

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0067 CAF**

**ROBERT W. WALKER,
Complainant**

v.

**GENERAL MOTORS LLC and
ACAR LEASING, LTD. D/B/A
GM FINANCIAL LEASING,
Respondents**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Robert W. Walker (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 indicates that the complained of condition is not 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 April 10, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented the Respondent. Bruce Morris, Field Service Engineer, and Jose Milan, District Manager Aftersales, testified for the Respondent. Johnny Gonzalez, System Vice President Customer Experience and Frank Escobar, Team Leader Customer Experience, represented ACAR Leasing, Ltd. d/b/a GM Financial Leasing (Lessor). The Department issued a decision and order on June 7, 2017. On July 3, 2017, the Respondent, filed a motion for rehearing. On July 27, 2017, Order No. 5 granted the Respondent's motion for rehearing. On August 8, 2017, Order No. 6 set a

¹ TEX. GOV'T CODE § 2001.051.

rehearing for September 28, 2017. The rehearing convened and the record closed on September 28, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Ted Walker also testified for the Complainant. Mr. Phillips represented the Respondent. Mr. Morris and Mr. Milan testified for the Respondent. Mr. Gonzalez and Mr. Escobar represented the Lessor.

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

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(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

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:

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

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).

[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

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

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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*.

(2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ 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.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 Complainant.¹⁷ 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.¹⁸ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

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).

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).

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

A. Complainant’s Evidence and Arguments

1. Hearing

On January 2, 2016, the Complainant, leased a new 2016 Cadillac CTS-V from Central Houston Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 12 miles on the odometer at the time of lease. The vehicle’s limited warranty provides bumper to bumper coverage of the vehicle for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 miles, whichever comes first. On October 12, 2016, the Complainant mailed a written notice of defect to the Respondent. On October 31, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the subject vehicle’s transmission shifts hard and jerks. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
08/29/16	5,917	Hesitating and downshifting rough
09/08/16	6,182	Transmission jerks on takeoff, delayed shifts, hard downshifts
10/05/16	6,685	Vehicle jerking between 0 to 40 mph in stop and go traffic
11/22/16	7,542	Vehicle shifts harshly in stop and go traffic

The Respondent’s opportunity to cure occurred on November 22, 2016.

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).

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).

The Complainant confirmed that the hard shift and jerking concerns did not occur before 5,000 miles but only occurred after the dealer tried to fix the vehicle's vibration, the initial reason for taking the vehicle for repair. He explained that when driving to Sugar Land, he felt vibration, and the vibration recurred again and again as he drove further. He would feel a shudder through the car at highway speeds. After changing/repairing the torque converter, the vehicle shifted too hard, hesitated, and overreacted: the transmission would down shift causing his head to hit the head rest and the vehicle would jerk in traffic without a foot on the brake between 10 and 30 miles per hour. At traffic lights, the vehicle felt as if it were bumped in the rear. The original shudder did not go away after the first repair (on July 18, 2016, at 4,920 miles). Upon picking up the vehicle from the first repair, reprogramming of the transmission, the vehicle shuddered all the way to Katy. The shudder occurred from Monday through Friday, so the Complainant returned the vehicle to the dealer. The Complainant confirmed that the shudder went away after the second repair attempt (on August 1, 2016, at 5,085 miles), which involved replacing the torque converter. However, on a road test with a technician, the vehicle shifted too hard, which it did not do before. The Complainant would notice the hard shifts at lower speeds and in stop and go traffic. The only time the transmission clunked was on the freeway when flooring the accelerator – the transmission would hesitate before taking off. Previously, the response was immediate, but now the transmission downshifted so hard it felt like a thunk. When leaving the garage, the shifts will jerk your head. The Complainant testified that he was the only driver of the vehicle. He has not driven the vehicle on a track and drives the vehicle in touring mode 99% of the time and sport mode 1% of the time and never in track mode. He noted that he would drive the vehicle at 90 to 100 mph but he drove all of his vehicles that way. The Complainant would experience hard shifting every day while driving to work downtown on Shepherd Drive, a six mile distance. Though the original shudder problem was fixed, the hard shifting has gotten worse with mileage.

On cross-examination, the Complainant explained that the hard shifting was more noticeable with less people in the car and very noticeable when driving alone. He acknowledged last having the vehicle in for repair on November 22, 2016. He confirmed that the torque converter was replaced but not the transmission.

The Complainant noted that reprogramming the transmission did not fix the shudder, which was not fixed until replacement of the torque converter. He added that he never complained about the delays in shifts between park and reverse. Rather, his concern relates to jerking driving down

the road. The Complainant described the vehicle's performance as "amazing" in the first 5,000 miles.

2. Rehearing

The Complainant testified that the comparison vehicle (described below in the discussion of the inspection and test drive) performed worse than the subject vehicle during the test drive at the rehearing. On cross-examination the Complainant testified that in his research, he found that the 8-speed transmission (as in the subject vehicle) had problems, including complaints about shudder in trucks and Escalades. He found that the complained of issue will recur after any attempted repairs. Specifically, the transmission could be reprogrammed and the torque converter replaced but the hard shifting will come back. He opined that the issue was a design defect. The Complainant concluded that all vehicles of the same model had the same issue as the subject vehicle.

B. Respondent's Evidence and Arguments

1. Hearing

Mr. Morris confirmed that the vehicle has a large supercharged Corvette engine that changes between eight and four cylinder modes. Mr. Morris explained that when flooring the accelerator the vehicle did not have a lag like turbo lag but downshifting would push you down into the seat. Mr. Morris acknowledged that he did not see any warning messages for shift denied or transmission hot – idle engine. He pointed out that the transmission had been take out to install the torque converter but the transmission had not been take apart. Upon inspection, Mr. Morris found no trouble codes and found the vehicle to be operating as designed. He also affirmed that the vehicle's transmission learns the driver's habits. He noted he felt a couple of instances of shudder, but watching the DIC (Driver Information Center) when coasting showed the engine shutting off four cylinders, and the transmission will bump when downshifting from 3rd to 1st. The transmission (by design) will not shift from 3rd to 2nd to 1st. Mr. Morris elaborated that the DIC showed the engine mode, V8 or V4, and gas mileage. When the vehicle comes to a stop, the display shows 99 mpg and the fuel injectors shut off.

On cross-examination, when asked if the hard 3rd to 1st shift when coming to a stop gets worse over time, Mr. Morris answered that it should have always been there. Upon a clarifying

question by the hearings examiner, Mr. Morris added that the Complainant may not have initially noticed because of the torque converter shudder (eventually eliminated by replacing the torque converter).

In reviewing the vehicle's history, Mr. Phillips testified that the Respondent released a bulletin for 2016 CTS-Vs addressing vibrations during transitions between V4 to V8 modes. Mr. Phillips noted that under the warranty, the Respondent may modify vehicles without any obligation to also modify previously built/sold vehicles. Another bulletin came out for hard shifts, relating to the 3rd to 1st gear shift. The dealer applied the bulletin's correction, transmission relearn, at the August 29, 2016 service visit. Additionally, delayed engagement from park to reverse or drive falls within specifications if no more than three seconds. The Respondent's field service engineer, Mr. Morris, found the vehicle to be working within factory specifications.

2. Rehearing

Mr. Morris stated that comparison vehicle performed similarly to the subject vehicle. Mr. Morris detailed the number of shifts and the corresponding levels for the transmission to adapt to the driver. He noted that some characteristics are learned during steady state speed. Additionally, he affirmed that the transmission learned based on the shifts, which were not mileage dependent. Mr. Morris affirmed that he felt a jerk in both vehicles leaving the parking lot during a cold takeoff. Mr. Morris confirmed that the 8-speed transmission has had customers concerns with jerks but the transmission was not defective. Mr. Morris reviewed various non-defect reasons for hard shifts, including hunting for a gear and transient conditions such as temperature. Specifically, shifts may be delayed until the transmission warms up because the transmission fluid is thicker when cold. Because the adaptive transmission continually makes adjustments, the shifting may feel different. Though the hard shifts may be annoying, they are not a defect. Mr. Morris testified that with any vehicle with the same 8-speed transmission, the Complainant would feel the same shifts.

Mr. Milan explained that he had arranged for three possible comparison vehicles, a 2018, 2017, and the 2016 CTS-V actually used in the test drive. However, prior to the hearing, the 2017 was sold and the 2018 had a purchase contract on it, leaving only the 2016 available. He affirmed that he did not specifically select this vehicle but the vehicle provided was determined by availability from the dealer. The comparison vehicle had 1,190 miles on it when Mr. Milan picked up the vehicle from the dealer the day before the hearing and brought it home and then to the

hearing. He attested that he felt the normal performance shifts when driving the comparison vehicle. He explained that the vehicle can be made to do a hard shift by manipulating the throttle, specifically letting of the throttle and stepping on it. He noted that feeling a shift is not a defect.

C. Inspection and Test Drive

1. Hearing

The vehicle had 10,631 miles on the odometer upon inspection at the hearing, before the test drive. For the test drive, the Complainant drove the vehicle predominantly on major arterial roads controlled by traffic lights. During the test drive, the vehicle apparently exhibited some rough shifts/jerking when accelerating/decelerating at lower speeds (stop and go driving). The Complainant explained that at higher speeds, the rough shifting disappeared unless stepping firmly on the accelerator. He pointed out that the rough shifting appeared worst in the morning with the vehicle cold. The Complainant demonstrated the rough downshift under hard acceleration: when flooring the accelerator, after a slight delay, the transmission downshifted firmly and the vehicle accelerated strongly. He explained that the vehicle originally accelerated smoothly, without the delay, hard shift, and sudden acceleration. He noted that a new same-model vehicle that he test drove did not exhibit the complained of rough shifting like the subject vehicle. He characterized the performance of the vehicle in the first 5,000 miles as “amazing”. The vehicle had 10,661 miles on the odometer at the end of the test drive.

2. Rehearing

The subject vehicle had 14,471 miles on the odometer at the rehearing, prior to the test drive. The Complainant initially drove the subject vehicle but Mr. Morris took over driving at 14,474 miles. The test drive ended at 14,482 miles. The same-model comparison vehicle had 1,226 miles on the odometer before the test drive. The Complainant initially drove the comparison vehicle but Mr. Morris took over at 1,230 miles. The test drive of the comparison vehicle ended at 1,237 miles. During the test drive of the comparison vehicle, the Complainant commented that he thought that the comparison vehicle was worse than the subject vehicle, noting that he heard grinding from the comparison vehicle. Both vehicles were driven on the same route and the change of drivers occurred in approximately the same location during both test drives.

D. Analysis

As detailed below, the subject vehicle does not have a defect eligible for Lemon Law relief. Instead, the complained of transmission performance results from the vehicle's design rather than any manufacturing defect covered by warranty.

1. Warrantable Defects

The Lemon Law does not apply to all problems a consumer may have with a vehicle. Rather, the Lemon Law only applies to defects covered by warranty (warrantable defects).²³ If the manufacturer's warranty does not cover the complained of condition; the Lemon Law does not provide any relief. The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for 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.²⁴ In this case, the vehicle's warranty specifies that: "The warranty 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." Accordingly, the warranty applies to defects in materials 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" do not cover design issues.²⁵ 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."²⁶ In other words,

²³ TEX. OCC. CODE § 2301.603(a).

²⁴ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁵ 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.").

²⁶ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

a manufacturing defect is an isolated 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. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which occurs before manufacturing) are not warrantable defects. 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. In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves."²⁷ 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.

2. Shifting Issue

A preponderance of the evidence shows that the complained of shifting issue is not a warrantable defect that qualifies the vehicle for relief. The record reflects that all vehicles with the same 8-speed transmission as the subject vehicle may exhibit the same hard shifting, which indicates that this characteristic arises from the shared transmission design and not from any manufacturing defect specific to the subject vehicle. Significantly, the same-model comparison vehicle exhibited the same (or worse) hard shifting as the subject vehicle. The Complainant discovered from his own research that vehicles with the same 8-speed transmission would exhibit the same hard-shifting characteristics. Moreover, he found that the hard shifting had no real, lasting fix, noting that the hard shifting would recur after reprogramming the transmission and replacing the torque converter. This indicates that the subject vehicle, as well as other vehicles that share the same transmission, do not have a manufacturing defect that may be repaired by replacing a defective part with a non-defective part. Rather, the shifting issues with the transmission arises from the design, which cannot be repaired but would require a redesign to address the hard shifting. Although the hard shifting may be undesirable, the warranty does not apply because the hard

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

shifting is a design issue and not a manufacturing defect. In sum, because the hard shifting is not a warranted manufacturing defect, the Lemon Law provides no relief.

III. Findings of Fact

1. On January 2, 2016, the Complainant, leased a new 2016 Cadillac CTS-V from Central Houston Cadillac, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 12 miles on the odometer at the time of lease.
2. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for four years or 50,000 miles, whichever occurs first and powertrain coverage for six years or 70,000 miles, whichever comes first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
08/29/16	5,917	Hesitating and downshifting rough
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11/22/16	7,542	Vehicle shifts harshly in stop and go traffic

4. The Respondent's opportunity to cure occurred on November 22, 2016.
5. On October 12, 2016, the Complainant mailed a written notice of defect to the Respondent.
6. On October 31, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the subject vehicle's transmission shifted hard and jerked.
7. On January 23, 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 matters asserted.
8. The hearing in this case convened and the record closed on April 10, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Kevin Phillips, Business Resource Manager, represented the Respondent. Bruce Morris, Field Service Engineer, and Jose Milan, District Manager

Aftersales, testified for the Respondent. Johnny Gonzalez, System Vice President Customer Experience and Frank Escobar, Team Leader Customer Experience, represented the Lessor.

9. The Department issued a decision and order on June 7, 2017. On July 3, 2017, the Respondent, filed a motion for rehearing. On July 27, 2017, Order No. 5 granted the Respondent's motion for rehearing. On August 8, 2017, Order No. 6 set a rehearing for September 28, 2017.
10. The rehearing convened and the record closed on September 28, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Ted Walker also testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Bruce Morris, Field Service Engineer, and Jose Milan, District Manager Aftersales, testified for the Respondent. Johnny Gonzalez, System Vice President Customer Experience and Frank Escobar, Team Leader Customer Experience, represented the Lessor.
11. The vehicle's odometer displayed 10,631 miles at the time of the hearing.
12. The vehicle's warranty was in effect at the time of the hearing.
13. The vehicle exhibited some hard shifts during the test drives at the hearing and rehearing. The same-model comparison vehicle exhibited similar or worse shifting during the test drive at the rehearing.
14. Other vehicles with the same type of transmission as the subject vehicle may exhibit the same hard shifting as the subject vehicle.
15. The subject vehicle may normally exhibit the complained of hard shifting and jerking due to the vehicle's transmission design.

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

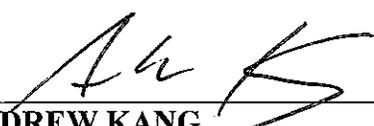
the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.

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's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a warrantable defect. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. 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 November 20, 2017



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