicle for service as follows:

- On February 22, 2014, the Dealer found that the vehicle had the wrong suspension controls in the center console and installed the correct controls.
- On September 9, 2014, at 11,612 miles, the Complainant took the vehicle to the Dealer to address a suspension/leaning issue, water leak, and musty odor. The Dealer replaced the front left coil spring assembly to address the suspension concern, which the Dealer verified. However, the repair did not completely eliminate the lean. The Dealer also replaced the cabin air filter with a charcoal injected filter to address the odor. The dealer made no repairs relating to the water leak upon finding no leaks or moisture after testing the vehicle.⁶
- On September 23, 2014, at 11,785 miles, the Complainant took the vehicle to the Dealer stating that the lean seemed worse. The Dealer found the difference between the left and right sides to be .5 inches, which falls within the .79 inch specification.⁷ The Dealer attempted to return the vehicle to the Complainant on September 24, 2014. However, the Complainant did not retrieve the vehicle from the dealership until the end of December 2014.⁸

The Complainant completed a Texas Lemon Law Complaint Form (Complaint) on December 17, 2014, and sent a copy of the Complaint to the Respondent.⁹ The Texas Department of Motor Vehicles received the Complaint on January 14, 2015.

The Complainant testified that he noticed the vehicle leaning in early July of 2014. The Complainant testified that the leaning was pronounced when cornering and with passengers. The Complainant conjectured that the leaning had to be wearing on the suspension. The Complainant alleged that he had been without his vehicle for 96 consecutive days. The Complainant testified that the vehicle had an odor characterized as like urine and new car smell. The dealer replaced an

⁶ Complainant's Ex. 9, Service Invoice 35279 dated September 9, 2014.

⁷ Complainant's Ex. 10, copy of correspondence received by the Texas Department of Motor Vehicles from Respondent.

⁸ Complainant's Ex. 10, copy of correspondence received by the Texas Department of Motor Vehicles from Respondent.

⁹ Complainant's Ex. 4, attachment to the Lemon Law complaint form, dated December 7, 2014.

air filter, but the smell persisted. Mrs. Smith testified that the odor was more noticeable in humid weather and when the vehicle was closed up. The Complainant testified that he felt the leaning affected his equilibrium. The Complainant testified that the repairs did not improve the leaning issue and that the leaning appears to have become worse. The Complainant noted that the repair order stated the front leaned but rear actually leaned. The Complainant recounted that he had been flagged down during a funeral procession because his vehicle was leaning. The Complainant further testified that occupants can feel the effect of the leaning on their equilibrium when exiting the vehicle.

During the inspection at the hearing, measurement of the vehicle at the wheel wells per the manufacturer's "On-Vehicle Inspection" instructions¹⁰ showed the following heights:

	Left	Right
Front	34-3/8 inches (34.375 inches)	33-3/8 inches (33.375 inches)
Rear	36-5/8 inches (36.625 inches)	35-5/16 inches (35.3125 inches)

The difference between the sides at the front was 1 inch and the difference at the rear was 1.3125 inches. According to the On-Vehicle Inspection instructions, the height difference should be less than 0.787 inches. Ostensibly, the front exceeded the manufacturer's specification by 0.213 inches and the rear by 0.5255 inches. However, the On-Vehicle Inspection instructions also states to "[p]erform this step with the fuel tank full." At the time of inspection, the fuel gauge showed less than 1/8th of a tank of gas. Although the Complainant was provided an opportunity to refuel the vehicle before measuring, the Complainant declined. Inspection of the vehicle showed that the fuel tank was located on the left side on the rear half of the vehicle. The vehicle did not have any unbalanced loads.

C. Respondent's Evidence and Arguments

Michael Bell, Field Technical Specialist, testified on behalf of the Respondent. Mr. Bell currently serves as a Field Technical Specialist for the Southern area for Respondent. His responsibilities include supporting dealers and resolving issues. His background includes four years as an Air Force vehicle mechanic, 18 years as a Toyota dealer mechanic, and four years as a

¹⁰ Respondent's Ex. 1, Suspension Control: Suspension Control System (w/KDSS): On-Vehicle Inspection; 2015 MY GX460 [08/2014 -].

field technical specialist. Mr. Bell holds ASE (Automotive Service Excellence) Master Technician and Toyota Master Diagnostic Technician certifications.

Mr. Bell explained that the Kinetic Dynamic Suspension System (KDSS) on the vehicle is the sole reason the vehicle may exhibit a lean. Mr. Bell testified that KDSS continuously monitors road conditions and adjusts the suspension to adapt to road conditions to keep tires in contact with the surface. Mr. Bell explained that hydraulic cylinders (part of KDSS) under pressure pushing up on the left side are known to contribute to the lean of the vehicle. Mr. Bell noted that Lexus issued a technical service bulletin for conditions in which the difference between the left and right sides exceeds 20 millimeters (0.787 inches).¹¹ On September 9, 2014, the Dealer measured the height difference as outside specifications and corrected this by bringing the height difference to within 0.5 inches.¹² Mr. Bell explained that the vehicle fell outside the specification before repair and within specification after repair. On September 24, 2014, the Dealer did not repair the vehicle. The Dealer found the vehicle to be within specifications. Mr. Bell testified that KDSS enhances, rather than impairs, the value, use and safety of the vehicle. Mr. Bell stated that the repair documentation only showed only one repair attempt for the leaning issue.

With respect to the vehicle's odor, Mr. Bell testified that various factors may contribute to the odor issues, such as outside conditions. Mr. Bell also noted that CAFE (Corporate Average Fuel Economy) standards may contribute to odors for all vehicles. Specifically, Mr. Bell explained that federal law requires all manufacturers to make the vehicles air conditioning system recirculate the air at ambient temperatures above 75 degrees Fahrenheit. Mr. Bell stated that the repair documentation only showed one repair attempt for the odor issue.

D. Analysis

1. Repurchase or Replacement Relief

In this case, the Complainant failed to show a reasonable number of repair attempts, which is an essential element for obtaining repurchase or replacement relief. To qualify for

¹¹ Respondent's Ex. 1, Suspension Control: Suspension Control System (w/KDSS): On-Vehicle Inspection; 2015 MY GX460 [08/2014 -].

¹² Complainant's Ex. 9, Service Invoice 35279 dated September 9, 2014.

repurchase/replacement relief, the Lemon Law requires a reasonable number of repair attempts.¹³ Under Section 2301.605(a)(1) of the Lemon Law, four attempts to repair the same defect, with two attempts in the first 12 months or 12,000 miles and another two attempts in the next 12 months or 12,000 miles, establishes a presumption of reasonable repair attempts.¹⁴ However, the evidence only shows one attempt to repair the leaning and odor issues on September 9, 2014. The Complainant subsequently took the vehicle to the Dealer on September 23, 2014. At the second service visit, the vehicle's lean did not exceed the manufacturer's specifications, so the Dealer did not attempt any repairs. The one repair attempt and the following visit, during which no repair attempt occurred, does not satisfy the requirement to undertake a reasonable number of repair attempts.¹⁵ Because of the failure to undertake a reasonable number of repair attempts, the vehicle in this case does not qualify for repurchase or replacement relief.

2. Warranty Repair Relief

Although the vehicle is not eligible for repurchase or replacement relief, the vehicle may still qualify for warranty repair. The measurement of the vehicle at the inspection showed height differences of 1 inch and 1.3125 inches at the front and rear respectively, exceeding the 0.787 inch specification. However, the On-Vehicle Inspection instructions specify to perform the measurement with the fuel tank full, indicating that measuring the height of the vehicle with an empty tank would skew the results. In this case, a full fuel tank would presumably lower the difference in height given that the fuel tank is located on the high side of the vehicle. Given the instructions to measure the vehicle with the fuel tank full and the fact that the fuel tank had less than 1/8th of a tank of gas, the measurements in this case appear suspect, particularly since the law imposes the burden of proof on the Complainant and the Complainant expressly refused the opportunity to refuel the vehicle before measurement. Nevertheless, to the extent the vehicle's difference in height between the left and right sides actually exceeds 0.787 inches (20 millimeters), as measured according to the On-Vehicle Inspection instructions (i.e., with the fuel tank full), the Respondent has an obligation to correct that condition under warranty pursuant to TEX. OCC. CODE § 2301.204.

¹³ TEX. OCC. CODE § 2301.604(a).

¹⁴ TEX. OCC. CODE § 2301.605(a)(1).

¹⁵ TEX. OCC. CODE § 2301.605(a)(1).

III. Findings of Fact

1. On February 18, 2014, the Complainant purchased a new 2014 Lexus GX460 from Lexus of Austin (Dealer) in Austin, Texas.
2. The vehicle's basic warranty provides coverage for 48 months or 50,000 miles, whichever comes first.
3. On September 9, 2014, the Dealer replaced the front left coil spring assembly to address the Complainant's suspension concern and replaced the cabin air filter with a charcoal injected filter to correct the musty odor. These were the only repairs attempted on the Complainant's vehicle.
4. The Complainant completed a Texas Lemon Law Complaint Form on December 17, 2014, and sent a copy to the Respondent.
5. The Texas Department of Motor Vehicles received the Lemon Law complaint on January 14, 2015.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE § 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. Complainant timely filed his Lemon Law complaint. TEX. OCC. CODE § 2301.606(D).
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
5. Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. Complainant failed to undertake a reasonable number of repair attempts. TEX. OCC. CODE § 2301.205(A)(1).

7. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle after a reasonable number of attempts. TEX. OCC. CODE § 2301.604.
8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. TEX. OCC. CODE § 2301.204.
9. Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED July 14, 2015



ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES