

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0327 CAF**

**CHIKAKO NAKAMA,
Complainant**

v.

**MAZDA NORTH AMERICAN
OPERATIONS,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Chikako Nakama (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2014 Mazda 3 manufactured by Mazda North American Operations (Respondent). The hearings examiner concludes that the vehicle has a warrantable defect that qualifies for repurchase/replacement.

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 on November 18, 2015, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. Alan Roberson represented the Complainant. Mr. Roberson, as well as the Complainant herself, testified for the Complainant. Rob Merz, Regional Technical Specialist, represented and testified for the Respondent.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor

vehicle after a reasonable number of attempts.”¹ In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.² In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

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.³

b. Substantial Impairment

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders 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.”⁴

c. Reasonable Number of Repair Attempts

For serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.601(4).

⁴ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁵

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.⁶ 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.⁷

d. Other Requirements

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;⁸ (2) the manufacturer 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

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."¹¹

⁵ TEX. OCC. CODE § 2301.605(a)(2).

⁶ "[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).

⁷ "[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).

⁸ TEX. OCC. CODE § 2301.606(c)(1).

⁹ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁰ TEX. OCC. CODE § 2301.606(d)(2).

¹¹ TEX. OCC. CODE § 2301.204.

A. Complainant's Evidence and Arguments

On July 31, 2014, the Complainant, Chikako Nakama, purchased a new Mazda 3 from Hiley Mazda of Hurst, located in Hurst, Texas, a franchised dealer of the Respondent, Mazda North American Operations. The vehicle had 35 miles on the odometer at the time of purchase. The vehicle's basic warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.¹² In a letter dated June 25, 2015, the Complainant mailed a written notice of defect to the Respondent.¹³ On July 20, 2015, the Complainant filed a Lemon Law complaint with the Department of Motor Vehicles alleging failure of the brake rotors and pads. The Complainant took the vehicle to a dealer on the following dates and miles as shown below for a total of three repair attempts:

Date	Miles	Issue
November 11, 2014	4,794	Brake rotors and pads ¹⁴
November 25, 2014	4,875	
May 11, 2015	11,607	Brake rotors and pads ¹⁵
August 27, 2015	15,821	Brake rotors and pads ¹⁶

The Respondent's final opportunity to repair the vehicle occurred on August 27, 2015. Mr. Roberson testified that the vehicle had a total of three total repair visits and that no repairs occurred at the final opportunity to repair. Mr. Roberson testified that the vehicle had three sets of rotors and pads, the original and two sets of replacements. Mr. Roberson stated that they would notice grooves appearing on the rotors about 1,000 to 1,500 miles after each repair.

Mr. Roberson testified that he and the Complainant first noticed gouging and scarring of the rotors at about 4,000 miles. Mr. Roberson noted that the Complainant's prior vehicle, a Honda, went 150,000 miles without needing a brake job and that his vehicle, a Toyota Four Runner, had a 100,000 and never had a brake job. The Complainant testified that she drove her vehicle almost every day to commute to work. The commute consisted predominantly of highway miles. The

¹² Complainant's Ex. 3, Warranty Vehicle Inquiry Report attached to R/O No. 6125892/1.

¹³ Complainant's Ex. 5, Written Notification to Mazda.

¹⁴ Complainant's Ex. 3, R/O No. 6125892/1. The dealer found grooves on the rotors at a service visit on November 11, 2014, at 4,794 miles, under R/O No. 6125768/1 and ordered parts for repair according to a technical service bulletin. The repair was completed on November 25, 2014 under R/O No. 6125892/1. These two repair orders appear to cover a single repair attempt.

¹⁵ Complainant's Ex. 3, R/O No. 6131399/1.

¹⁶ Respondent's Ex. 1, Respondent's response to the Texas Department of Motor Vehicles.

Complainant testified that she did not notice any performance difference in relation to the brake issue. Mr. Roberson expressed concern about the cost of brake maintenance, for which parts cost about \$250 and the labor, about \$200. Mr. Roberson testified that the rotors and pads required replacement within 5,000 miles.

B. Respondent's Evidence and Arguments

On cross-examination, the Complainant acknowledged that she did not have any concerns with the braking performance. Mr. Merz asserted that the complained of issue was not a defect and that the Complainant's concern was cosmetic. Mr. Merz testified that at the inspection on August 27, 2015, at 15,821 miles, the vehicle's rotors had markings but not grooves. Mr. Merz explained that the vehicle's original brake pads and the replacement brake pads were both semi-metallic, but the new pads used a different composite with less abrasive materials to reduce deep grooves. Mr. Merz explained that rotor life depended on driving habits, highway miles driven, cargo in the car, and other variables.

C. Inspection at the Hearing

A visual inspection of the vehicle at the hearing revealed deep grooves in the rotors.

D. Analysis

The evidence shows that grooves may normally occur on the rotors due to metallic particles from the brake pads grinding against the rotor. However, the rate of rotor wear in this case appears inconsistent with the Complainant's use of the vehicle. Testimony shows that the Complainant predominately drove highway miles, which should result in less braking and therefore less rotor wear. However, the Complainant's vehicle required rotor replacement within the first 5,000 miles. In comparison, the Complainant's prior vehicle went 150,000 miles without needing such repair. The record shows that at the manufacturer's final opportunity for repair on August 27, 2015, at 15,821 miles, the vehicle's rotors had markings but not grooves. However, by the time of the hearing on November 18, 2015, at 18,984 miles, the vehicle's rotors already exhibited significant grooves. Accordingly, a preponderance of the evidence shows that the vehicle has an existing warrantable defect. Given the extraordinary rate of wear on the rotors with the potential for brake failure, the defect appears to pose a serious safety risk. Consequently, the vehicle qualifies for repurchase or replacement.

III. Findings of Fact

1. On July 31, 2014, the Complainant, Chikako Nakama, purchased a new Mazda 3 from Hiley Mazda of Hurst, located in Hurst, Texas, a franchised dealer of the Respondent, Mazda North American Operations. The vehicle had 35 miles on the odometer at the time of purchase.
2. The vehicle's basic warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer to address the complained of issues as follows:

Date	Miles	Issue
November 11, 2014	4,794	Brake rotors and pads
November 25, 2014	4,875	
May 11, 2015	11,607	Brake rotors and pads
August 27, 2015	15,821	Brake rotors and pads

5. The vehicle's brake rotors and pads required replacement within 5,000 miles.
6. The Complainant drove the vehicle predominantly on the highway.
7. On June 25, 2015, the Complainant mailed a written notice of defect to the Respondent.
8. On July 20, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
9. On September 22, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Mazda North American Operations, 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.
10. The hearing in this case convened on November 18, 2015, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. Alan Roberson represented the Complainant. Mr. Roberson, as well as the Complainant herself, testified

for the Complainant. Rob Merz, Regional Technical Specialist, represented and testified for the Respondent.

11. The vehicle's odometer displayed 18,984 miles at the time of the hearing.
12. A visual inspection of the vehicle at the hearing revealed deep grooves in the rotors.
13. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$28,375.28
Delivery mileage	35
Mileage at first report of defective condition	4,794
Mileage on hearing date	18,984
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$28,375.28		
Mileage at first report of defective condition	4,794		
Less mileage at delivery	-35		
Unimpaired miles	4,759		
Mileage on hearing date	18,984		
Less mileage at first report of defective condition	-4,794		
Impaired miles	14,190		
<i>Reasonable Allowance for Use Calculations:</i>			
Unimpaired miles	$4,759 \div 120,000$	$\times \$28,375.28$	$= \$1,125.32$
Impaired miles	$14,190 \div 120,000$	$\times \$28,375.28$	$\times 50\% = \$1,677.69$
Total reasonable allowance for use deduction			\$2,803.00
Purchase price, including tax, title, license and registration	\$28,375.28		
Less reasonable allowance for use deduction	-\$2,803.00		
Plus filing fee refund	\$35.00		
TOTAL REPURCHASE AMOUNT	\$25,607.28		

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's defect constitutes a serious safety hazard. TEX. OCC. CODE § 2301.601(4).
7. The Complainant's vehicle qualifies 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 the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) 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 **\$25,607.28**. 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 January 15, 2016



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