

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0160 CAF**

JAMIE ERMATINGER,
Complainant

v.

**VOLKSWAGEN GROUP OF AMERICA,
INC.,**
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jamie Ermatinger (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2014 Volkswagen Passat. The Complainant argued that the vehicle’s navigation system made a shrill “screeching” noise and froze. Volkswagen Group of America, Inc. (Respondent) countered that the malfunctioning navigation system resulted from a collision, not a manufacturing defect. Moreover, the Respondent asserted that the Complainant did not undertake a reasonable number of repair attempts. The hearings examiner concludes that the Complainant established that the vehicle has a warrantable defect that substantially impairs the vehicle’s value. Considering the Complainant’s profession and other particular circumstances, the timing of the repair attempts was reasonable. Therefore, the Complainant’s vehicle qualifies for repurchase relief.

I. Procedural History, Notice and Jurisdiction

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on July 16, 2015, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant, Jamie Ermatinger, represented herself. Adrian Guerrero, Arbitration Specialist, represented the Respondent.

II. Discussion

A. Applicable Law

The Lemon Law, in part, requires a distributor of a motor vehicle to repurchase or replace a vehicle when the distributor is “unable to conform a motor vehicle to an applicable express warranty.”¹ Additionally, warranty repair under Section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a distributor’s . . . warranty agreement applicable to the vehicle.”² Accordingly, for a vehicle to be eligible for repurchase or replacement, or even warranty repair, the vehicle must have a defect under an applicable warranty (warrantable defect). The Complainant must prove the existence of a warrantable defect by a preponderance, that is, the evidence must show that a warrantable defect more likely than not exists.³

Further, for a vehicle to qualify for replacement or repurchase, a warrantable defect must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle despite a “reasonable number of attempts” at repair.⁴ The Lemon Law 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.⁵ Under the Lemon Law, a rebuttable presumption is established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ E.g., *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁶

The statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.⁷

However, regardless of the existence of a warrantable defect, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the distributor;⁸ (2) the distributor was given an opportunity to cure the defect or nonconformity;⁹ and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.¹⁰

B. Complainant's Evidence and Arguments

The Complainant acquired a new 2014 Volkswagen Passat from Randy Hiley Mazda Volkswagen of Arlington (Hiley Volkswagen), located in Arlington, Texas, on April 15, 2014. The vehicle had 11 miles on the odometer at the time of title transfer to the Complainant.¹¹ The vehicle was a replacement pursuant to an order from a prior Lemon Law complaint that addressed the same navigation system malfunction in a 2013 Volkswagen Passat. The vehicle's New Vehicle Limited Warranty provides coverage for three years or 36,000 miles, whichever occurs first.¹² The Complainant is the primary driver of the vehicle. The Complainant's mother used the vehicle on a few occasions.

⁶ 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.

⁷ "[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'" *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

⁸ TEX. OCC. CODE § 2301.606(c)(1).

⁹ TEX. OCC. CODE § 2301.606(c)(2).

¹⁰ TEX. OCC. CODE § 2301.606(d)(2).

¹¹ Complainant's Ex. 2, Application for Texas Certificate of Title.

¹² Complainant's Ex. 1, Volkswagen USA Warranty and Maintenance.

On October 14, 2014, at 13,679 miles, the Complainant took the vehicle to Hiley Volkswagen because the navigation system would freeze and make a shrill “screeching” noise. The repair order noted that the customer stated that the navigation system “will not load”; the Complainant testified that she told the dealer it would freeze. Hiley Volkswagen provided the Complainant with a navigation map update in an attempt to correct the issue.¹³

On November 3, 2014, at 15,427 miles, the Complainant returned to Hiley Volkswagen because the navigation system continued to freeze. The screen would not change and the buttons would not respond. In particular, the Complainant could not turn off the radio. The technician found a fault for an open antenna circuit. The dealer made no repairs because the vehicle had been undergoing repairs at a body shop for a different issue.¹⁴

The navigation system continued to screech and freeze intermittently, so on December 4, 2014, the Complainant brought the vehicle to Volkswagen of Weatherford. A technician test drove the vehicle and could not duplicate the Complainant’s concern. However, the Complainant provided the technicians video of the malfunctioning navigation system, so they removed and replaced the navigation unit in an attempt to correct the issue. The vehicle was taken on another test drive to verify the repair. On one of the test drives, the vehicle struck a coyote. Volkswagen of Weatherford repaired the damage. The vehicle’s mileage was 18,383 when the vehicle was dropped off, but was 20,937 when retrieved according to the repair order. This suggests that after the initial visit in December, the Complainant retrieved the vehicle and then returned in early January to have the navigation system replaced. However, the service invoice is unclear.¹⁵

On January 27, 2015, at 22,973 miles, the Complainant returned to Volkswagen of Weatherford. The navigation system continued to screech. The only repair made was an update to the radio.¹⁶ On February 12, 2015, the Complainant filed a Lemon Law complaint. On February 27, 2015, the Complainant provided the distributor with mailed written notice of the defect.

¹³ Complainant’s Ex. 3, Repair Order 501417 dated October 14, 2014.

¹⁴ Complainant’s Ex. 4, Repair Order 502867 dated November 3, 2014.

¹⁵ Complainant’s Ex. 5, Repair Order 11604 dated January 14, 2015.

¹⁶ Complainant’s Ex. 6, Repair Order 12236 dated January 27, 2015.

During the inspection and test drive at the hearing, the vehicle's odometer had 37,085 miles. The Complainant stated that the navigation system usually malfunctioned after driving at least five miles, so the vehicle was driven for more than five miles. The navigation system did not malfunction during the test drive; however, the Complainant provided videos showing four separate instances when the system did malfunction. The first video clip, recorded in September 2014, demonstrated the navigation system making the noise (a loud, shrill, continuous electronic sound similar to feedback from a microphone or a smoke detector's alarm). The Complainant testified that even after turning the system off and back on, the noise would not stop. The second video, recorded in October 2014, shows the buttons on the navigation system being unresponsive. The third video, recorded in December 2014, showed the navigation screen freezing. The fourth video, recorded in July 2015, demonstrated the navigation screen freezing and the noise. These video clips provide clear examples of the navigation system's issues.

C. Respondent's Evidence and Arguments

Adrian Guerrero, a national arbitration specialist, represented the Respondent. Mr. Guerrero served as a regional case manager in California before taking the arbitration specialist position. The Respondent argued that because the Complainant's first repair attempt took place after 12,000 miles, she did not undertake a reasonable number of repair attempts. The Respondent also presented evidence of repairs for a collision resulting in damage to the right rear side of the vehicle. The repairs, which totaled \$7,736.02, occurred before the first reported navigation system malfunction. The Respondent relied on the timing of the collision and subsequent navigation system malfunction to suggest that the collision caused the navigation system's problems and not any manufacturing defect.¹⁷

D. Analysis

The Complainant did not establish a rebuttable presumption under Texas Occupations Code Section 2301.605 because the first two repair attempts did not occur within the first 12,000 miles following the date of original delivery to the owner.¹⁸ However, the statutory rebuttable is not an exclusive method for demonstrating a reasonable number of repair attempts. Different

¹⁷ Respondent's Ex. 2, Repair History.

¹⁸ TEX. OCC. CODE § 2301.605(a)(1).

circumstances with fewer attempts may still show the undertaking of a reasonable number of repair attempts.¹⁹

In *Ford Motor Company v. Texas Department of Transportation*, the complainant used a Ford AeroMax semi-tractor vehicle for long-distance hauls of freight.²⁰ Because of the long distance usage of the vehicle, two repairs within 12,000 miles, under the presumption in Texas Occupations Code Section 2301.605 would have been difficult. The Complainant in the present case uses her vehicle for work, accumulating large numbers of miles each month and otherwise spending significant time in the vehicle. The Complainant also heavily relies on her navigational system. The hearings examiner in *Ford Motor Company v. Texas Department of Transportation*, justified her decision based on the fact that owners of trucks that “attempt to make a living by accumulating a large number of miles over a short time” would not likely be able to meet the statutory presumption for reasonable number of repair attempts.²¹ The complainant in that case did not first attempt to repair the vehicle until after accumulating 81,753 miles and yet his complaint was upheld.²² The Complainant missed the statutory presumption’s limit for the second visit by only 3,427 miles. Considering the circumstances in this case, the Complainant has undertaken a reasonable number of repairs.

Due to the nature of the Complainant’s use of the vehicle, the timing of the repair attempts are reasonable. The Complainant’s profession as a private investigator requires her to drive more miles and spend more time in her vehicle than the average person. The Complainant’s profession also requires her to rely on the navigation system more often than the average person. Moreover, the vehicle did not begin exhibiting the problems until after the 12,000 mile mark, so she could not have brought it in sooner. The Complainant diligently undertook four repair attempts within 10,000 miles upon discovering the navigation system’s problems.

¹⁹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

²⁰ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

²¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

²² *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

The Complainant presented evidence clearly showing the navigation system malfunctioning. The Respondent argued that the collision may have caused the navigation system's problems. However, Mr. Guerrero did not know whether the area impacted by the collision contained any equipment related to the navigation system that would have been affected. Furthermore, the Complainant's prior vehicle, which was the same model as the present vehicle, exhibited the same issues with the navigation system. The prior vehicle never had a collision but nevertheless exhibited the same issues as the current vehicle.

From a reasonable buyer's perspective, a malfunctioning navigation system that freezes and makes a piercing shrill noise would significantly detract from the vehicle's value.²³ Accordingly, the vehicle qualifies for repurchase in this case.

III. Findings of Fact

1. Jamie Ermatinger (Complainant) acquired a new 2014 Volkswagen Passat from Randy Hiley Mazda Volkswagen of Arlington (Hiley Volkswagen), located in Arlington, Texas, on April 15, 2014. The vehicle had eleven miles on the odometer at the time of the transfer of the vehicle's title to the Complainant.
2. The vehicle was a replacement pursuant to an order from a prior Lemon Law complaint that addressed the same navigation system issue in a 2013 Volkswagen Passat. The vehicle's sales price as listed on the Application for Texas Certificate of Title is \$34,940.
3. Volkswagen Group of America, Inc. (Respondent) distributed the vehicle.
4. The vehicle's New Vehicle Limited Warranty provides coverage for three years or 36,000 miles, whichever occurs first.
5. The vehicle's mileage on the date of the hearing was 37,085.
6. The Complainant took the vehicle to a Volkswagen authorized dealer on the following dates to address the malfunctioning navigation system:
 - a. October 14, 2014, at 13,679 miles;

²³ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation*, 383 S.W.3d 217 (Tex. App.—Austin 2012, no pet.) (“factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine . . . if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”).

- b. November 3, 2014, at 15,427 miles;
 - c. December 4, 2014, at 18,383 miles; and
 - d. January 27, 2015, at 22,973 miles.
7. The Complainant provided video evidence showing the navigation system freezing and making a loud shrill noise.
 8. The malfunctioning navigation system resulted from a warrantable defect.
 9. The malfunctioning navigation system substantially impairs the vehicle's market value.
 10. On February 27, 2015, the Complainant mailed written notice to the Respondent of the vehicle's navigation system's defect.
 11. On February 12, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 12. On May 7, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
 13. The hearing in this case convened and the record closed on July 16, 2015, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant, Jamie Ermatinger, represented herself. Adrian Guerrero, Arbitration Specialist, represented the Respondent.
 14. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$34,940.00
Delivery mileage	11
Mileage at first report of defective condition	13,679
Mileage on hearing date	37,085
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$34,940.00
Mileage at first report of defective condition	13,679
Less mileage at delivery	<u>-11</u>
Unimpaired miles	13,668

Mileage on hearing date					37,085
Less mileage at first report of defective condition					<u>-13,679</u>
Impaired miles					23,406
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
					<u>13,668</u>
	120,000	X	\$34,940.00	=	\$3,979.67
Impaired miles					
					<u>23,406</u>
	120,000	X	\$34,940.00	X .5	= <u>\$3,407.52</u>
Total reasonable allowance for use deduction:					\$7,387.19
Purchase price, including tax, title, license and registration					\$34,940.00
Less reasonable allowance for use deduction					-\$7,387.19
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$27,587.81

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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 43 TEX. ADMIN. CODE § 215.202.
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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. TEX. OCC. CODE § 2301.604(a).

7. After a reasonable number of attempts, the Respondent has been unable to repair the nonconformity in the Complainant's vehicle so that it conforms to the applicable express warranty. TEX. OCC. CODE §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, the Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
9. Based on the above Findings of Fact and Conclusions of Law, the Respondent shall repurchase the Complainant's 2014 Volkswagen Passat at the price of \$27,587.81. TEX. OCC. CODE § 2301.604(a)(1).

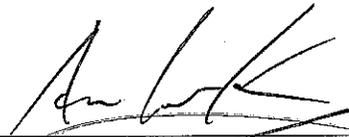
V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of \$27,587.81. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;

3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, the Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

SIGNED September 11, 2015



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