TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0349 CAF

GEORGE R. LAMBRIGHT, **Complainant**	§	**BEFORE THE OFFICE**
v.	§	**OF**
LEXUS A DIVISION OF TOYOTA MOTOR SALES, INC., **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

George R. Lambright (Complainant) filed a 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 distributed by Lexus a Division of Toyota Motor Sales, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has 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[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 and the record closed on January 25, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Matthew Hennessey, Field Technical Specialist, represented 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, a 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 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]

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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).

[8] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[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.'").

[9] *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include "those occasions when the fault for failing to repair the vehicle rests with the dealership." Conversely, "those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.").

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, converter's, or distributor's . . . warranty agreement applicable to the vehicle."[13] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[14]

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[10] 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 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). 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 all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.[16]

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] Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[20]

A. Complainant's Evidence and Arguments

On June 1, 2015, the Complainant, purchased a new 2015 Lexus GS 350 from Dealer, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 12 miles on the odometer at the time of purchase. The vehicle's basic limited warranty covers the vehicle for 48 months years or 50,000 miles, whichever occurs first. On March 13 and July 5, 2016, the Complainant mailed written notices of defect to the Respondent. On July 12, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the rear of the sound system produced almost no sound. The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

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

Date	Miles	Issue
June 9, 2015	598	Rear speakers sound terrible
June 15, 2015	925	Rear speakers have no amplification
August 24, 2015	5,108	Customer does not like sound faded to back or front
October 29, 2015	10,409	Customer unhappy with the way sound system works when faded to back or front

The Complainant believed that the sound system's amplifier did not amplify the sound enough to the rear speakers. When setting the fader to the front, the sound system produced an abundance of sound but when moving the fader to the just the rear speakers, the sound level was inadequate. With fader set to the middle, he could hear the front speakers well but could barely hear the back speakers. In his opinion, the sound system should have a separate amplifier for the rear speakers or a larger amplifier. He first noticed the issue between one and two weeks after purchasing the vehicle. The Complaint explained that the issue occurred constantly. No repair attempts improved the issue.

B. Respondent's Evidence and Arguments

Mr. Hennessey testified that the vehicle had been in five times for audio service. Each time, the subject vehicle was compared side-by side with a comparison GS 350 with the Marc Levinson sound system and no difference could be noticed. As a result, the vehicle did not have any actual repairs attempted. He explained that the lower sound level was just a characteristic of the vehicle and did not affect the use, value, or safety of the vehicle since it performed the same as any other GS with the same sound system.

C. Inspection

The vehicle had 40,315 miles at the time of inspection at the hearing. With the sound (fader) set in the middle between front and rear, the speakers generally appeared to have the same loudness, except that the front center speaker seemed noticeably louder and the rear center speaker seemed noticeably quieter. The volume at the front with the fader set completely to the front appeared louder than the volume at the rear with the fader set completely to the rear.

D. Analysis

The vehicle's sound system does not have a warrantable defect that qualifies for relief. The Lemon Law only applies to defects covered by an applicable warranty.

1. Warrantable Defect

In the present case, the vehicle's warranty specifies that "[t]his warranty covers repairs and adjustments needed to correct defects in materials or workmanship of any part supplied by Lexus."[21] However, a warranty that covers "defects in materials or workmanship" does not apply to characteristics of a vehicle's design. Courts have affirmed that language covering "defects in material or workmanship" did not cover design issues.[22] That is, defects in materials or workmanship (manufacturing defects) differ from design issues. The courts have explained that "[a] manufacturing defect is one created by a manufacturer's failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer's design specifications."[23] In other words, a manufacturing 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. Issues that do not arise from manufacturing, such as the design of the vehicle (which occurs before manufacturing), are not warrantable defects. Design characteristics result from the vehicle's design and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer's specifications should ordinarily have the same characteristics, which would require redesigning the vehicle to change the characteristics.

2. Lower Rear Volume is an Intended Characteristic of the Sound System's Design

In the present case, the Complaint identified issues with the sound level from the rear speakers. The Complainant's testimony reflect that his concerns relate to the design. For example, the Complainant opined that the rear speakers should have a separate amplifier or the sound system

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[21] Complainant's Ex. 3, Warranty.

[22] *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

[23] *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

should use a larger amplifier. Significantly, comparisons of the subject vehicle with other same model vehicles showed that such vehicles' sound systems perform similarly, indicating that the rear sound level is a design issue rather than a manufacturing defect. Upon inspection at the hearing, the overall volume from the rear sounded quieter than the overall volume from the front, confirming the Complainant's observations. However, this does not appear to be a defect but appears to be an intended design characteristic. During the inspection, the front center speaker sounded noticeably louder than the other speakers and the rear center speaker sounded noticeably quieter than the other speakers. However, these sound levels comport with the impedance of the speakers. As shown in the speaker system specifications, the front center speaker has the lowest impedance at 4 ohms; in contrast, the rear center speaker has an impedance of 5.8 ohms.[24] Because of the lower resistance of the front speaker and the higher resistance of the rear speaker, the front speaker will draw more current than the rear speaker. Moreover, positioning the primary sound source at the front corresponds to a real life listening experience. For example, a musician or lecturer would be in front of the audience and not behind it. Accordingly, the speaker system's design reflects that most of the sound should come from in front of the audience. Although the sound system's lower rear volume may be undesirable, the record shows that this characteristic arises from the intended design of the sound system and not from a manufacturing defect. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief.

III. Findings of Fact

1. On June 1, 2015, the Complainant, purchased a new 2015 Lexus GS 350 from Dealer, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 12 miles on the odometer at the time of purchase.

2. The vehicle's basic limited warranty covers the vehicle for 48 months years or 50,000 miles, whichever occurs first.

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

[24] Respondent's Ex. 1, Speaker System Diagram.

Date	Miles	Issue
June 9, 2015	598	Rear speakers sound terrible
June 15, 2015	925	Rear speakers have no amplification
August 24, 2015	5,108	Customer does not like sound faded to back or front
October 29, 2015	10,409	Customer unhappy with the way sound system works when faded to back or front

4. On March 13 and July 5, 2016, the Complainant mailed written notices of defect to the Respondent.

5. On July 12, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the rear of the sound system produced almost no sound.

6. On October 18, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, 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.

7. The hearing in this case convened and the record closed on January 25, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Matthew Hennessey, Field Technical Specialist, represented the Respondent.

8. The vehicle's odometer displayed 40,315 miles at the time of the hearing.

9. The vehicle's warranty was in effect at the time of the hearing.

10. The vehicle's sound system by design has a lower volume level at the back as compared to the front of the vehicle.

11. The vehicle's sound system operated normally during the inspection at the hearing.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.

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 warranty. TEX. OCC. CODE §§ 2301.603.

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 February 17, 2017

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