

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0306 CAF**

**CESAR A. OCHOA,  
Complainant**

v.

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Cesar A. Ochoa (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in his 2014 GMC Sierra 1500. The Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle vibrates and hops at highway speeds of 65 mph and higher; the driver's seat falls out of track; the vehicle made a clicking noise from the front end while turning; and the vehicle made hard transmission shifting noises. General Motors LLC (Respondent) argued that the vehicle did not have any substantial loss of use or safety issues. Additionally, the vehicle's aftermarket tires precluded some repairs from warranty coverage. The hearings examiner concludes that the vehicle does not have an existing warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair 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 October 2, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maribel Ochoa also appeared for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Ron Novak, 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.”<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> The Department applies a reasonable purchaser standard for determining whether the defect substantially impairs the value of the vehicle.<sup>5</sup> The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.<sup>6</sup> The first applies generally,<sup>7</sup> the second applies to serious safety hazards,<sup>8</sup> and the third applies to vehicles out of service for repair for at least 30 days.<sup>9</sup>

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<sup>1</sup> TEX. OCC. CODE § 2301.604(a).

<sup>2</sup> TEX. OCC. CODE § 2301.204.

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> “[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).

<sup>6</sup> TEX. OCC. CODE § 2301.605(a).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity,<sup>14</sup> 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.<sup>15</sup>

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<sup>10</sup> 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.

<sup>11</sup> “[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).

<sup>12</sup> “[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).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> TEX. OCC. CODE § 2301.606(c)(2).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

The law places the burden of proof on the Complainant.<sup>16</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.<sup>17</sup> For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail.

### B. Complainant's Evidence and Arguments

On December 8, 2014, the Complainant, Cesar A. Ochoa, purchased a new 2014 GMC Sierra 1500 from Gunn Buick GMC, a franchised dealer of the Respondent, General Motors LLC, in San Antonio, Texas.<sup>18</sup> The vehicle had 85 miles on the odometer at the time of purchase.<sup>19</sup> The vehicle's limited warranty provides bumper-to-bumper coverage for three years or 36,000 miles and powertrain coverage for five years or 100,000 miles, whichever occurs first.<sup>20</sup> The Complainant took the vehicle to a dealer to on the following dates and miles as shown below:

| Date              | Miles  | Issue   |
|-------------------|--------|---|
| December 10, 2014 | 270    | Vibration around 70 mph <sup>21</sup>   |
| February 27, 2015 | 6,316  | Vibration around 70 mph <sup>22</sup>   |
| March 20, 2015    | 8,495  | Vibration at 70-75 mph <sup>23</sup>  |
| June 17, 2015     | 14,489 | Shaking/hopping when turning at 70 mph or higher <sup>24</sup>  |
| July 13, 2015     | 15,749 | Vibration at 45-50 mph and 68-75 mph; driver's seat moves; vehicle makes sounds when downshifting; clicking sounds when turning <sup>25</sup> |
| July 27, 2015     | 16,279 | Driver's seat shifts; vibration at highway speeds; clicking sound when gears shift; clicking noise when turning                               |

<sup>16</sup> 43 TEX. ADMIN. CODE § 215.206.66(d).

<sup>17</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>18</sup> Complainant's Ex. 1, Buyer's Order; Respondent's Ex. 1, Buyer's Order.

<sup>19</sup> Complainant's Ex. 1, Buyer's Order; Complainant's Ex. 2, Odometer Disclosure Statement; Respondent's Ex. 1, Buyer's Order.

<sup>20</sup> Complainant's Ex. 3, 2014 GMC Limited Warranty and Owner Assistance Information at 2.

<sup>21</sup> Complainant's Ex. 5, RO Number 90631274; Respondent's Ex. 1, RO Number 90631274.

<sup>22</sup> Complainant's Ex. 6, RO Number 906034300; Respondent's Ex. 1, RO Number 906034300.

<sup>23</sup> Complainant's Ex. 7, RO Number 906035229; Respondent's Ex. 1, RO Number 906035229.

<sup>24</sup> Complainant's Ex. 8, RO Number 267477; Respondent's Ex. 1, RO Number 267477.

<sup>25</sup> Complainant's Ex. 9, RO Number 906040112; Respondent's Ex. 1, RO Number 906040112.

The Complainant testified that he first felt vibration on the way home after purchasing the vehicle (on December 8, 2014). He checked the lug nuts and took the vehicle back to the dealer the next day. The dealership advised the Complainant to return after driving the vehicle a few days. At the December 10, 2014, visit, the technician road force balanced the wheels but the Complainant did not notice any improvement in the vibration. After the first visit, the Complainant had the tires replaced. At the February 27, 2015, visit, the technician balanced the tires. However, on March 20, 2015, the Complainant brought the vehicle in again for vibration. The technician noted that the issue could not be duplicated on a test drive. However, the Complainant pointed out that the mileage in and out did not differ on the invoice. On June 17, 2015, the Complainant felt bad vibration and took the vehicle to a dealer. The Complainant testified that he did not feel safe taking a turn at the speed limit on State Highway 130 by Buda, Texas. The dealer duplicated the vibration on a test drive and advised the Complainant not to take turns over 70 mph. The Respondent's final repair attempt occurred on July 13, 2015. The Complainant testified that the driver's seat movement issue was resolved and that the clicking from the steering column was no longer an issue. At the July 27, 2015, visit, the dealer rotated the tires and road force balanced the wheels. The Complainant noticed a slight improvement in the vibration. During the test drive at the hearing, the Complainant stated that the noise during shifting occurred at lower speeds (30 to 40 mph) and could not be heard over the radio or air conditioning.

### **C. Respondent's Evidence and Arguments**

On cross-examination, the Complainant stated that the vehicle had aftermarket sidesteps and tonneau cover. The Complainant also confirmed that the vehicle never stalled or had lost control. The vehicles aftermarket Michelin tires were replaced with OEM tires on July 24, 2015. Mr. Novak testified that the warranty imposes no obligation to repair non-OEM (original equipment manufacturer) components. He also explained that discrepancies in a repair order's mileage in and out may occur because of a technician's indifference but that the technician's explanatory notes mean more than mileage in and out. At the July 30, 2015, inspection, Mr. Novak and Matt Kosub, Service Director at Gunn Buick GMC, test drove the vehicle and the vehicle performed comparably to other 2014 and 2015 GMC Sierras. Two tires exceed the maximum road force specification and were re-indexed to within specification. Mr. Novak drove the subject vehicle with a Vibration Analyzer and Pico Scope Analyzer. The readings from the analyzers fell

within the Respondent's 20 milli-g's (gravitational force) specification. Mr. Novak's report showed that the dealers have not submitted any warranty claims to the Respondent. Mr. Novak confirmed that the Complainant's vehicle came with the Z71 off-road package, which includes a stiffer suspension. Mr. Novak testified that a stiffer suspension would transmit more vibration from the road. Mr. Novak noted that the vehicle had aftermarket tires installed intended for heavy duty use appropriate for 2500 and 3500 series trucks rather than a 1500 series like the subject vehicle.

#### D. Analysis

The Lemon Law does not apply to all problems that may occur with a vehicle, such as conditions arising from the design of the vehicle or other issues arising from outside the manufacturing process. Instead, the Lemon Law's replacement/repurchase relief, as well as warranty repair, only apply to warrantable defects (defects covered by an applicable warranty).<sup>26</sup> The vehicle's warranty states that it "covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle related to materials or workmanship occurring during the warranty period."<sup>27</sup> Accordingly, for the warranty to apply, the complained of issue must result from a defect in materials or workmanship, a manufacturing defect, rather than the vehicle's design. Further, the warranty does not apply to "slight noise, vibrations, or other normal characteristics". A manufacturing defect occurs when the vehicle varies from the manufacturer's intended design (such as incorrect assembly or the use of a substandard part).<sup>28</sup> In contrast, design characteristics result from the vehicle's design itself and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer's specifications will normally have the same characteristics.

#### 1. Vibration

The issue here centers on whether the complained of vibration constitutes a warrantable defect and not whether the vehicle vibrates. In this case, the evidence indicates that the complained of vibration is a normal characteristic of the vehicle's design. During the test drive, the vehicle exhibited vibration at highway speeds. The Complainant found such vibration to be excessive. On

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<sup>26</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>27</sup> Complainant's Exhibit 3, 2014 GMC Limited Warranty and Owner Assistance Information at 4.

<sup>28</sup> See *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004).

the other hand, that vibration during the test drive did not appear abnormal to Mr. Novak. Objective measures showed that the vehicle's level of vibration is normal and not a defect for that model vehicle. Specifically, the vibration and Pico Scope analysis showed vibration within the accepted specification of 20 milli-g's. Further, a comparison of the subject vehicle with new, same-type vehicles showed that the subject vehicle had comparable levels of vibration as the new vehicle. Furthermore, the vehicle came equipped with a stiffer off-road suspension, which would ordinarily transmit more vibration than the standard suspension. Accordingly, the vehicle's vibration appears normal for the subject vehicle and not the result of a manufacturing defect. Although the vehicle's vibration may be undesirable, the record indicates that this vibration results from the vehicle's design and not from a manufacturing defect. Because the vibration does not arise from a manufacturing defect, the vehicle's warranty does not apply. Additionally, the terms of the warranty specifically exclude vibration. Accordingly, the vibration is not a warrantable defect.

## 2. Clicking Noise When Shifting

The Complainant testified that the clicking noise could not be heard with the air conditioning or radio on. The clicking noise was not audible from within the cabin during the test drive with the radio and air conditioning turned off. The evidence did not show that the noise had any effect on the vehicle's performance. A clicking noise was detectable on a video recorded by a camera mounted underneath the vehicle. However, the vehicle's warranty excludes slight noise from coverage. Given that the noise was only apparent from the video recorded underneath the vehicle, could not be heard from the cabin during the test drive, cannot be heard over the radio or air conditioning, the clicking appears to be a slight noise that does not constitute a warrantable defect. Additionally, the notice of defect the Complainant sent to the Respondent does not appear to address the clicking issue<sup>29</sup> and the record only shows two repair attempts for noise when shifting while the statutory presumption requires four attempts. Consequently, repurchase/replacement relief does not apply. Further, the nature of the noise was unclear. Testimony indicated that the noise could potentially arise from a normal level of play in the driveline. However, to the extent that the complained of noise actually results from a warrantable defect, such as a loose universal joint or other defect in the driveline, the Respondent has a

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<sup>29</sup> Complainant's Ex. 4, notice of defect to the Respondent.

continuing obligation under TEX. OCC. CODE §§ 2301.204 and 2301.603 to repair the defect even after the expiration of vehicle's the warranty.

### III. Findings of Fact

1. On December 8, 2015, the Complainant, Cesar A. Ochoa, purchased a new 2014 GMC Sierra 1500 from Gunn Buick GMC, a franchised dealer of the Respondent, General Motors LLC, in San Antonio, Texas. The vehicle had 85 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper-to-bumper coverage for three years or 36,000 miles and powertrain coverage for five years or 100,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The warranty does not cover slight noise or vibration.
5. The Complainant took the vehicle to a dealer to address the complained of issues as follows:

| Date              | Miles  | Issue   |
|-------------------|--------|---|
| December 10, 2014 | 270    | Vibration around 70 mph   |
| February 27, 2015 | 6,316  | Vibration around 70 mph   |
| March 20, 2015    | 8,495  | Vibration at 70-75 mph  |
| June 17, 2015     | 14,489 | Shaking/hopping when turning at 70 mph or higher  |
| July 13, 2015     | 15,749 | Vibration at 45-50 mph and 68-75 mph; driver's seat moves; vehicle makes sounds when downshifting; clicking sounds when turning |
| July 27, 2015     | 16,279 | Driver's seat shifts; vibration at highway speeds; clicking metal sound when gears shift; clicking noise when turning           |

6. The issues with the shifting driver's seat and clicking when turning no longer exist.
7. The vehicle's vibration fell within normal specifications.
8. The clicking noise when shifting is a slight noise.
9. On June 23, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).



10. 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.
11. The hearing in this case convened and the record closed on October 2, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maribel Ochoa also appeared for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Ron Novak, District Manager Aftersales, testified for the Respondent.
12. The vehicle's odometer showed 20,171 miles at the time of the hearing.
13. 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). TEX. OCC. CODE § 2301.606(c)(1).
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 did not meet the statutory requirement for a reasonable number of repair attempts for the clicking noise when shifting. TEX. OCC. CODE § 2301.605(a)(1).
8. The Complainant did not meet the statutory requirement to provide notice of the defect to the Respondent regarding the clicking noise issue.
9. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
10. 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.
11. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expired. 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 December 1, 2015**



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