

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0146142 CAF**

**GLEN OAKS FINANCIAL SERVICE,
LLC and GABRIEL FELDER,
Complainants**

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC, and USB LEASING LT,
Respondents**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Glen Oaks Financial Services, LLC and Gabriel Felder (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in their vehicle distributed by Jaguar Land Rover North America, LLC (Respondent) and leased by USB Leasing LT. A preponderance of the evidence does not show that the subject vehicle continues to have a warrantable defect after repair. Consequently, the Complainants' 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 on August 9, 2017, in New Braunfels, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Mr. Felder represented Glen Oaks Financial Services, LLC and himself. Meochia Chance testified for the Complainants. John Chambless, attorney, represented 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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.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:

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).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of 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.¹¹ 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.¹²

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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

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.¹⁵

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."¹⁶ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁸ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that each required fact is more likely than not true.¹⁹ If any required fact appears equally likely or unlikely, then the Complainants 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.²⁰ 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."²¹ However, the parties may expressly or impliedly consent

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ "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.").

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

to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

A. Complainants' Evidence and Arguments

On October 20, 2016, the Complainants, leased a new 2016 Land Rover Range Rover Sport from Land Rover San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 10 miles on the odometer at the time of lease. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On January 9, 2017, the Complainants provided a written notice of defect to the Respondent. On January 13, 2017, the Complainants filed a complaint with the Texas Department of Motor Vehicles alleging that the vehicle displayed: (1) a message warning: no engine restarts in 247 miles, incorrect diesel exhaust fluid (DEF) quality detected; and (2) an engine warning light. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
10/28/16	257	DEF warning
11/23/16	1,680	Engine shut off – wrong diesel quality
12/16/16	2,665	Check engine light – crankcase ventilation
02/16/17	4,818	DEF warning, check engine light – crankcase ventilation

The Respondent's final opportunity to repair the vehicle occurred June 21, 2017.

The Complainant stated that he actually took delivery of the vehicle on the lease agreement date, October 20, 2016. Ms. Chance testified that she was the primary driver of the vehicle. She described that the day after taking delivery of the vehicle, a warning light came on along with a message that the engine will not restart in 247 miles. That day, Ms. Chance took the vehicle to the dealer and the service advisor told her to continue driving the vehicle. The vehicle's message counted down from the 247 miles. After reaching 257 miles (on the odometer) when pulling into the driveway, the vehicle displayed a no engine restarts message. She turned off the engine and immediately turned it back on and it started. However, when she later tried to start the engine, it would not start. Ms. Chance called the dealer and arranged to have the vehicle towed to the dealer the next day. After picking up the vehicle on October 28, 2016, she took the vehicle back to the dealer for the same warning message. She took the vehicle to the dealer twice in October and once

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

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

in November for the no restart/incorrect DEF warning. The warning for incorrect DEF last appeared at the time of the November 23, 2016, service visit. Two weeks later, the engine warning light came on. Ms. Chance dropped off the vehicle at the dealership on December 15 (2016). At this service visit, the dealer found the crankcase vent leaking and a loose sensor. After New Year's Day, the check engine light came on again. Ms. Chance confirmed that neither one of the warning lights (DEF or check engine) have come back on after repair. However, she still could hear a knocking noise but not as loud as in the past. She noted that the vehicle did display a warning light because the spare tire needs to be replaced. On cross-examination, Ms. Chance confirmed that the tire currently in the spare compartment was originally on the vehicle but switched out with the full size spare and now the vehicle senses that the tire in the spare compartment is not fully inflated. Ms. Chance affirmed that the dealer made no repair attempt the first time she contacted the dealer regarding the countdown message. She understood that the countdown message concerned the DEF. Ms. Chance confirmed that the DEF warning issue was successfully repaired.

B. Respondent's Evidence and Arguments

The Respondent concluded that the issues appeared to have been successfully repaired leaving no outstanding issues. The Respondent acknowledged the inconvenience caused and the poor service but noted the distinction between the dealership and the Respondent.

C. Inspection

Upon inspection at the hearing, the vehicle's odometer read 10,122 miles. The vehicle displayed a "service required" message, apparently a reminder for regular maintenance. The vehicle also displayed a "check spare tire pressure" warning, which Ms. Chance explained resulted from replacing a flat tire with the full-size spare, so that the vehicle needed a new spare tire. Ms. Chance mentioned a ticking noise occurring after shutting off the engine but she noted that she did not know whether it may be a normal noise from the vehicle cooling.

D. Analysis

The record reflects that the vehicle previously did have problems, complicated by the dealer's failure to promptly address the Complainants' concerns. However, the Lemon Law requires the defects to continue to exist after repair to qualify for any relief. In this case, the record shows that the complained of issues were successfully repaired and have not reoccurred after

repair. In the event of any new occurrences of a warrantable defect, the new vehicle limited warranty's bumper to bumper coverage remains in effect for four years or 50,000 miles, whichever occurs first.

III. Findings of Fact

1. On October 20, 2016, the Complainants, leased a new 2016 Land Rover Range Rover Sport from Land Rover San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 10 miles on the odometer at the time of lease.
2. The vehicle's limited warranty provides bumper to bumper coverage 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
10/28/16	257	DEF warning
11/23/16	1,680	Engine shut off – wrong diesel quality
12/16/16	2,665	Check engine light – crankcase ventilation
02/16/17	4,818	DEF warning, check engine light – crankcase ventilation

4. The Respondent's final opportunity to repair the vehicle occurred June 21, 2017.
5. On January 9, 2017, the Complainants provided a written notice of defect to the Respondent.
6. On January 13, 2017, the Complainants filed a complaint with the Texas Department of Motor Vehicles alleging that the vehicle displayed: (1) a message warning: no engine restarts in 247 miles, incorrect diesel exhaust fluid quality detected; and (2) an engine warning light.
7. On May 5, 2017, 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 factual matters asserted.

8. The hearing in this case convened on August 9, 2017, in New Braunfels, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Mr. Felder represented Glen Oaks Financial Services, LLC and himself. Meochia Chance testified for the Complainants. John Chambless, attorney, represented the Respondent.
9. The vehicle's odometer displayed 10,122 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. At the inspection of the vehicle at the hearing, the vehicle displayed a "service required" message, apparently a reminder for regular maintenance. The vehicle also displayed a "check spare tire pressure" warning, resulting from replacing a flat tire with the full-size spare. The vehicle did otherwise appear normal and did not display a diesel exhaust fluid message or engine warning light.

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 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not prove that the vehicle has a currently existing defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) and 2301.604(a).

7. 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**.

SIGNED September 8, 2017



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