

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0359 CAF**

**MARK G. TORABI,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Mark G. Torabi (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 manufactured by General Motors LLC (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 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 November 3, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented the Respondent. Irfaun Bacchus, Field Service Engineer, 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

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

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁷ The first applies generally,⁸ the second applies to serious safety hazards,⁹ and the third applies to vehicles out of service for repair for at least 30 days.¹⁰

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.¹¹

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

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).

⁸ TEX. OCC. CODE § 2301.605(a)(1).

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.¹²

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.¹³

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.¹⁴

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.¹⁵

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;¹⁶

¹² TEX. OCC. CODE § 2301.605(a)(2).

¹³ TEX. OCC. CODE § 2301.605(a)(3).

¹⁴ “[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).

¹⁵ “[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).

¹⁶ 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>

(2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁷ 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.¹⁸

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."¹⁹ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."²⁰

3. Burden of Proof

The law places the burden of proof on the Complainant.²¹ 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.²²

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²³ The complaint should state "sufficient facts to enable the department and the party complained against to know

(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.

¹⁷ 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).

¹⁸ TEX. OCC. CODE § 2301.606(d)(2).

¹⁹ TEX. OCC. CODE § 2301.204.

²⁰ TEX. OCC. CODE § 2301.603(a).

²¹ 43 TEX. ADMIN. CODE § 215.66(d).

²² *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²³ "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

the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”²⁴ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²⁵ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁶

A. Complainant’s Evidence and Arguments

On September 19, 2014, the Complainant, purchased a new 2014 Chevrolet Silverado 1500 from Friendly Chevrolet, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 55 miles on the odometer at the time of purchase.²⁷ The vehicle’s limited warranty bumper to bumper coverage lasts for three years or 36,000 miles, whichever occurs first. On August 1, 2016, the Complainant mailed a written notice of defect to the Respondent. On August 5, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle shakes and vibrates excessively at highway speeds. In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 15, 2014	5,525	Driving at 70-80 mph, the truck vibrates badly
February 27, 2015	9,722	Vibrates badly from 75-80 mph
April 23, 2015	13,099	Vibrates at low speeds
February 10, 2016	35,248	Vibration in vehicle at 75-80 mph

The Complainant testified that the vehicle’s vibration is magnified/highest at certain highway speeds (75-80 mph). He believed vibration existed at other speeds but without being as noticeable. He noted that he could see drinks shaking in the center console and hear loose objects moving in the cabin. The Complainant first noticed the vibration when leaving the dealership (after purchasing the vehicle). After speaking with dealership personnel, he initially believed that the vehicle may have had flat spots from sitting. However, the vibration did not resolve itself over time. The Complainant last noticed the vibration on the day of the hearing. He explained that the

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.”).

²⁴ 43 TEX. ADMIN. CODE § 215.202(a)(2).

²⁵ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁶ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁷ Note, however, the odometer disclosure statement shows a printed “6” marked out and “55” handwritten in place of the “6”. The purchase contract shows “6” as the mileage at purchase.

vibration seemed fairly consistent, with some days worse than others, but did not appear any worse under load, and he could not determine what may have made the vibration better or worse. In response to the hearing examiner's question whether the vibration affected the vehicle's performance, the Complainant stated that, other than the vibration itself, the vibration did not affect performance and the vehicle functioned mechanically. He added that the dealers made an effort not to acknowledge the issue. The invoices acknowledged the vibration in a couple of instances. The Complainant claimed that the new wheels (after market wheels purchased in response to a nicked tire) had nothing to do with the problem and the problem did not change at all. Further, over a course of service visits, the dealer put on different wheels, factory wheels from other trucks, but driving with these wheels never changed the problem. The original wheels had the problem, the aftermarket wheels did, and at least six different sets of wheels had the same problem.

B. Respondent's Evidence and Arguments

The invoice for the service visit at 9,722 miles noted that the rear passenger side tire had a chunk of sidewall missing and the front passenger side tire had curb damage and a bolt in the tire. The Complainant confirmed that he drove six months on the original wheels and 20 months and almost 39,000 miles on the aftermarket wheels.

Mr. Bacchus affirmed that he inspected the subject vehicle on August 17, 2016, at 45,086 miles. He confirmed that the warranty did not cover aftermarket tires or wheels. Using a picoscope on the vehicle, with aftermarket wheels/tires, identified T1 (first order tire) vibration of 30 to 40 mG at 70 to 75 mph. The frequency would be anywhere between 15 to 21 Hz. At that frequency, the vibration would be fairly significant. Mr. Bacchus acknowledged that all vehicles vibrate and added that road conditions may contribute to vibration. His inspection showed that the wheels were not centered on the hub flanges. He explained that most good wheel manufacturers use a centering ring that mates the hub to the aftermarket wheel whose bore is larger than the hub (the ring fits in the gap between the hub and the aftermarket wheel so the wheel will be centered on the hub). In comparison, OEM (original equipment manufacturer) wheels are machined to specifically fit the hub. The subject vehicle only had the lug nuts centering the wheels and the wheels did not contact the center hubs at all. Mr. Bacchus tested the vehicle after replacing the aftermarket wheels with factory wheels from a used same-model vehicle with 35,000 miles. The vehicle with factory

wheels exhibited 8 to 10 mG of force. Additionally, the subject vehicle, upon inspection, had different size tires (275/65 R18) than manufacturer recommended (265/65R 18).

C. Inspection

The vehicle was test driven primarily on a freeway (I-30) at varying speeds up to a little over 80 mph. Vibration did seem to increase after 80 mph. However, the vibration did not appear so distinct as to be attributable to a vehicle nonconformity as opposed to road conditions or other factors.

D. Analysis

As detailed below, the Lemon Law complaint was not timely filed and a preponderance of the evidence does not show the vehicle has a warrantable defect.

1. Filing Deadline

As an initial matter, a Lemon Law complaint must be filed no later than six months after the earliest of: the warranty's expiration or 24 months after deliver or 24,000 miles after delivery (24,055 miles on the odometer). In the present case, the vehicle had 23,018 miles on August 25, 2015, and 35,254 miles on February 10, 2016, a total of 12,236 miles over 169 days or approximately 72.4 miles per day. The vehicle would have reached 24,055 after 1,038 miles from the mileage on August 25, 2015. At 72.4 miles per day, the vehicle would have had 24,055 miles about 14 days after August 25, 2015, on September 8, 2015. Accordingly, the complaint should have been filed by March 8, 2015. The present complaint has a filed date of August 5, 2016. Consequently, repurchase or replacement relief cannot be granted.

2. Warrantable Defect

The Lemon Law only applies to defects covered by warranty. The vehicle's warranty specifies that it "covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle related to materials or workmanship occurring during the warranty period."²⁸ The evidence shows that replacement of the vehicle's aftermarket wheels and tires with OEM wheels and tires would substantially improve the vehicle's vibration. Nevertheless, the Complainant's experience with different wheels and tires suggests that his experience of the

²⁸ Complainant's Ex. 3, 2014 Chevrolet Limited Warranty and Owner Assistance Information.

vibration may not be fully resolved by replacement of the wheels/tires. However, the vibration in this case appears to fall outside of the warranty according to its express terms, which excludes slight noise, vibrations, and other normal characteristics. During the test drive, the complainant of vibration did not appear distinct as to be attributable to any nonconformity in the vehicle itself as opposed to road conditions or normal operating characteristics. Although the vibration may be undesirable, it does not appear to rise to the level of being a warrantable defect. Accordingly the vehicle does not qualify for repair relief.

III. Findings of Fact

1. On September 19, 2014, the Complainant, purchased a new 2014 Chevrolet Silverado 1500 from Friendly Chevrolet, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 55 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty bumper to bumper coverage lasts for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 15, 2014	5,525	Driving at 70-80 mph, the truck vibrates badly
February 27, 2015	9,722	Vibrates badly from 75-80 mph
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February 10, 2016	35,248	Vibration in vehicle at 75-80 mph

4. On August 1, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On August 5, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle shakes and vibrates excessively at highway speeds.
6. On October 25, 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 November 3, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented the Respondent. Irfaun Bacchus, Field Service Engineer, testified for the Respondent.
8. The vehicle's odometer displayed 50,364 miles at the time of the hearing.
9. The warranty expired prior to the hearing.
10. The warranty specifies that it "covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle related to materials or workmanship occurring during the warranty period."
11. The warranty does not cover aftermarket wheels or tires.
12. Some of the currently existing vibration is attributable to the aftermarket wheels.
13. During the test drive at the hearing, the complained of vibration did not appear to result from a nonconformity.

IV. Conclusions of Law

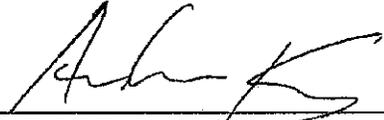
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
4. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
5. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).

6. The Complainant did not timely file the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
7. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
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.

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 and § 2301.204 is **DISMISSED**.

SIGNED January 2, 2017



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