

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0251 CAF**

**DAVID ENRIQUEZ-GOMEZ,  
Complainant**

**v.**

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

David Enriquez-Gomez (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle continues to have a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 August 9, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Justin Ewert, attorney, represented the Complainant. The Complainant testified for himself. Samuel Snyder, attorney, represented the Respondent. David Piper, Field Service Engineer, Kevin Phillips, Business Resource Manager, and John Jacob District Manager Aftersales, testified for the Respondent. Antonella Muñoz interpreted the proceedings.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### 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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

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

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

<sup>5</sup> *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.”<sup>6</sup>

**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.<sup>7</sup>

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value and: (A) the vehicle is out of service for repair for a cumulative 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; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.<sup>8</sup>

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<sup>6</sup> *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.”).

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

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(3).

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>9</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle 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.<sup>10</sup>

#### 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;<sup>11</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>12</sup> 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.<sup>13</sup>

## 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, converter's, or

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<sup>9</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

<sup>10</sup> “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

<sup>11</sup> TEX. OCC. CODE § 2301.606(c)(1). 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.

<sup>12</sup> TEX. OCC. CODE § 2301.606(c)(2). 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).

<sup>13</sup> TEX. OCC. CODE § 2301.606(d)(2).

distributor's . . . warranty agreement applicable to the vehicle.”<sup>14</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>15</sup>

### 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>16</sup> The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present evidence showing that every required fact is more likely than not true.<sup>17</sup>

### 4. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.<sup>18</sup> 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.”<sup>19</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>20</sup> Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>21</sup>

### 5. Attorney Fees

When repurchase or replacement is ordered, the Department's rules allow reimbursement of “attorney fees if the complainant retains counsel after notification that the respondent it

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<sup>14</sup> TEX. OCC. CODE § 2301.204.

<sup>15</sup> TEX. OCC. CODE § 2301.603(a).

<sup>16</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>18</sup> “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.”).

<sup>19</sup> 43 TEX. ADMIN. CODE § 215.202(b).

<sup>20</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>21</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

represented by counsel.” Such expense “must be reasonable and verified through receipts or similar written documents.”<sup>22</sup>

#### A. Summary of Complainant’s Evidence and Arguments

On December 11, 2014, the Complainant, purchased a new 2015 Chevrolet Silverado 1500 from Friendly Chevrolet, a franchised dealer of the Respondent, General Motors LLC, in Dallas, Texas. The vehicle had six miles on the odometer at the time of purchase.<sup>23</sup> The vehicle’s limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 100,000 miles, whichever comes first.<sup>24</sup>

On January 21, 2016, the Complainant’s attorney on behalf of the Complainant mailed a written notice of defect to the Respondent.<sup>25</sup> On April 26, 2016, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the vehicle vibrated when decelerating between 38 and 50 mph; the air conditioning did not blow cold air; and the vehicle had issues with the transmission windshield and washer fluid lines. The vibration was the only nonconformity at issue in the hearing.<sup>26</sup>

The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
05/18/16	20,424	Vibration when decelerating <sup>27</sup>
03/05/16	18,644	AC not blowing cold; transmission delays in shifting <sup>28</sup>
10/06/15	9,772	Delay in shift from 3rd to 2nd gear; vibration in steering wheel at 45 mph <sup>29</sup>
08/13/15	7,612	
07/27/15	7,588	Vibration on deceleration <sup>30</sup>
05/02/15	2,984	Vibration after letting off gas <sup>31</sup>

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>23</sup> Complainant’s Ex. 1, Retail Purchase Contract.

<sup>24</sup> Respondent’s Ex. 3, New Vehicle Limited Warranty.

<sup>25</sup> Complainant’s Ex. 8, Notice of Defect.

<sup>26</sup> The Complainant only addressed the vibration issue at the hearing.

<sup>27</sup> Complainant’s Ex. 2, Invoice CVWS93778.

<sup>28</sup> Complainant’s Ex. 3, Invoice CVCS84970.

<sup>29</sup> Complainant’s Ex. 4, Invoice CVCS68333.

<sup>30</sup> Complainant’s Ex. 5, Invoice CVCS62723; Complainant’s Ex. 6, Invoice CVCS60714.

<sup>31</sup> Complainant’s Ex. 7, Invoice CVCS68333.

The Complainant testified that when driving at 50 mph, the steering would start vibrating and the vehicle would make a strange noise from the rear. More specifically, he explained that when driving at 60 mph and releasing the gas pedal, the vehicle would start vibrating at about 50 mph. He described the vibration as substantial originally but added that it improved after repair. He asserted that the vibration continued to persist. The Complainant recounted multiple visits which did not resolve the issue. He noted that he needed the vehicle for work and requested a loaner vehicle when at the dealer for service. However, he received a loaner vehicle not suitable for work purposes.

### **B. Summary of Respondent's Evidence and Arguments**

On cross-examination, the Complainant confirmed that the last repair was the manufacturer's final repair attempt. The Complainant noted that all repair attempts occurred in the first 24,000 miles since the vehicle had not yet accumulated 24,000 miles. He explained that he initially could not get a loaner vehicle because he did not have a license. He did confirm that the vibration improved after repair.

Mr. Piper testified that during a test drive of the subject vehicle, while operating a picoscope in the front passenger seat, he experienced vibration he did not like and ordered the dealer to replace the rear axle assembly. The initial picoscope reading showed 21.1 milli-g's (g-force) at prop 1. Over 10 milli-g's is considered unacceptable. After replacing the rear axle, the picoscope showed a decrease of over 20 milli-g's, down to 1.73 milli-g's. Mr. Piper also testified that some vibration would ordinarily be expected between 50 to 30 mph. Moreover, the vehicle's warranty does not cover slight noise, vibrations, or normal characteristics of the vehicle.

### **C. Inspection and Test Drive**

The vehicle had 23,168 miles upon inspection before the test drive. The test drive occurred predominantly on the freeway and service roads over a distance of 30 miles on both smooth and rough surfaces. The vehicle was driven at highway speeds, up to 70 mph, and decelerated repeatedly to try to replicate the vibration between 60 and 50 mph. However, the vehicle did not exhibit any unusual vibration. The Complainant noted that when vibration occurred in the past, he could feel it through the steering wheel. However, the vehicle did not exhibit any such vibration

through the steering wheel. Any significant vibration that did occur resulted from driving over rough road surfaces.

#### **D. Analysis**

The vehicle does not currently have a defect to support granting any relief. The parties do not dispute that the vehicle initially had a warrantable nonconformity (specifically, the excessive vibration). The salient question is whether such nonconformity continues to exist. Though the Complainant testified that the vibration continued to exist, the objective measurement of vibration in milli-g's shows a dramatic decrease in vibration after the final repair attempt, from 21.1 to 1.73 milli-g's. Testimony showed that 10 milli-g's of vibration is considered acceptable. Significantly, the test drive at the hearing confirmed the absence of any significant vibration. Any abnormal vibration, if it existed, was so attenuated as to be indistinguishable from the normal vibration of the vehicle. Further, the warranty specifies that it does not cover "slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period."<sup>32</sup> In sum, the record reflects that the complained of vibration has been successfully repaired so that the vehicle no longer has a warrantable nonconformity.

### **III. Findings of Fact**

1. On December 11, 2014, the Complainant, purchased a new 2015 Chevrolet Silverado 1500 from Friendly Chevrolet, a franchised dealer of the Respondent, General Motors LLC, in Dallas, Texas. The vehicle had six 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 and powertrain coverage for five years or 100,000 miles, whichever comes first.
3. On January 21, 2016, the Complainant's attorney on behalf of the Complainant mailed a written notice of defect to the Respondent.
4. On April 26, 2016, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the vehicle vibrated when decelerating

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<sup>32</sup> Respondent's Ex. 3, New Vehicle Limited Warranty.



between 38 and 50 mph; the air conditioning did not blow cold air; and the vehicle had issues with the transmission and windshield washer fluid lines.

5. On May 31, 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.
6. The hearing in this case convened and the record closed on August 9, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Justin Ewert, attorney, represented the Complainant. The Complainant testified for himself. Samuel Snyder, attorney, represented the Respondent. David Piper, Field Service Engineer, Kevin Phillips, Business Resource Manager, and John Jacob District Manager Aftersales, testified for the Respondent. Antonella Muñoz interpreted the proceedings.
7. The vehicle's odometer displayed 23,168 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. Prior to replacement of the vehicle's rear axle assembly, the vehicle exhibited 21.1 milli-g's of vibration.
10. More than 10 milli-g's of vibration is considered unacceptable.
11. After replacement of the vehicle's rear axle assembly, the vehicle exhibited 1.73 milli-g's of vibration.
12. The vehicle has been successfully repaired.
13. During the test drive at the hearing, the vehicle did not present any unusual vibration and otherwise operated normally.

#### **IV. Conclusions of Law**

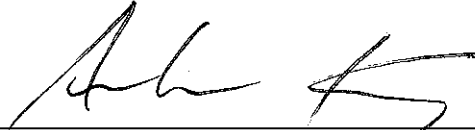
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.

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 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 did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's 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 §§ 2301.603 and 2301.204.
9. 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 September 30, 2016**



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