

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0134 CAF**

**DIANE V. SOLARCZYK AND
RAYMOND SOLARCZYK,
Complainants**

v.

**LEXUS A DIVISION OF TOYOTA
MOTOR SALES, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Diane V. Solarczyk and Raymond Solarczyk (Complainants) 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 their vehicle manufactured by Lexus a Division of Toyota Motor Sales, Inc. (Respondent). The hearings examiner concludes that the subject vehicle does not have a warrantable defect. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

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 March 3, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Matt Hennessey, Field Technical Specialist, represented and testified for the Respondent. Chris Syamken, Diagnostic Specialist at North Park Lexus, 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

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.⁶

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.⁷ 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.⁸

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;⁹ (2) the manufacturer was given an

⁶ 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.

⁷ “[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).

⁸ “[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).

⁹ 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).

opportunity to cure the defect or nonconformity;¹⁰ and (3) the owner or someone on behalf of 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.¹¹

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."¹²

3. Burden of Proof

The law places the burden of proof on the Complainants.¹³ The Complainants must prove each fact required for relief by a preponderance, that is, the Complainants must present evidence showing that all of the required facts are more likely than not true.¹⁴ For example, the Complainants 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 Complainants and the Respondent, the Respondent will prevail. The Complainants prevail only if the evidence shows that all of the required facts are more likely than not true.

4. The Complaint Limits the Issues in this Case

The law limits the scope of this case to the issues identified in the Complaint and any amendments.¹⁵ The pleadings should state "sufficient facts to enable the department and the party

¹⁰ 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).

¹¹ TEX. OCC. CODE § 2301.606(d)(2).

¹² TEX. OCC. CODE § 2301.204.

¹³ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁴ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁵ The complaint identifies the issues to be addressed in this proceeding. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

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.”¹⁶

A. Complainants’ Evidence and Arguments

On March 14, 2015, the Complainants, purchased a new 2015 Lexus NX 200t from North Park Lexus, a franchised dealer of the Respondent, Lexus a Division of Toyota Motor Sales, Inc., in San Antonio, Texas.¹⁷ The vehicle had 13 miles on the odometer at the time of purchase.¹⁸ The vehicle’s limited warranty’s basic coverage lasts 48 months or 50,000 miles, whichever occurs first.¹⁹

The Complainants alleged problems with their vehicle’s “Remote Touch” touchpad, the “infotainment system” (the system of hardware and software used to operate audio, Bluetooth connectivity, and other features), and the display brightness. Mrs. Solarczyk testified about the difficulty she had with accurately navigating using the touchpad. She noted for example that when trying to make a call from call history, the touchpad may scroll down and select a different caller and other times the touchpad may not scroll or select at all. Mrs. Solarczyk added that the infotainment system would freeze and the vehicle would lose all infotainment functions, such as Bluetooth and audio controls, until restarting the vehicle. The dealer suggested unpairing phones from the vehicle. Mrs. Solarczyk also stated that, after replacement of the radio, the volume would vary between radio stations. Mrs. Solarczyk also explained that the information on the multi-information display in the instrument cluster above the steering wheel would differ from the information on the infotainment system display, for instance, the song shown on the multi-information display as playing on the radio would be different than on the infotainment display. Mrs. Solarczyk also noted an issue with light sensitivity (that the dash display would not properly adjust brightness). Sometimes the display would dim and other times it would stay bright and would not change unless going under an overpass.²⁰

¹⁶ 43 TEX. ADMIN. CODE § 215.202(b).

¹⁷ Complainants’ Ex. 1, Retail Installment Sales Contract.

¹⁸ Complainants’ Ex. 2, Odometer Disclosure Statement.

¹⁹ Complainants’ Ex. 3A, Warranty and Services Guide.

²⁰ Note: neither the Complaint nor the written notice to the Respondent included the display brightness issue. Therefore, this issue exceeds the scope of this case.

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

Date	Miles	Issue
September 14, 2015	12,656	Navigation screen froze ²¹
October 7, 2015	8,144 [<i>sic</i>]	Computer locks up ²²
October 28, 2015	14,271	Intermittent 2-3 second hesitation when changing radio stations; mouse sensitive even after setting to least sensitive setting; navigation will sometimes be on a double screen ²³

On or about January 15, 2016, the Complainants or a person on behalf of the Complainants mailed a written notice of defect to the Respondent.²⁴ On January 5, 2016, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that infotainment screen settings change without touching the touchpad and navigating (the display) with the touchpad is not easy; infotainment system freezes; after replacement of the radio, volume settings differ between stations and never stays at the same level; the multi-information display in the instrument cluster is not consistent with the infotainment systems' display on the center stack; and the dealer disabled Bluetooth pairing to attempt to resolve freezing.

B. Respondent's Evidence and Arguments

The Respondent asserted that the vehicle did not have any problems. Mr. Hennessey testified that any condition in the subject vehicle can be exhibited on a like vehicle. Various conditions depended on external factors such as XM, AM, and FM. The subject vehicle handled these issues the same as any other Lexus NX. Many of the telematics problems appear to relate to Mrs. Solarczyk's iPhone's custom set-up that downloaded her employer's entire contact list. Mr. Hennessey stated that iPhones with custom set-ups have known issues, which he has encountered on multiple occasions. He also explained that every customized phone cannot be made to work with the vehicle. He added that not just the Respondent but every manufacturer has problems with phones. Every new version of software comes with a new set of problems. Mr. Hennessey noted

²¹ Complainants' Ex. 4F, Invoice 118491.

²² Complainants' Ex. 4G, Invoice 120168.

²³ Complainants' Ex. 4I, Invoice 121689.

²⁴ Complainants' Ex. 6, Written Notice to Respondent.

the further complication that Apple will not share its software for testing by the manufacturer so vehicle manufacturers cannot test Apple's software until available on the market.

Mr. Syamken testified that he paired his work phone and personal phone with the vehicle and even drove to Mrs. Solarczyk's work to try to recreate the issue but was unable to duplicate the concerns. He also made numerous calls to try to get the vehicle to do anything out of the ordinary and also compared the subject vehicle to similar new vehicles. Mr. Syamken affirmed that the subject vehicle performed similarly to the new vehicles.

C. Inspection

The vehicle had 21,975 miles on the odometer at the inspection on the day of the hearing. The inspection showed that Mrs. Solarczyk's phone was currently paired with the vehicle. The vehicle's infotainment system appeared to operate sluggishly as a result of trying to process the contacts in the Mrs. Solarczyk's phone (a total of 9,392 entries). Her phone had version 8.1.1 of the operating system (the current version is in the 9th series). Reviewing the audio system's settings showed that the automatic sound levelizer (ASL), which automatically adjusts the volume, had been turned on. The display dimming feature worked properly during the inspection.

D. Analysis

The record indicates that the vehicle does not have a warrantable defect subject to repurchase or replacement or warranty repair relief. Repurchase/replacement and warranty repair relief do not apply to every type of problem but only apply to manufacturing defects. A manufacturing defect is an unintended condition that occurs when the vehicle varies from its intended design. That is, the defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part. As a result, a defective vehicle differs from a properly manufactured vehicle. In contrast, characteristics of the intended design do not arise from any error in the manufacturing process, but may normally exist in same-model vehicles produced according to the manufacturer's specifications. For example, problems arising from inherent limitations in technology or conditions

caused outside of manufacturing are not warrantable defects. To qualify for relief, a complainant must prove by a preponderance of the evidence that the vehicle has a warrantable defect.²⁵

Though the Complainant has had problems with the vehicle's infotainment system (the system of hardware and software used to provide audio, Bluetooth connectivity, and other features), a preponderance of the evidence does not indicate that a manufacturing defect caused the issues. Rather, the issues appear to stem from limitations inherent to the technology, either of the phone or the vehicle. The vehicle's infotainment system has known problems with custom-configured iPhones such as Mrs. Solarczyk's phone. Also, Mrs. Solarczyk's phone had version 8.1.1 of the operating system while the current version is in the 9th series. Moreover, Mrs. Solarczyk's phone contained an extraordinarily large number of contacts—a total of 9,392 entries. However, the vehicle can only handle 1,000 entries at a time. During the inspection at the hearing, the vehicle's infotainment system slowed when dealing with the contacts on the Complainant's phone. Apparently, the phone overburdened the infotainment system's processing ability. Further, the record reflects that, despite the Respondent's efforts to test phones for compatibility, the sheer number of possible variations in phones makes 100% compatibility impossible. Limitations due to differences between phones, operating systems, software/firmware and vehicles, even without any manufacturing defects, may affect function. In the present case, the infotainment system issues appear to result from the limitations in the technology of the infotainment system and/or phone rather than any manufacturing defect.

The Remote Touch, a capacitive touchpad (like a laptop's) on the center console, is used to navigate through the various screens of the infotainment system. Consequently, the vehicle's touchpad would have the same limitations as any other capacitive pointing device. A capacitive touchpad would appear inherently more difficult to operate while in motion, which is consistent with Mrs. Solarczyk's testimony and consistent with the operation of the touchpad with the vehicle parked. When the hearings examiner asked Mrs. Solarczyk's if she noticed the sensitivity issues when standing still or driving, she confirmed that issue occurred when driving. However, during the inspection, when operating the touchpad while parked at the hearing site, the touchpad operated normally. The nature of capacitive touchpads may require a level of fingertip precision more difficult to perform while in motion. In essence, using the vehicle's touchpad is like using a

²⁵ TEX. OCC. CODE § 2301.604(a).

computer's touchpad while driving. Moreover, because the touchpad is capacitive, anything that interferes with the conductivity of the fingers may affect the function of the touchpad. Even if the implementation of a touchpad in the vehicle is a sub-optimal design, design issues do not qualify for Lemon Law relief.

Although undesirable and even problematic, technological design limitations are not manufacturing defects subject to relief under the limited scope of the Lemon Law. The record shows the issues in this case result from the characteristics of the design of the vehicle and/or Mrs. Solarczyk's phone and not from any manufacturing defect. Accordingly, the Complainants' vehicle does not qualify for repurchase or replacement or warranty repair.

III. Findings of Fact

1. On March 14, 2015, the Complainants, purchased a new 2015 Lexus NX 200t from North Park Lexus, a franchised dealer of the Respondent, Lexus a Division of Toyota Motor Sales, Inc., in San Antonio, Texas. The vehicle had 13 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty's basic coverage lasts 48 months or 50,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. In relevant part, the Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
September 14, 2015	12,656	Navigation screen froze
October 7, 2015	8,144 [sic]	Computer locks up
October 28, 2015	14,271	Intermittent 2-3 second hesitation when changing radio stations; mouse sensitive even after setting to least sensitive setting; navigation will sometimes be on a double screen

5. On January 15, 2016, the Complainants mailed a written notice of defect to the Respondent.
6. On January 5, 2016, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that infotainment screen settings change without touching the touchpad and navigating (the display) with the touchpad is not easy; infotainment system freezes; after replacement of the radio, volume

settings differ between stations and never stays at the same level; the multi-information display in the instrument cluster is not consistent with the infotainment systems' display on the center stack; and the dealer disabled the Bluetooth pairing to attempt to resolve freezing.

7. On February 12, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Lexus a Division of Toyota Motor Sales, Inc., 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 and the record closed on March 3, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Matt Hennessey, Field Technical Specialist, represented and testified for the Respondent. Chris Syamken, Diagnostic Specialist at North Park Lexus, testified for the Respondent.
9. The vehicle's odometer displayed 21,975 miles at the time of the hearing.
10. The vehicle's touchpad operated normally during the inspection at the hearing. The Complainant's phone was paired to the vehicle through a Bluetooth connection at the time of inspection. The vehicle's infotainment system performed sluggishly due to the large number of contacts in the Complainant's phone.
11. The issues in this case result from technological design limitations and not from any manufacturing defects.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
 6. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
 7. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
 8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED May 2, 2016



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