

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0053 CAF**

**DOUGLAS MURDOCH,  
Complainant**

v.

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Douglas Murdoch (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 shows that the Respondent's warranty does not apply to the subject vehicle. 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 **May 16, 2017**, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Jennifer Murdoch, the Complainant's spouse, testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Shawn Angel, District Manager Aftersales, and Bruce Morris, Field Service Engineer, testified for the Respondent.

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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>

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.<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)(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.<sup>9</sup>

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.<sup>10</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>11</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>12</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>13</sup> and (3) the

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> *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.’”).

<sup>11</sup> *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.”).

<sup>12</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 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>13</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).

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>14</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 distributor's . . . warranty agreement applicable to the vehicle."<sup>15</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>16</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>17</sup> 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.<sup>18</sup> If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

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

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

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<sup>14</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>15</sup> TEX. OCC. CODE § 2301.204.

<sup>16</sup> TEX. OCC. CODE § 2301.603(a).

<sup>17</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>19</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 factual 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>20</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.<sup>21</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>22</sup>

### A. Complainant's Evidence and Arguments

On December 1, 2014, the Complainant, purchased a new 2014 Cadillac XTS from Classic Chevrolet Buick GMC Cadillac, a franchised dealer of the Respondent, in Galveston, Texas. The vehicle had 5,176 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for four years or 50,000 miles, whichever occurs first. On or about October 17, 2016, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent. On October 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the glove compartment would not open, the CUE (Cadillac User Experience) infotainment system did not work, the CUE and the dash went out, and the dashboard peeled up. The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
March 3, 2017	33,013	CUE would not come on
December 28, 2016	32,992	CUE would not come on
December 19, 2016	32,846	CUE blacks out
September 23, 2016	32,534	CUE would be blank
April 5, 2016	26,716	CUE screen would not respond

The Complainant testified that the dashboard peeling and the glove compartment were successfully repaired, leaving the CUE issue resolution. Mrs. Murdoch testified that she was the primary driver of the subject vehicle. She first noticed the CUE issue roughly in late 2015. The issue started as a flash or flicker and did not completely cut off until reported. She last noticed the CUE system malfunctioning on March 22, 2017. The Complainant did not find that any repairs improved the CUE system or the instrument panel. Mrs. Murdoch confirmed that the when the instrument panel would go out, it would come back on when restarting the vehicle. On the other hand, the CUE system stayed off "95%" of the time when it went out.

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

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

Mr. Phillips pointed out that the vehicle's registration sticker had expired in 2016. On cross-examination, the Complainant confirmed that the vehicle was not currently registered. Ms. Angel recounted an e-mail of hers detailing that the CUE system was functioning. She confirmed that the CUE system worked each time going through multiple screens. Mr. Phillips reviewed the vehicle's history and pointed out that the first repair order one year after purchase did not list the CUE system as an issue. Going over the warranty, Mr. Phillips noted that the vehicle was registered and therefore not covered. Additionally, the warranty excluded communications devices that become nonfunctional because of unavailability of compatible wireless or GPS signals. He also noted that the Respondent did not get a copy of the notice of defect until the day before the hearing. With regard to the DVD player provided by the dealer, Mr. Morris explained that an inverter was an aftermarket device to allow the DVD to play. He confirmed that the warranty did not cover aftermarket products and that such products may affect the vehicle if wired improperly. Mr. Morris testified that during his inspection of the vehicle, he never saw the dash display or CUE turn off and found no trouble codes.

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

During the inspection at the hearing, the vehicle displayed a tire pressure monitoring system (TPMS) warning; however, the warning appeared to arise from a change in the tires without resetting the TPMS. The vehicle's odometer displayed 33,121 miles on the odometer before the test drive. The Complainant drove the vehicle predominantly on a major arterial road controlled by traffic lights. The Complainant paired his phone (a Samsung Galaxy running Android 7.0) via Bluetooth midway through the test drive. In addition, the hearing examiner covered the light sensor with a notepad to test the displays' dimming. However, the displays did not dim after several minutes. The CUE screen and the instrument panel remained on throughout the test drive. The test drive ended at 33,131 miles, for a total of 10 miles driven. At the end of the test drive, the Complainant opened the glove compartment, which operated properly.

### **D. Analysis**

The evidence shows that the manufacturer's warranty does not apply to the subject vehicle; therefore, the Lemon Law does not provide any relief. The Lemon Law does not require that a manufacturer provide any particular warranty coverage. The Lemon Law only requires

conformance with an applicable warranty. In other words, a warranty must apply for the Lemon Law to provide a remedy. In this case, the vehicle's warranty, under the heading "Warranty Applies", specifies that: "This warranty is for GM vehicles registered in the United States and normally operated in the United States or Canada, and is provided to the original and any subsequent owners of the vehicle during the warranty period."<sup>23</sup> However, the vehicle's registration expired in November of 2016 and the vehicle did not have a current registration at the time of the hearing. Although the Complainant's unwillingness to pay to register an unused vehicle may be understandable, the warranty only applies to registered vehicles. Since the vehicle is no longer registered, the warranty does not apply and the law does not allow repurchase/replacement or repair relief.

### III. Findings of Fact

1. On December 1, 2014, the Complainant, purchased a new 2014 Cadillac XTS from Classic Chevrolet Buick GMC Cadillac, a franchised dealer of the Respondent, in Galveston, Texas. The vehicle had 5,176 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for four years or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
March 3, 2017	33,013	CUE would not come on
December 28, 2016	32,992	CUE would not come on
December 19, 2016	32,846	CUE blacks out
September 23, 2016	32,534	CUE would be blank
April 5, 2016	26,716	CUE screen would not respond

4. On or about October 17, 2016, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.
5. On October 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the glove compartment would not open, the CUE (Cadillac User Experience)

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<sup>23</sup> Complainant's Ex. 1, Cadillac Limited Warranty and Owner Assistance Information (emphasis added).

- infotainment system did not work, the CUE and the dash went out, and the dashboard peeled up.
6. On January 5, 2017, 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 factual matters asserted.
  7. The hearing in this case convened and the record closed on May 16, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Jennifer Murdoch, the Complainant's spouse, testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Shawn Angel, District Manager Aftersales, and Bruce Morris, Field Service Engineer, testified for the Respondent.
  8. The vehicle's odometer displayed 33,121 miles at the time of the hearing.
  9. The vehicle's warranty only applies to registered vehicles, specifying that: "This warranty is for GM vehicles registered in the United States."
  10. The vehicle's registration expired in 2016 and was not in effect at the time of the hearing.
  11. Inspection of the vehicle at the hearing showed that the registration sticker had a November 2016 expiration date.

#### **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 filed a sufficient complaint with the Department. 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 an applicable manufacturer's express warranty. TEX. OCC. CODE §§ 2301.204(a), 2301.603(a) and 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604(a).
8. The Complainant's vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 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 July 11, 2017**

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