

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0204 CAF**

MARY LUIGS,
 Complainant

v.

VOLVO CARS OF NORTH AMERICA,
LLC,
 Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Mary Luigs (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2013 Volvo XC70. The Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle’s check engine light would come on and that she did not have the vehicle because the vehicle would go back and forth between the dealer and Caliber Collision. Volvo Cars of North America, LLC (Respondent) contended that the issues were accident related and not warrantable defects. The Respondent also added that it offered to repurchase the vehicle, but the Complainant refused. The hearings examiner concludes that the vehicle does not have an existing defect covered by an applicable warranty. Additionally, the Complainant failed to provide notice of the defect by mail as required by the Lemon Law. Consequently, the Complainant’s vehicle does not qualify for repurchase/replacement or warranty repair.

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 September 17, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, Mary Luigs, represented herself. Bill Ferris, Aftersales Market Manager – Texas South, represented the Respondent. In addition to Mr. Ferris, Ben Castillo, Field Technical Specialist, testified for the Respondent.

II. Discussion

A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer 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 manufacturer’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

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 manufacturer;⁶ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;⁷ and (3) the owner filed the Lemon Law complaint within six months

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).

⁶ TEX. OCC. CODE § 2301.606(c)(1).

⁷ TEX. OCC. CODE § 2301.606(c)(2).

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.⁸

B. Complainants' Evidence and Arguments

The Complainant purchased a new 2013 Volvo XC70 from Volvo Center in San Antonio, Texas, on October 2, 2012. The vehicle had 10 miles on the odometer at the time of purchase. The vehicle's new vehicle limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.⁹ The vehicle's short term warranty for emission defects and performance covers two years or 24,000 miles, whichever occurs first.¹⁰ The long term warranty for Emission Defects and Performance, which only applies to the three-way catalytic converter, engine control module, and on-board diagnostic system, covers eight years or 80,000 miles, whichever occurs first.¹¹

The Complainant testified that the vehicle had 17 total repair visits for the check engine light. The check engine light issue apparently stemmed from a collision with a deer on May 24, 2013. The Complainant also mentioned an air bag issue, not listed in the complaint, and explained that her complaint did not include the air bag issue because she did not know about it at the time.¹² The Complainant stated that all of the repairs were done under warranty but none of them were supposed to be. The Complainant stated that her insurance company would pay for hitting the deer but the insurer claimed that something was wrong with the vehicle before the collision. When asked whether the check engine lights were for the same thing, the Complainant explained that (after the collision) while driving from one of her ranches to another, a 26 mile trip, the check engine light came on in Pipe Creek and the engine stopped. She added that the vehicle stopped twice on State Highway 46. The Complainant stated that Jim Coyle of Roger Beasley Volvo explained the vehicle had a problem with the catalytic converter.

The Complainant stated that she did not want her vehicle repaired under warranty because she did not want Volvo to pay for the repair because she knew the vehicle was not defective before

⁸ TEX. OCC. CODE § 2301.606(d)(2).

⁹ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 34, 37.

¹⁰ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 34, 48.

¹¹ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 34, 48.

¹² Note: the complaint identifies the issues to be addressed at the hearing. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

she bought it. She asserted that her insurance should have paid for it. The hearings examiner asked “it was not defective before you bought it?” The Complainant answered “I don’t think it was defective before I bought it at all.” She explained that she hit a deer and this “sprung the whole thing.” Then the hearings examiner asked “you don’t think there was any defect before you had that collision with the deer?” The Complainant responded “of course not, I put 4,900 miles on it . . . the engine light had never come on on that car until I hit that deer and afterwards.” When the hearings examiner asked if everything occurred after the collision, the Complainant responded “absolutely.” The hearings examiner then asked “you had no issues until the collision?” And the Complainant responded “yes.” The Complainant also stated that on Friday of Memorial Day weekend, May 24, 2013, at 8:40 p.m., after hitting the deer and driving 6/10th of a mile, while stopped opposite her gate on Highway 46, the air bag went off when she reached for her purse on the passenger seat. She said the force of the air bag took the steering column out along with the steering wheel and pushed her in and the whole seat moved back with her head over the headrest. The Complainant testified that she has not driven the vehicle since the repairs but her employees occasionally drive the vehicle. The Complainant stated that the vehicle did not have any issues, explaining that her employees would have told her of any issues.

C. Respondent’s Evidence and Arguments

Mr. Castillo testified that all of the diagnostic trouble codes occurred after the collision. He noted that the issue with the catalytic converter may have occurred whether or not the accident happened. Despite the accident, the Respondent offered to repurchase the vehicle for the full purchase price and the dealer agreed to refund the extended warranty amount.¹³ The vehicle performed normally during the test drive at the hearing.

D. Analysis

The record in this case shows that the vehicle does not have an existing defect covered by an applicable warranty. Additionally, the Complainant did not provide notice of the defect by mail as required by the Lemon Law. Consequently, the vehicle does not qualify for repurchase/replacement or warranty repair relief.

¹³ Respondent’s Ex. 3, e-mail dated May 7, 2015 re: Repurchase Detailed Breakdown.

1. Warrantable Defect

Repurchase/replacement and warranty repair relief do not apply all possible defects a vehicle may have. Instead, the law only provides such relief for defects covered by an applicable warranty.¹⁴ Volvo's new vehicle limited warranty specifies that: "Volvo warrants that repairs required to Volvo passenger vehicles due to defects in material or workmanship and occurring under normal use will be made at no charge for parts and/or labor during the warranty period."¹⁵ In other words, the vehicle must have a flaw because of some error in making it, such as the use of an out-of-specification part or incorrect assembly. Additionally, Volvo's warranty contains specific exclusions. In particular, "[r]epairs required because of damage . . . [or] collision are not covered by the warranties."¹⁶ Moreover, the warranty lists "Vehicles severely damaged and/or declared to be a total loss by an insurer" under "What is Not Warranted".¹⁷ The vehicle's emissions warranty states "[t]his warranty covers repairs resulting from any defect in material or workmanship which would cause the vehicle to not to meet emission standards during the applicable warranty period."¹⁸ The vehicle's emissions warranty lists "[d]amage resulting from accidents, acts of nature, and events beyond the control of Volvo" under "What is Not Warranted".¹⁹

In sum, the warranty only applies to defects in parts or workmanship used in manufacturing the vehicle, in essence, mistakes in the manufacturing process. Accordingly, such a defect would have to exist when the vehicle leaves the factory. Repurchase/replacement and warranty repair relief do not apply to conditions caused by factors outside of manufacturing. However, in this case,

¹⁴ "The owner of a motor vehicle or the owner's designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer's, converter's, or distributor's warranty agreement applicable to the vehicle." TEX. OCC. CODE § 2301.204(a); "A manufacturer, converter, or distributor that is unable to conform a motor vehicle to an applicable express warranty . . . shall reimburse the owner for reasonable incidental costs resulting from loss of use of the motor vehicle because of the nonconformity or defect and: (1) replace the motor vehicle with a comparable motor vehicle; or (2) accept return of the vehicle from the owner and refund to the owner the full purchase price, less a reasonable allowance for the owner's use of the vehicle, and any other allowances or refunds payable to the owner." TEX. OCC. CODE § 2301.604(a).

¹⁵ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 37 (emphasis added).

¹⁶ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 35.

¹⁷ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 40.

¹⁸ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 48.

¹⁹ Complainant's Ex. 1, 2013 U.S.A./Canada Warranty and Maintenance Records Information at 49.

the Complainant testified, and repeatedly affirmed, that she did not believe that the vehicle had a defect prior to the collision with the deer. The timing of the check engine lights comports with the Complainant's belief that the vehicle did not have a defect prior to the collision. Significantly, the vehicle's warranty excludes repairs for damage or collision. Moreover, even if the collision with the deer did not cause the complained of defects, the vehicle's warranty specifically excludes coverage of severely damaged vehicles. Furthermore, to obtain relief, whether repurchase/replacement or repair, the law requires that the vehicle have a currently existing defect. However, the evidence in this case shows that the vehicle has not exhibited any further issues since the final repairs. Though the Complainant has not driven or ridden in the vehicle, the Complainant testified that her employees drive the vehicle occasionally and that her employees would have notified her if they experienced any issues with the vehicle but they have not reported any issues. Finally, the vehicle performed normally during the test drive at the hearing, further supporting that the vehicle does not have a currently existing defect.

2. Notice of Defect

The law prohibits granting repurchase or replacement relief unless "the [vehicle] owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor."²⁰ The evidence shows that the Complainant had the notice of defect faxed to the Respondent and not mailed.²¹ Consequently, the law prohibits granting repurchase or replacement relief.

III. Findings of Fact

1. The Complainant, Mary Luigs, purchased a new 2013 Volvo XC70 from Volvo Center in San Antonio, Texas, on October 2, 2012. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle's new vehicle limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.

²⁰ TEX. OCC. CODE § 2301.606(c)(1).

²¹ Complainant's Ex. 4, Notice of Defect, March 25, 2015.

3. The vehicle's short term warranty for emission defects and performance covers two years or 24,000 miles, whichever occurs first.
4. The vehicle's long term warranty for emission defects and performance covers eight years or 80,000 miles, whichever occurs first.
5. The vehicle's long term warranty for emission defects and performance only applies to the three-way catalytic converter, engine control module, and on-board diagnostic system.
6. The vehicle's new vehicle limited warranty expressly excludes repairs required because of damage or collision.
7. The vehicle's new vehicle limited warranty expressly excludes severely damaged vehicles.
8. The vehicle's emission warranties expressly exclude damage from accidents and acts of nature.
9. The new vehicle limited warranty and long term warranty for emission defects and performance were in effect at the time of the hearing.
10. On May 24, 2013, the Complainant's vehicle collided with a deer.
11. After the collision with the deer, the vehicle's check engine light began to turn on.
12. On March 26, 2015, the Complainant had her written notice of defect faxed, and not mailed, to the Respondent.
13. On March 26, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On July 3, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Volvo Cars of North America, LLC, 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.
15. The hearing in this case convened, and the record closed, on September 17, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, Mary Luigs, represented herself. Bill Ferris, Aftersales Market Manager – Texas South, represented the

Respondent. In addition to Mr. Ferris, Ben Castillo, Field Technical Specialist, testified for the Respondent.

16. The vehicle's odometer showed 8,205 miles at the time of the hearing.
17. The vehicle operated normally during the test drive at the hearing.
18. Since the repairs to the vehicle, the Complainant has not driven or ridden in the vehicle but the Complainant's employees drive the vehicle and would have notified the Complainant of any issues but have not reported any issues.

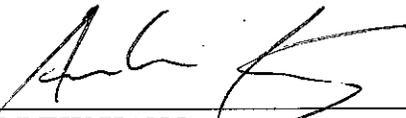
IV. Conclusions of Law

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 did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

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

SIGNED November 13, 2015



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