TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0107 CAF

COOK CONCRETE LP,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
GENERAL MOTORS LLC,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER ON RECONSIDERATION

Cook Concrete LP (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 its vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that can support granting repurchase/replacement or warranty repair in this proceeding.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 March 22, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Respondent filed a motion for rehearing on June 6, 2016. The Department granted the Respondent's motion for rehearing on July 11, 2016. The record closed on September 2, 2016, upon the filing of the Respondent's response to the Complainant's brief. Bradley W. Cook, II, represented the Complainant. Teresa Cook testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Irfaun Bacchus, Field Service Engineer, and 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 Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers "whether a defect or nonconformity hampers the intended normal operation of the vehicle." For instance, "while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired."[5]

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[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).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard "does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value." Instead, 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."[6]

c. Reasonable Number of Repair Attempts

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.[7]

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.[8] Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle

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[6] *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) ("[T]he Division's interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute's goal of mitigating manufacturers' economic advantages in warranty-related disputes.").

[7] 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.

[8] "[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).

to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.[9]

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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;[10] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[11] and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.[12]

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."[13] The manufacturer has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[14]

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[9] "[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).

[10] TEX. OCC. CODE § 2301.606(c)(1). Note: the Lemon Law does not define the words "mailed" or "mail", so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines "mail" as "to send by mail; place in a post office or mailbox for transmission" or "to transmit by email." mail. Dictionary.com. *Dictionary.com Unabridged.* Random House, Inc. http://www.dictionary.com/browse/mail (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

[11] TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

[12] TEX. OCC. CODE § 2301.606(d)(2).

[13] TEX. OCC. CODE § 2301.204.

[14] TEX. OCC. CODE § 2301.603(a).

3. Burden of Proof

The law places the burden of proof on the Complainant.[15] The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present evidence showing that all of the required facts are more likely than not true.[16] 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 equally supports the Complainant and the Respondent, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.[17] The complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."[18] However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.[19]

B. Summary of Complainant's Evidence and Arguments

On October 30, 2014, the Complainant, purchased a new 2015 Cadillac Escalade from James Wood Chevrolet-Cadillac, a franchised dealer of the Respondent, General Motors LLC, in Denton, Texas. The vehicle had 10 miles on the odometer at the time of purchase.[20] The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 miles, whichever occurs first. On

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[15] 43 TEX. ADMIN. CODE § 215.66(d).

[16] *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

[17] "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted." TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) ("The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

[18] 43 TEX. ADMIN. CODE § 215.202(a)(2).

[19] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

[20] Complainant's Ex. 1, Purchase Order.

November 24, 2015, a person on behalf of the Complainant mailed a written notice of defect to the Respondent.[21] On November 30, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging that: the vehicle persistently made a clunk or thump noise when pressing the gas pedal from a stop; the engine shook the vehicle at random times when idling; the vehicle had a paint chip on the door and Mr. Cook thought the dealer should have replaced the door but the dealer touch-up painted the door after offering to either repaint the entire door or to touch-up paint the chip. In relevant part, the Complainant had the vehicle taken to a dealer for repair as shown below:

Date	Miles	Issue
11/13/14	649	Paint rubbed off driver's door[22]
12/29/14	1,019	Top of driver's door needs paint touched up[23]
01/21/15	1,579	Front end makes thumping noise when taking off[24]
03/02/15	3,222	Vehicle has clicking noise in transmission; at idle, movement in engine causing a shake[25]
07/01/15	6,817	Recall for prop shaft u-joint retainer bolts; recall for torque converter clutch shudder; Clunking noise at takeoff first thing in the morning[26]
07/21/15	7,318	Vehicle has thump in driveline when stopping and taking off[27]
10/27/15	11,497	Clunk in transmission[28]
12/16/15	13,440	Clunk in transmission shifting from reverse to drive; when coming to a complete stop and pressing gas, it clunks[29]

The Respondent's final opportunity to repair the vehicle occurred on December 16, 2015.

Mr. Cook, the only driver of the Complainant's vehicle, stated that he first noticed the complained of noise after driving about 1,000 miles. The noise recurred approximately 1,000 after replacement of the transmission. Mr. Cook explained that condition improved after reprogramming, the vehicle operated more smoothly, but the repairs did not take away the clunk.

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[21] Complainant's Ex. 15, Written Notice of Defect to Respondent.

[22] Complainant's Ex. 2, Invoice CDCS180472.

[23] Complainant's Ex. 3, Invoice CDCS192772.

[24] Complainant's Ex. 4, Invoice CDCS199041.

[25] Complainant's Ex. 5, Invoice CDCS208564.

[26] Complainant's Ex. 6, Invoice CDCS242240.

[27] Complainant's Ex. 7, Invoice CDCS275770.

[28] Complainant's Ex. 8, Invoice CDCS275770.

[29] Complainant's Ex. 9, Invoice CDCS289360.

The engine vibration improved after repair but came back. The vehicle would shake when standing at idle. Mr. Cook affirmed that the dealer always made a loaner vehicle available. Mr. Cook explained that he only drove and stopped abruptly during the test drive to demonstrate the clunk noise. Mrs. Cook testified that she drove like a race car driver, her husband (Mr. Cook's father) drove terribly, and Mr. Cook drove like "an old man". Mr. Cook pointed out that the rubberized paint could be peeled and power-washed off and that the paint manufacturer offered a product to release the residual paint. Mr. Cook stated that both the Complainant's vehicle and his mother's vehicle had their transmission's replaced.

In the Complainant's brief, Mr. Cook expressed that the original decision and order was correct. Mr. Cook explained that he did not dictate the content of the work orders, the work orders did not exactly match Mr. Cook's wording and were vague, and he would have provided a more extensive explanation of the transmission clunk. He explained that the clunk caused vibrations from the delayed contact of metal parts due to excessive play. Mr. Cook stated that he had never driven a vehicle with a transmission that exhibited as much play, delay, and noise. He represented that he tried several times to show that the delay caused the clunk. He stated that could not tell how to fix the transmission but expressed that the transmission had space allowing play and that he could feel and hear that it caused a delay leading to a loud clunk; the dealer never documented this because the dealer could not identify the cause and did not care to fix the vehicle. Mr. Cook claimed the service advisor only vaguely described the clunk and never really investigated it because the dealer would find serious problems with the transmission that would cost the dealer. In comparison, Mrs. Cook's Escalade did not exhibit the same clunk, demonstrating that these vehicles were not supposed to operate with such delay and noise. Mr. Cook argued that he clearly used the transmission noise to point out the delay and defect in the transmission; the transmission's delay was a manifestation of the clunk; the clunk did not arise from normal operation; and he complained about the clunk to get the physical defect fixed. When pulling out of a parking lot, the vehicle's transmission would shift slowly with a jerk, make loud clunks. Torqueing the u-joints did not alleviate the clunk or transmission delay. A software update also did not fix the clunk or delay. Mr. Cook expressed that the Respondent should have focused on taking care of a customer they obviously wronged but instead obstructed him and delayed this case even though the Complainant met the requirements for repurchase. Mr. Cook concluded that the vehicle continued to clunk and delay [responding to the accelerator] and vibration had become worse. The original

transmission started acting abnormally and clunking within 1,000 miles and the new transmission performed the same way within 1,000 miles of driving.

C. Summary of Respondent's Evidence and Arguments

On cross-examination, Mr. Cook affirmed that he had sprayed the Complainant's vehicle with a (blue-green) rubberized paint. Though at the time of the paint chip repair, the vehicle was still black and had not been painted blue-green. Mr. Bacchus testified that, using a PicoScope, the vehicle vibration measured under two milli-Gs, which was not substantial. He also explained that the vehicle's adaptive learning feature learns the driver's driving patterns. The Complainant's vehicle had erratic engagement at times but Mr. Bacchus believed Mrs. Cook's vehicle shifted better because she did not drive as aggressively. Mr. Bacchus confirmed that driving style affects the clunk and that the noise may result from the build-up of free play or backlash. He further affirmed that the noise usually does not result from a single part and that all transmissions have moving parts, but the noise would not substantially affect durability. Additionally, if the play develops to the point it exceeds tolerances, the check engine light would turn on. Mr. Bacchus added that the vehicle may take 500 or more miles to learn a driver's style. Mr. Bacchus offered that if Mr. Cook drove Mrs. Cook's vehicle, that vehicle may develop a clunking noise. Mr. Bacchus confirmed that the rubberized paint had been removed from the major panels but not to the standard of "Cadillac" clean. He noted that the rubberized paint remained on the suspension and just one of the vehicle's shocks may cost as much as $500 to $700. Even after installing a new transmission or reprogramming, the clunk could return because the vehicle is constantly learning. Mr. Wiseman added that Cadillac's warranty has an exclusion for noise.

In response to the Complainant's brief, the Respondent pointed out that the only alleged defect found in the original decision and order was a delayed response in the drivetrain. However, the Respondent did not have notice of this alleged defect prior to the hearing and did not have any attempts to repair, or a final opportunity to repair, the alleged delay. The hearings examiner found the delay during the test drive and based the original decision on this delay. But the Respondent did not have an opportunity to present evidence on this issue or investigate the validity of the alleged delay defect. The Complainant did not present evidence of the delay at the hearing, assert a claim on an alleged delay, or bring the alleged defect to the Respondent's attention before the hearing. No repair order, letter to the manufacturer, or other documents mentioned the alleged

delay. Further, the complaint did not include the alleged delay and therefore was not an issue at the hearing.

D. Inspection and Test Drive

The vehicle's odometer had 16,114 miles at the inspection during the hearing. Almost all of the rubberized, blue-green paint had been removed with small amounts of residue in areas such as crevices and larger amounts in the wheel wells. Mr. Cook brought Mrs. Cook's vehicle (the same model as the Complainant's vehicle) for comparison purposes. During the test drive, the subject vehicle, unlike Mrs. Cook's vehicle, exhibited play in the drivetrain when shifting between park, reverse, and drive. The vehicle appeared to make a clunk noise when shifting between park, reverse, and drive. Mr. Cook pointed out that the subject vehicle exhibited a noticeable delay before moving after pressing the gas pedal. During the test drive, the vehicle would intermittently make a slight clicking noise (like the sound of marbles tapping) when coming to a stop after accelerating. This noise did not appear to originate from the transmission, but came from further back in the drivetrain (aft of the transmission). The vehicle did not present any abnormal engine vibration during the inspection and test drive.

E. Analysis

1. Transmission Issues

a. Clunk Noise

The noise Mr. Cook characterized as a "clunk" does not by itself constitute a warrantable defect. As Mr. Wiseman testified, the warranty does not cover mere noises. Accordingly the noise alone cannot support repurchase/replacement relief. Although the noise may be significant to Mr. Cook, it simply does not rise to the level of a substantial impairment or even a warrantable defect.

b. Delayed Response

During the test drive at the hearing, Mr. Cooke pointed out that the subject vehicle exhibited a delayed response to the accelerator. Accordingly, the subject vehicle appears to have a nonconformity. However, the delayed response issue was only raised during the test drive at the hearing and not otherwise addressed. Consequently, as explained below, the delayed response issue was not properly pleaded in the complaint or noticed as required by law.

i. Complaint

The complaint must identify the delay issue for consideration in this proceeding.[30] Specifically, Section 215.202(a)(2) of the Department's rules provides that the complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."[31] With regard to the transmission, the complaint identified a "[p]ersistent [c]lunk or [t]hump noise in transmission when pressing gas pedal from being stopped" but did not reference a delay in the vehicle's response. Likewise, the notice of defect attached to the Complaint addressed the clunk noise but not the delayed response. Nevertheless, a party may impliedly consent to trying an unpleaded issue.[32] However, implied consent did not occur here. As described previously, evidence of the delayed response came out during the test drive. The Respondent's expert witnesses, Mr. Bacchus and Mr. Wiseman, rode along for the test drive, but Mr. Phillips (the Respondent's authorized representative and therefore the person responsible for making the Respondent's objections) was not present. Consequently, Mr. Phillips could not have known to object when the delayed response occurred. Therefore, the Respondent did not consent, nor had the opportunity to consent, to having the delayed response issue considered in this proceeding. Although the delayed response appears to be a defect, this issue cannot support any relief because it was not properly pleaded in the Complaint and the Respondent did not consent to its consideration in this proceeding.

ii. Written Notice of Defect and Opportunity to Cure

Section 2301.606(c)(2) of the Lemon Law prohibits granting repurchase or replacement unless: "(1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer . . . and (2) the manufacturer . . . has been given an opportunity to cure the alleged defect or nonconformity." In the present case, the written notice of defect, e-mailed on November 24, 2015, addressed the clunk noise and other issues, but did not

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[30] "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted." TEX. GOV'T CODE § 2001.052. Note: the complaint is attached to the notice of hearing issued by the Department.

[31] 43 TEX. ADMIN. CODE § 215.202(b) (emphasis added).

[32] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

mention the delayed response.[33] Additionally the record does not show that the Respondent had a final opportunity to repair the delayed response problem. As a result, the Lemon Law prohibits granting repurchase or replacement based on the delayed response issue.

2. Engine Vibration

The record shows only one repair attempt, on March 2, 2015, for the engine vibration issue. However, the statutory presumption requires at least four repair attempts. Moreover, the record does not reflect any circumstances to justify finding a reasonable number of repair attempts on fewer than four repair attempts. Accordingly, the engine vibration issue does not support repurchase or replacement relief.

3. Paint Chip

A preponderance of the evidence does not show that the paint chip constitutes an existing warrantable manufacturing defect. A manufacturing defect occurs when the vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a substandard part. A manufacturing defect occurs during the manufacturing process and exists when it leaves the manufacturer. Therefore, problems arising outside of the manufacturing process, such as damage occurring at the dealership, are not warrantable manufacturing defects. In this case, the relevant repair invoice shows that the customer stated "paint rubbed off top back tip of drivers door", suggesting that the issue occurred post-manufacture after painting, rather than a defect in the painting during manufacturing. Moreover, although Mr. Cook may not have been satisfied with the repair, the evidence shows that the dealer did touch-up paint the chipped door. Accordingly, the paint chip is not an existing warrantable defect.

4. Diminution of Value from Rubberized Paint

The Respondent provided a $21,626.11 estimate from James Wood Auto Park for restoring the vehicle's original finish. However, the dealer developed the estimate based on the condition of the vehicle before Mr. Cook had removed the vast majority of the rubberized paint. Although the record includes some testimony indicating that the rubberized paint had diminished the vehicle's value, the Respondent did not prove the diminished value of the vehicle in its present state.

[33] Complainant's Ex. 15, Notice of Defect, E-mailed November 24, 2015.

Moreover, Mr. Cook testified that the residual rubberized paint can be power washed off and that the paint manufacturer offers a product to remove the paint.

III. Findings of Fact

1. On October 30, 2014, the Complainant, purchased a new 2015 Cadillac Escalade from James Wood Chevrolet-Cadillac, a franchised dealer of the Respondent, General Motors LLC, in Denton, Texas. The vehicle had 10 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 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
11/13/14	649	Paint rubbed off driver's door
12/29/14	1,019	Top of driver's door needs paint touched up
01/21/15	1,579	Front end makes thumping noise when taking off
03/02/15	3,222	Vehicle has clicking noise in transmission; at idle, movement in engine causing a shake
07/01/15	6,817	Recall for prop shaft u-joint retainer bolts; recall for torque converter clutch shudder; Clunking noise at takeoff first thing in the morning
07/21/15	7,318	Vehicle has thump in driveline when cold when stopping and taking off
10/27/15	11,497	Clunk in transmission
12/16/15	13,440	Clunk in transmission shifting from reverse to drive; when coming to a complete stop and pressing gas, it clunks

5. On November 24, 2015, a person on behalf of the Complainant mailed a written notice of defect to the Respondent. The written notice of defect did not address any delay in the transmission's response.

6. On November 30, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that: the vehicle persistently makes a clunk or thump noise when pressing the gas pedal from a stop; the engine shakes the vehicle at random times when idling; the vehicle had a paint chip on the door and Mr. Cook expected

the dealer to replace the door but the dealer touch-up painted the door. The complaint did not address any delay in the transmission's response.

7. On January 4, 2016, 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.

8. The hearing in this case convened on March 22, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Respondent filed a motion for rehearing on June 6, 2016. The Department granted the Respondent's motion for rehearing on July 11, 2016. The record closed on September 2, 2016, upon the filing of the Respondent's response to the Complainant's brief. Bradley W. Cook, II, represented the Complainant. Teresa Cook testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Irfaun Bacchus, Field Service Engineer, and Doug Wiseman, District Manager Aftersales, testified for the Respondent.

9. During the inspection and test drive at the hearing, the vehicle made a slight intermittent clunk noise when stopping that originated aft of the transmission. As compared to Mrs. Cook's vehicle, the subject vehicle exhibited significantly more play and noise when shifting between park, reverse, and drive. The subject vehicle also exhibited a delayed response to the accelerator, which Mr. Cook pointed out. The vehicle did not otherwise exhibit any abnormal characteristics.

10. Mr. Bacchus and Mr. Wiseman rode along for the test drive but Mr. Phillips did not.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.

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 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 did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).

7. The Complainant or a person on behalf of the Complainant did not provide notice of the delayed response issue to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

8. The Respondent did not consent to trying the delayed response issue. 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

9. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604; TEX. OCC. CODE § 2301.606(c).

10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.603 and 2301.204.

11. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.603 and 2301.204.

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 October 20, 2016

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