

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0063 CAF**

**MICHAEL KRUTIKOV,  
Complainant**

v.

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

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Michael Krutikov (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 American Honda Motor Co., 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<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 March 20, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on April 10, 2017, the deadline for filing a response to the Complainant's written submission. The Complainant, represented and testified for himself. Abigail Mathews, attorney, represented the Respondent. Steve Tuleja, District Parts and Service Manager, 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 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 November 20, 2015, the Complainant, purchased a new 2016 Honda Pilot from Round Rock Honda, a franchised dealer of the Respondent, in Round Rock, Texas. The vehicle had 21 miles on the odometer at the time of purchase. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first. On October 21, 2016, the Complainant mailed a written notice of defect to the Respondent. On October 27, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the driver's seat was loose and made a knocking noise, and the vehicle made a loud metal clank when backing up. The Complainant testified that the most recent repair successfully resolved the driver's seat concern. The Complainant took the vehicle to a dealer for repair of the remaining alleged issue as follows:

Date	Miles	Issue
04/14/16	5,673	Faint noise when driving
04/21/16	5,916	Clunking sound from left front wheel
06/14/16	7,735	Clunking noise when backing up
07/26/16	9,296	Loud metal to metal click sound
01/31/17	17,418	Brakes make a ticking noise when backing out

The Complainant explained that the metallic noise occurred almost every time in reverse, when starting from park and going backwards. The noise was especially noticeable and occurred most frequently at low speed and more pronounced when turning while backing up. He first noticed the noise within about two months of purchase. The noise occurred daily. He initially thought that the noise related to certain conditions, but the noise would occur during hotter and colder temperatures, throughout the course of the year, throughout the day, and in different weather. One dealership commented that different, non-Honda, brake pads could fix the issue. The Complainant affirmed that he had the impression that every Honda OEM (original equipment manufacturer) brake pad would make the noise because of the way they were made. On cross-examination, Mr. Tuleja confirmed that shimming the brake pads with business card pieces would eliminate the

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<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).

noise. In conclusion, the Complainant expressed his belief that shims added to the existing brake pads or different brake pads would eliminate the shift.

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

On cross-examination, the Complainant confirmed that he was advised that the brake pad shift/click noise was normal and not a defect. The Complainant acknowledged that Mr. Dahl of Howdy Honda stated that the Complainant could upgrade his brake pads; however, Mr. Dahl did not say that the vehicle was defective or unsafe.

Mr. Tuleja testified that he had driven a Honda Pilot for three months and that he had driven other 2016 Honda Pilots. He affirmed that the click or clink associated with the brake pad shift occurred because of the clearance needed to allow the brake pad to move in the caliper. The Respondent published a ServiceNews Article and a Product Characteristic Sheet explaining that the brake clicking was normal. Mr. Tuleja confirmed that he heard the shift/click noise in other Honda Pilots. He also heard the same noise in the Complainant's vehicle. He opined that the noise was a normal characteristic of the vehicle. Mr. Tuleja inspected the subject vehicle's wheels and calipers to ensure that the components were secure and the noise still occurred. He affirmed that the noise had no effect on performance or safety. Mr. Tuleja concluded that the noise did not affect the vehicle's value and all 2016 Pilot's may exhibit the same noise.

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

The vehicle had 19,710 miles on the odometer before the test drive. During the test drive, the vehicle exhibited the complained of clicking noise when braking going into reverse after braking going forward.

### **D. Analysis**

The parties do not disagree that the complained of brake pad shift noise exists. This case hinges on whether the noise constitutes a warrantable defect (a defect covered by warranty). The Lemon Law does not apply to all problems that may occur with a vehicle, but only applies to warrantable defects.<sup>23</sup> However, the manufacturer's warranty does not cover the complained of noise; therefore, the Lemon Law does not provide any relief. The Lemon Law does not require

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<sup>23</sup> TEX. OCC. CODE § 2301.603(a).

that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for noise or other vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for replacement or repurchase or for warranty repair, the vehicle must have a defect covered by warranty.<sup>24</sup> In this case, the vehicle's warranty specifies that:

Honda will repair or replace any part that is defective in material or workmanship under normal use.<sup>25</sup>

Accordingly, the warranty applies to conditions resulting from a defect in material or workmanship. On the other hand, the warranty does not cover conditions arising from the vehicle's design. Courts have affirmed that warranty language covering "defects in material or workmanship" did not cover design defects.<sup>26</sup> That is, defects in materials or workmanship (manufacturing defects) differ from characteristics of the design. 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."<sup>27</sup> 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 a broken 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. In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification

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<sup>24</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>25</sup> Complainant's Ex. 1, Limited Warranty, at 9 (emphasis added).

<sup>26</sup> *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.").

<sup>27</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

but there is a flaw in the specifications themselves.”<sup>28</sup> Likewise, design characteristics result from the vehicle’s specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer’s specifications may ordinarily exhibit the same characteristics. If the complained of condition constitutes a design characteristic or even a design defect, the Lemon Law does not apply because the warranty only covers manufacturing defects.

In the present case, the evidence shows that the Honda brake pads, as designed, have a clearance that allows the brake pads to move within the caliper. At the same time, as a side effect, the movement of the brake pads may produce the complained of clicking noise. However, because the noise arises from the intended design and normal function of the brake pads, the warranty does not cover the brake pad shift noise. In determining whether a defect exists, the relevant inquiry is not how loud the noise is or how problematic the condition may be. The Lemon Law does not mandate any specifications for vehicles. Rather, the Lemon Law looks to whether the Respondent’s warranty covers the condition. Stated another way, the relevant inquiry is not whether a better design or better part exists but whether the vehicle comports with the manufacturer’s chosen design specifications. As explained above, the warranty only covers manufacturing defects and not design characteristics. Nothing in evidence indicates that the subject vehicle has an out-of-specification part or assembly causing the noise. Instead, the evidence shows that the noise may occur with any 2016 Honda Pilot with OEM brake pads of the same design. The record reflects that the brakes as designed may normally make a clicking noise from the brake pads shifting. Moreover, the Respondent contemplates that the brakes will make such noise and produces documentation instructing dealers how to demonstrate that the noise results from the brake pads shifting. Although an aftermarket brake pad or an otherwise different design may reduce the complained of noise, such changes relate to the design of the vehicle while the Lemon Law only considers whether the vehicle complies with the warranty and the warranty does not cover design issues. In sum, the complained of brake shift noise is not a warrantable condition subject to Lemon Law relief.

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<sup>28</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

**III. Findings of Fact**

1. On November 20, 2015, the Complainant, purchased a new 2016 Honda Pilot from Round Rock Honda, a franchised dealer of the Respondent, in Round Rock, Texas. The vehicle had 21 miles on the odometer at the time of purchase.
2. The vehicle’s limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
04/14/16	5,673	Faint noise when driving
04/21/16	5,916	Clunking sound from left front wheel
06/14/16	7,735	Clunking noise when backing up
07/26/16	9,296	Loud metal to metal click sound
01/31/17	17,418	Brakes make a ticking noise when backing out

4. On October 21, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On October 27, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the driver’s seat was loose and made a knocking noise, and the vehicle made a loud metal clank when backing up. The driver’s seat concerned was successfully repaired prior to the hearing.
6. On December 12, 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 March 20, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed on April 10, 2017, the deadline for filing a response to the Complainant’s written submission. The Complainant, represented and testified for himself. Abigail Mathews, attorney, represented the Respondent. Steve Tuleja, District Parts and Service Manager, testified for the Respondent.
8. The vehicle’s odometer displayed 19,710 miles at the time of the hearing.

9. The vehicle's warranty was in effect at the time of the hearing.
10. During the test drive at the hearing, the vehicle exhibited the complained of clicking sound when braking going into reverse after braking going forward.
11. The complained of clicking sound results from brake pad shift. The vehicle's brake pads may normally shift due to designed clearances that allow the brake pad to move within the caliper.

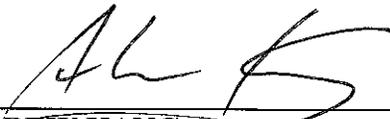
#### **IV. Conclusions of Law**

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 Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. 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 May 23, 2017**



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