

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0281 CAF**

**ALMEDA CASHIN,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Almeda Cashin (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2014 Buick Encore. The Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle's infotainment display will go blank. General Motors LLC (Respondent) contended that issue had been repaired and that essentially the vehicle has not been substantially impaired. The hearings examiner concludes that the vehicle has an existing warrantable defect but that the record does not contain sufficient evidence to show substantial impairment of its use or value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but does qualify for 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 19, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Kevin Phillips, Business Resource Manager, represented the Respondent. David Piper, Field Service Engineer, and Doug Wiseman, District Manager Aftersales, 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).

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.³ 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.⁴ The Department applies a reasonable purchaser standard for determining whether the defect substantially impairs the value of the vehicle.⁵ The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ In this case, the general method applies.

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ “[F]actfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) 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.” *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts 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 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.¹⁰

However, 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.¹¹ Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.¹²

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ 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.¹⁵

¹⁰ 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.

¹¹ “[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).

¹² “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ TEX. OCC. CODE § 2301.606(c)(2).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

B. Complainant's Evidence and Arguments

On May 7, 2014, the Complainant, Almeda Cashin, purchased a new 2014 Buick Encore from Dow Autoplex in Mineola, Texas.¹⁶ The vehicle had 31 miles on the odometer at the time of purchase.¹⁷ The vehicle's warranty provides bumper to bumper coverage for 4 years or 50,000 miles, whichever occurs first.¹⁸ The Complainant stated that the display (infotainment display), located at the top of the center stack, would randomly go blank for about two to three minutes to as long as 20 minutes. The Complainant confirmed that the display would normally come back on after shutting off the vehicle and restarting. The Complainant noted a couple of instances when the display would not come on upon starting the vehicle. The Complainant testified that the display first went blank, for about 20 minutes, while going from McKinney to east Texas on July 31, 2014. The Complainant took the vehicle to a dealer for warranty repair on the following dates and miles as shown below:

Date	Miles	Issue
June 23, 2014	3,805	Dash lights randomly go out; at times back up camera does not come on when in reverse ¹⁹
August 7, 2014	7,190	At times dash lights do not illuminate ²⁰
October 10, 2014	9,823	Display screen goes blank randomly ²¹
December 11, 2014	11,199	Radio display will intermittently black out ²²
February 4, 2015	12,170	Radio screen will go black ²³
June 30, 2015	16,107	Radio screen will black out ²⁴

The Complainant stated that she first took her vehicle for service to address the display issue on August 7, 2014. The Complainant noted that the dealer always provided a loaner vehicle while the dealer serviced her vehicle. The Complainant testified that the repairs did not resolve the display issue. Even after the repairs, the screen would still periodically go blank. At the final repair attempt

¹⁶ Complainant's Ex. 16, Motor Vehicle Retail Installment Sales Contract.

¹⁷ Complainant's Ex. 15, Odometer Disclosure Statement.

¹⁸ Complainant's Ex. 11, Owners Warranty & Protection, 2014 Warranty Information.

¹⁹ Complainant's Ex. 5, Invoice No. 128852.

²⁰ Complainant's Ex. 6, Invoice No. 130056.

²¹ Complainant's Ex. 7, Invoice No. 193013.

²² Complainant's Ex. 8, Invoice No. 196451.

²³ Complainant's Ex. 9, Invoice No. 199298.

²⁴ Complainant's Ex. 10, Invoice No. 208032.

on June 30, 2015, the Respondent's field service engineer replaced the radio and video cable. The issue continued even after this repair.

C. Respondent's Evidence and Arguments

On cross-examination, the Complainant could not recall whether the icons appeared on the display in reference to the June 23, 2014, service visit. The Complainant confirmed that the display never stayed off permanently. David Piper, Respondent's field service engineer, who inspected the vehicle on June 30, 2015, testified that testing did not reveal any faults and the display did not go blank during the inspection. The Complainant stated that the radio and heating/ventilation/air conditioning continued to function even after the display went blank. Mr. Piper explained replacement of the radio resolved similar display issues on other like model vehicles. Mr. Piper explained that he would want to replace the display if the blank screen recurred. Mr. Piper did not find any driveability concerns about the vehicle. Doug Wiseman, district manager aftersales for the Respondent, testified that the radio and cable were replaced and that the display operated normally.

D. Analysis

The Complainant's vehicle qualifies for warranty relief since it continues to have a warrantable defect but does not qualify for repurchase or replacement because the defect does not substantially impair the use or value of the vehicle.

1. Warrantable Defect

The Complainant testified that the blank display issue continued to recur even after the final warranty repair, indicating that the vehicle has a currently existing warrantable defect.

2. Reasonable Repair Attempts

The Complainant satisfied the requirements for reasonable repair attempts under the statutory presumption in § 2301.605(a)(1)(A) and (B) of the Texas Occupations Code. The record shows that vehicle had two repair attempts in the first 12,000 miles after delivery and another two attempts in the next 12,000 miles. The Complainant testified that she first took her vehicle to the dealer to address the display issue on August 7, 2014 (at 7,190 miles). Although the repair order referenced the dash lights, it did not specify that the Complainant raised the display issue.

Nevertheless, even excluding the August 7, 2014, visit, the record still shows sufficient repair attempts for the display issue (October 10, 2014, at 9,823 miles; December 11, 2014, at 11,199 miles; February 4, 2015, 12,170 miles; and June 30, 2015, 16,107 miles).

3. Substantial Impairment of Use or Value

The evidence shows that the blank screen did not prevent the radio or the heating ventilation and air conditioning from functioning, the clock did not require resetting after the infotainment display went blank, and the malfunctioning infotainment display did not affect the vehicle's driveability. Furthermore, when the display does malfunction, the display does not stay off permanently but will come back on. Given these circumstances, the vehicle does not "more likely than not" have a substantial impairment in use or value.

III. Findings of Fact

1. On May 7, 2014, the Complainant, Almeda Cashin, purchased a new 2014 Buick Encore from Dow Autoplex, a franchised dealer of the Respondent, General Motors LLC, in Mineola, Texas. The vehicle had 31 miles on the odometer at the time of purchase.
2. The vehicle's warranty provides bumper to bumper coverage for 4 years or 50,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle in for repair as follows:

Date	Miles	Issue
August 7, 2014	7,190	At times dash lights do not illuminate ²⁵
October 10, 2014	9,823	Display screen goes blank randomly ²⁶
December 11, 2014	11,199	Radio display will intermittently black out ²⁷
February 4, 2015	12,170	Radio screen will go black ²⁸
June 30, 2015	16,107	Radio screen will black out ²⁹

²⁵ Complainant's Ex. 6, Invoice No. 130056.

²⁶ Complainant's Ex. 7, Invoice No. 193013.

²⁷ Complainant's Ex. 8, Invoice No. 196451.

²⁸ Complainant's Ex. 9, Invoice No. 199298.

²⁹ Complainant's Ex. 10, Invoice No. 208032.

5. The infotainment display continued to intermittently go blank after the final repair.
6. The blank screen did not prevent the radio or the heating ventilation and air conditioning from functioning.
7. The clock did not require resetting after the infotainment display went blank.
8. The malfunctioning infotainment display did not affect the vehicle's driveability.
9. On June 1, 2015, the Complainant mailed a written notice of defect to the Respondent.
10. On June 4, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On August 18, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, General Motors 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.
12. The hearing in this case convened and the record closed on September 19, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Kevin Phillips, Business Resource Manager, represented the Respondent. David Piper, Field Service Engineer, and Doug Wiseman, District Manager Aftersales, testified for the Respondent.
13. The vehicle's odometer showed 17,196 miles at the time of the hearing.
14. The vehicle operated normally during the test drive at the hearing.

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

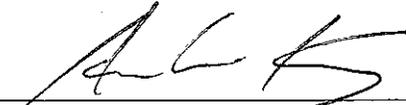
the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.

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 does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
7. 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**. It is **FURTHER ORDERED** that the Respondent shall repair the vehicle's infotainment display. Within 30 days from the receipt of this order, the parties shall complete the delivery and repair of the subject vehicle, subject to any delay from a party's exercise of rights under TEX. GOV'T CODE §§ 2001.144-2001.146. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may deem the Complainant to have rejected the granted relief and consider the complaint closed under 43 TEX. ADMIN. CODE § 215.210(2).

SIGNED November 6, 2015



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