

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0036 CAF**

**TAHSEEN SHAHZAD,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Tahseen Shahzad (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her vehicle (Vehicle) manufactured by General Motors LLC (Respondent). The hearings examiner concludes that the Vehicle has an existing warrantable defect that qualifies for repurchase or replacement.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 January 6, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Sharon Shahzad, the Complainant's husband, represented and testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Doug Wiseman, District Manager Aftersales, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

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.”² 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.³ 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.⁴

b. Substantial Impairment of Value

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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

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 presumption is applicable. 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

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).

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).

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;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

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."¹⁶

A. Complainant's Evidence and Arguments

On April 1, 2015, the Complainant, purchased a new GMC Yukon XL from Ewing Buick GMC, a franchised dealer of the Respondent, General Motors LLC, in Plano, Texas. The vehicle had 2,768 miles on the odometer at the time of purchase.¹⁷ The vehicle's limited warranty provides bumper-to-bumper coverage for three years or 36,000 miles, whichever occurs first.¹⁸

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ Complainant's Ex. 1, Title Application Receipt; Respondent's Ex. 2, Purchase Order.

¹⁸ Complainant's Ex. 9, Limited Warranty and Owner Assistance Information.

In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
8/7/15	10,990	Vehicle feels bouncy ¹⁹
8/18/15	11,508	Vibrating at highway speeds ²⁰
8/24/15	12,348	Vibration at highway speeds ²¹
Unknown	13,126	Vibration at highway speeds
10/8/15	13,975	Vibration at highway speeds ²²

Mr. Shahzad testified that he brought the vehicle to Gateway Buick GMC at 13,126 miles, but the dealer refused to attempt any repair. The Respondent's final opportunity to repair the vehicle occurred on October 8, 2015, at 13,975 miles, at Ewing Buick GMC in Plano, Texas.²³

Mr. Shahzad testified that the Vehicle began vibrating in August at 81 mph and above. The first service visit for this issue did not reveal much. At the second service visit, the technician felt the vibration during a test drive. The dealer's technician could not resolve the issue and had to involve the Respondent's engineers. The vibration improved after repairing the differential. Mr. Shahzad affirmed that a loaner vehicle was provided for all repairs. Mr. Shahzad testified that the Vehicle vibrated in city driving also but not at a particular speed. Mr. Shahzad testified that his company's fleet had almost half-a-dozen Yukons and Suburbans and none of them felt like the subject Vehicle. Mr. Shahzad confirmed that the vibration improved after the differential repair. However, Mr. Shahzad explained that the vibration at 81 mph and higher was constant. Mr. Shahzad noted that when driving over a rough patch, the vehicle feels like it is not holding the road. Mr. Shahzad noted that his complaint regarding bounciness and vibration were for the same issue. Mr. Shahzad explained that the \$1,199 aftermarket charge on the purchase order was for leather seats. Mr. Shahzad testified that the Complainant was originally the primary driver of the Vehicle, but Mr. Shahzad became the primary driver of the Vehicle because the Complainant began driving another vehicle.

¹⁹ Complainant's Ex. 5, Invoice No. PGCS61993.

²⁰ Complainant's Ex. 6, Invoice No. PGCS63993.

²¹ Complainant's Ex. 7, Invoice No. PGCS65000.

²² Respondent's Ex. 4, Vehicle Inspection Report.

²³ Respondent's Ex. 4, Vehicle Inspection Report.

On September 24, 2015, the Complainant mailed a written notice of defect to the Respondent.²⁴ On September 28, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle vibrated.

B. Respondent's Evidence and Arguments

On cross examination, Mr. Shahzad affirmed that the vehicle never left him stranded, never lost control, and never had any accidents. Mr. Shahzad also confirmed that vehicle originally came with Continental tires but currently had Michelins. Mr. Phillips noted that changing tires constituted an alteration (under the warranty). Additionally, Mr. Shahzad affirmed that the tires on the Vehicle were balanced (conventionally) but not road force balanced. Mr. Wiseman testified that all vehicles vibrate and that road conditions affect a vehicle's vibration. The Vehicle Inspection Report from October 8, 2015, stated that the Vehicle's vibration frequency and amplitude, measured using a PicoScope and NVH software, driving on President George Bush Turnpike, showed less amplitude (strength) and similar frequencies of a known good comparison vehicle. In sum, the Vehicle performed as well, if not better than, a good comparison vehicle. In closing, the Respondent stated that the vehicle was out of service 12 to 14 days, the existing Michelin tires are not covered under warranty, and that the only a few dealers in the country could have test driven the Vehicle at over 80 mph (since the test drives occur in the dealer's area).

C. Inspection and Test Drive

During the test drive at the hearing, the vehicle exhibited a strong, distinct vibration at 81 mph and above. Mr. Shahzad explained that the vehicle vibrated at 81 mph and above regardless of road conditions. Mr. Shahzad noted that he could feel some vibration at 70 mph also.

D. Analysis

The record shows that the Vehicle continues to have warrantable defect that substantially impairs the use or value of the Vehicle despite a reasonable number of repair attempts. Therefore, the Vehicle qualifies for repurchase or replacement relief. As outlined above, the Complainant had the Vehicle taken to a dealer for service on five occasions, with the first two repair attempts within

²⁴ Complainant's Ex. 2, Written Notice of Defect Mailed to Respondent, September 24, 2015.

the first 12 months or 12,000 miles after purchase and the next three repair attempts occurring in the subsequent 12 months or 12,000 miles after purchase after the second repair attempt. Although the dealer did not actually attempt any repair during the visit at 13,126 miles, the visit nevertheless constitutes a repair attempt according to the Department's application of the Lemon Law.²⁵ Mr. Shahzad's testimony and the vehicle's performance during the test drive at the hearing clearly showed the vehicle exhibited a very strong and distinct vibration at speeds of 81 mph and higher. Such vibration substantially impairs the use or market value of the Vehicle under a reasonable prospective purchaser perspective. Consequently, repurchase/replacement relief applies in this case.

III. Findings of Fact

1. On April 1, 2015, the Complainant, Tahseen Shahzad, purchased a new GMC Yukon XL from Ewing Buick GMC, a franchised dealer of the Respondent, General Motors LLC, in Plano, Texas. The vehicle had 2,768 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, 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 for repair as shown below:

Date	Miles	Issue
8/7/15	10,990	Vehicle feels bouncy
8/18/15	11,508	Vibrating at highway speeds
8/24/15	12,348	Vibration at highway speeds
Unknown	13,126	Vibration at highway speeds
10/8/15	13,975	Vibration at highway speeds

5. The Vehicle continued to vibrate at speeds over 81 mph even after the repair attempts.
6. On September 24, 2015, the Complainant mailed a written notice of defect to the Respondent.

²⁵ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

7. On September 28, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle vibrated.
8. On October 19, 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.
9. The hearing in this case convened and the record closed on January 6, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Sharoon Shahzad, the Complainant's husband, represented and testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Doug Wiseman, District Manager Aftersales, testified for the Respondent.
10. The vehicle's odometer displayed 18,655 miles at the time of the hearing.
11. The vehicle exhibited a strong, distinct vibration at 81 mph and above during the test drive at the hearing.
12. The Complainant had aftermarket leather seats added to the Vehicle at purchase for \$1,199.00. The appropriate calculations for the aftermarket leather seats' reasonable allowance for use are:

Unimpaired miles	$8,222 \div 120,000 \times \$1,199.00$	=	\$82.15
Impaired miles	$7,665 \div 120,000 \times \$1,199.00 \times 50\%$	=	\$38.29
Total reasonable allowance for use deduction for leather seats			\$120.44

13. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$48,604.38
Delivery mileage	2,768
Mileage at first report of defective condition	10,990
Mileage on hearing date	18,655
Useful life determination	120,000

Purchase price, including tax, title, license and registration				\$48,604.38
Mileage at first report of defective condition	10,990			
Less mileage at delivery	-2,768			
Unimpaired miles	8,222			
Mileage on hearing date	18,655			
Less mileage at first report of defective condition	-10,990			
Impaired miles	7,665			
<i>Reasonable Allowance for Use Calculations:</i>				
Unimpaired miles	$8,222 \div 120,000$	$\times \$48,604.38$	$=$	\$3,330.21
Impaired miles	$7,665 \div 120,000$	$\times \$48,604.38$	$\times 50\%$	$=$ \$1,552.30
Total reasonable allowance for use deduction				\$4,882.51
Purchase price, including tax, title, license and registration				\$48,604.38
Less reasonable allowance for use deduction				-\$4,882.51
Plus filing fee refund				\$35.00
Plus reimbursement for leather seats				\$1,199.00
Less reasonable allowance for use deduction for leather seats				-\$120.44
TOTAL REPURCHASE AMOUNT				\$44,835.43

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 § 206.66(d).
6. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant met the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a)(1).
8. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604.

V. Order

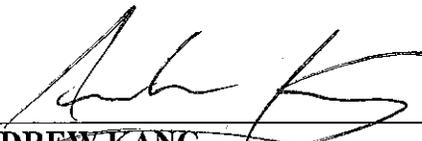
Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired Vehicle 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 **\$44,835.43**. 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 February 10, 2016



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