

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0002 CAF**

**LORI HERNANDEZ and
ROBERT HERNANDEZ,
Complainants**

v.

**AMERICAN HONDA MOTOR CO., INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Lori Hernandez and Robert Hernandez (Complainants) 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 their vehicle distributed by American Honda Motor Co., Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect. However, the vehicle did not have a reasonable number of repair attempts and the Respondent did not have an opportunity to repair. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement but does qualify for 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 December 19, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainants represented themselves. Douglas Zamora testified for the Complainants. Steven Felix, Mediation Specialist, represented the Respondent. Aaron Schroeder, Districts Parts and Service Manager, 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

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

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

[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.⁸

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 TEX. OCC. CODE § 2301.605(a)(2).

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.⁹

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.¹⁰ 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.¹¹

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;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *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.’”).

¹¹ *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.”).

¹² 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.

¹³ 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).

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.¹⁴

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."¹⁵ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁷ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that every required fact is more likely than not true.¹⁸

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ 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."²⁰ However, the parties may expressly or impliedly consent

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁹ "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.").

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

to trying issues not included in the pleadings.²¹ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Complainants' Evidence and Arguments

On September 16, 2015, the Complainants, purchased a new 2016 Acura MDX from Sterling McCall Acura, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had six miles on the odometer at the time of purchase. The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first. On September 9, 2016, the Complainants mailed a written notice of defect to the Respondent. On September 12, 2016, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the transmission did not work properly. The Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
August 16, 2016	21,523	Grinding noise when pressing the accelerator
August 29, 2016	21,875	Transmission shifting roughly
September 8, 2016	22,243	Transmission acting up at low speeds

On October 5, 2016, at 23,318 miles, Mrs. Hernandez brought the vehicle to the dealership for a test drive with the Respondent's representative. The Respondent offered to replace the transmission and provide a vehicle service contract. However, the Complainants declined the Respondent's offer to repair the vehicle.

The Complainants first noticed the transmission issue about August 10, 2016. The transmission would jerk and squeak when shifting between second and third gear. Mr. Zamora drove the vehicle in and out of the garage and identified the transmission as the source of the issue. The Complainants contacted the dealer and then brought the vehicle in for service on August 16, 2016. The vehicle needed its transmission replaced along with the radiator as well as other repairs. The Complainants picked up the vehicle from the dealer on August 23, 2016, but still noticed the vehicle jerking and not driving smoothly, so they took the vehicle back to the dealer. The Complainants took the vehicle to the dealer for another service visit, at which Mr. Schroeder test drove the vehicle and represented that the vehicle operated according to specifications. Mrs.

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

²² See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

Hernandez testified that the vehicle no longer squeaked but the gear changes could be felt and when stopped for a while, the vehicle will jerk. Mrs. Hernandez confirmed that the repairs resolved the squeak and improved the jerk some. When first taking the vehicle to the dealer, the vehicle felt bad, as if it would leave them stranded. However, the vehicle never actually stalled. The condition was not as bad after repair but still jerky. Mrs. Hernandez stated that she last noticed the rough gear shift on the day of the hearing. She explained that the jerking occurred mostly driving in town. The vehicle will jerk when first taking off and in stop-and-go traffic. However, the vehicle would not jerk once on the highway. Mrs. Hernandez affirmed that she can feel when the gear changes. At the last visit to the dealer (October 5, 2016), Mr. Felix, Mr. Schroeder, and the dealer's service manager test drove the vehicle. Mr. Schroeder compared the subject vehicle to another like vehicle and he noticed a difference. Mrs. Hernandez affirmed that they received a loaner vehicle for the service visits. Mr. Zamora testified that after the first time the Complainants called him, he drove the vehicle and noticed jumping and squeaking when shifting from third to fourth gear in manual mode. He told the Complainants that they need to take the vehicle in (for repair). Afterwards, the Complainants asked Mr. Zamora to test drive the vehicle again. This time, he noticed a difference: the vehicle shifted better but still hard. He could feel the vehicle shift from second to third to fourth gear. When idling, the vehicle tried to jump – the vehicle would jerk when idling. Mr. Zamora testified that on the way to the hearing, he could feel the vehicle down shift and swaying, especially when slowing down in traffic. In the parking lot, while in drive with brake held down, the vehicle did the same (swaying) for a while. In closing, Mrs. Hernandez stated that she lives 52 miles from the dealership and the vehicle had three repair attempts and that driving 52 miles was a huge inconvenience. Mrs. Hernandez pointed out that the Carfax did not address the transmission replacements.

B. Respondent's Evidence and Arguments

On cross-examination, Mr. Zamora could not confirm whether he had worked on any nine-speed, five-speed, or CVT²³ transmissions. Mr. Felix recounted that the dealer had addressed the concerns according to the warranty. When advised of the grinding noise, the dealer found cross-contamination with the coolant and transmission fluid and replaced the transmission and other

²³ Continuously Variable Transmission.

components. On another visit, the dealer reprogrammed the power control module. The Respondent arranged a test drive with Mr. Schroeder and he noticed a slight difference between the subject vehicle and a like comparison vehicle. As a result, Mr. Schroeder recommended replacement of the transmission but Mrs. Hernandez declined. Mr. Felix explained that the Acura MDX has a nine speed transmission, which differs from a five speed transmission. The nine speed behaves more like a manual with a different shifting pattern. The vehicle was not defective but repairs were made to ensure its integrity. Mr. Felix asserted that the issue does not meet the definition of a serious safety hazard. Mr. Schroeder testified that the difference between the comparison vehicle and Complainant's vehicle was subjective in nature. He initially did notice a difference but compared to the new vehicle, the Complainant's vehicle's shifting was not as refined. In closing, Mr. Felix stated that the dealer addressed the concerns according to the warranty. He did not contend that the vehicle did not exhibit the shifting sensation but added that the transmission was different from the Complainants' other vehicles. The vibration at idle was not addressed in the repair orders. A Carfax showed the vehicle's value as unaffected and the fact that the vehicle has over 20,000 miles indicates its use has not been impaired.

C. Inspection and Test Drive

Upon inspection at the hearing, the vehicle's odometer displayed 28,514 miles. The vehicle was driven one mile over a span of approximately five minutes on the local roads around the hearing location. The vehicle did exhibit a rough shift during the test drive.

D. Analysis

1. Reasonable Repair Attempts

The record shows that the vehicle did not have a reasonable number of repair attempts. The general rebuttable presumption, which applies here, requires two repair attempts in the first 12 months or 12,000 miles and then another two repair attempts in the 12 months or 12,000 miles following the second repair. In this case. The record only shows three repair attempts. Although the vehicle was brought in for a test drive after the third repair, Mrs. Hernandez confirmed that she

and her husband decided to forgo the repair offered by the Respondent.²⁴ Additionally, the facts in this case do not support otherwise finding a reasonable number of repair attempts. Consequently, the vehicle does not qualify for repurchase or replacement relief.

2. Repair Relief

The evidence indicates that the subject vehicle shifted differently than a new similar comparison vehicle, indicating that some level of nonconformity exists. Accordingly, the vehicle still qualifies for repair relief.

III. Findings of Fact

1. On September 16, 2015, the Complainants, purchased a new 2016 Acura MDX from Sterling McCall Acura, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had six miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
August 16, 2016	21,523	Grinding noise when pressing the accelerator
August 29, 2016	21,875	Transmission shifting roughly
September 8, 2016	22,243	Transmission acting up at low speeds

4. On September 9, 2016, the Complainants mailed a written notice of defect to the Respondent.
5. On September 12, 2016, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the transmission did not work properly.
6. On October 5, 2016, at 23,318 miles, the Complainants brought the vehicle to the dealership for a test drive with the Respondent's representative. The Respondent offered to replace the transmission and provide a vehicle service contract. However, the Complainants declined the Respondent's offer to repair the vehicle.

²⁴ This visit to the dealership is not considered a repair attempt under the Lemon Law. *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

7. On November 2, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants 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.
8. The hearing in this case convened and the record closed on December 19, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainants represented themselves. Douglas Zamora testified for the Complainants. Steven Felix, Mediation Specialist, represented the Respondent. Aaron Schroeder, Districts Parts and Service Manager, testified for the Respondent.
9. The vehicle's odometer displayed 28,514 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. The vehicle exhibited a rough transmission shift during the test drive at the hearing but otherwise appeared to operate normally.

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 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 showed that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainants did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a); TEX. OCC. CODE § 2301.606(c).
9. If the Complainants' vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's transmission to the applicable warranty. The Complainants shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.²⁵ Within 20 days after receiving the vehicle from the Complainants, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

²⁵ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

SIGNED February 15, 2017



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