

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0159331 CAF**

**ROY LOGGINS,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Roy Loggins (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 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 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 June 22, 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 Gary Hays, Service Manager for Turner Chevrolet testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

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

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁹

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹⁰ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹¹

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹¹ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹² TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹³ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁴

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle.”¹⁵ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁶

3. Burden of Proof

The law places the burden of proof on the 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.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ The complaint should state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”²⁰ However, the parties may expressly or impliedly consent

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

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

¹⁹ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV'T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the 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.”).

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

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

On October 7, 2015, the Complainant, purchased a new 2016 Chevrolet Suburban from Turner Chevrolet, a franchised dealer of the Respondent, in Crosby, Texas. The vehicle had 12 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever occurs first. On December 15, 2016, the Complainant mailed a written notice of defect to the Respondent. On January 11, 2017, the Complainant filed a Lemon Law complaint with the Department alleging vibration in the gas pedal, steering wheel, and driver's side floor with drone noise and an exhaust tone change when operating in V-4 mode. The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
March 2, 2016	7,084	Vibration in steering wheel at 35 mph
April 6, 2016	8,037	Vibration in steering wheel at 30 mph
June 14, 2016	10,146	Vibration at 30 mph in 4 cylinder mode
August 31, 2016	12,700	Vibration at low speeds
September 12, 2016	13,958	Vibration at low speeds
February 2, 2017	20,934	Vibration in steering at low speeds after V-4 is active

The Complainant testified that the vehicle exhibits vibration mainly in steering wheel, but also the gas pedal and floorboard, when driving in town and the vehicle changes from V8 to V4 mode while driving 25 to 40 mph. The vibration gets worse up to 45 to 50 mph, but goes away in V8 mode. The Complainant stated that the vehicle's vibration in V4 mode was irritating. He first noticed the vibration when picking up the vehicle from the dealership before getting home. The Complainant also noticed a droning noise associated with the V4 mode that does not occur in V8 mode. He explained that the noise occurred during V4 mode on the highway. When asked if the vibration/noise affected performance, the Complainant answered that he did not think so. Rather,

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 noise and vibration were just irritating. He pointed out that he believed the vehicle was too big to lug around on four cylinders.

B. Respondent's Evidence and Arguments

Mr. Hays acknowledged that all vehicles vibrate. He stated that to determine if a concern is actually a problem, the technician will test drive a like model. In this case, a like model vehicle exhibited the same characteristics and the dealership did not find a defect. Mr. Hays confirmed that he did not feel anything unusual during the test drive at the hearing. Mr. Hays noted that the dealership replaced the muffler-exhaust pipe for noise at low rpms, knowing that the noise would not go away but they wanted to try to improve the issue. Mr. Phillips outlined the vehicle's history. Mr. Morris reviewed his report of the February 3, 2017, inspection. Mr. Morris noted that he test drove the vehicle at about 30 to 40 mph. Once the vehicle entered V4 mode, he lightly accelerated the vehicle while keeping it in V4 mode and the vehicle exhibited a rumbling feel/noise. However, this condition was a normal operational characteristic of the vehicle when lugging the engine and transmission. Mr. Morris drove a comparison vehicle from the dealership's lot and experienced the same results as with the Complainant's vehicle. This condition only occurred in V4 mode and further acceleration will transition the vehicle out of V4 mode and the lugging will not occur. The Active Fuel Management (AFM) System (which turns off four of the eight cylinders) promotes fuel economy and allows up to a 20% increase in throttle to achieve the highest fuel economy possible before switching back to V8 mode. Mr. Morris concluded that the subject vehicle was operating as designed.

C. Inspection and Test Drive

The vehicle had 26,284 miles on the odometer at the inspection at the hearing before the test drive. During the test drive, the vehicle exhibited vibration/noise at about 30 to 35 mph in V4 mode when accelerating from about 1,000 rpms. The vehicle did not exhibit such vibration/noise at highway speeds. The test drive ended at 26,310 miles.

D. Analysis

The Lemon Law does not apply to all problems that may occur with a vehicle, but only applies to warrantable defects.²³ In this case, the manufacturer's warranty does not cover the complained of vibration and noise; therefore, 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 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 due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts."²⁵ Accordingly, the warranty applies to conditions resulting from a defect 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 defects.²⁶ 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."²⁷ 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

²³ TEX. OCC. CODE § 2301.603(a).

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

²⁵ Complainant's Ex. 1, 2016 Chevrolet Limited Warranty (emphasis added).

²⁶ *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.").

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

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."²⁸ 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.

Although a vehicle may not perform to the satisfaction of the consumer, under the Lemon Law, the manufacturer's warranty defines what constitutes a warrantable defect. As explained above, the vehicle's warranty only covers manufacturing defects and does not cover characteristics arising from the design, such as the noise and vibration resulting from the operation of the AFM System. The evidence shows that, to improve fuel economy, the vehicle's AFM System will shut off four of the eight cylinders so that the engine operates in V4 mode. While this conserves fuel, it has the side effect of producing greater noise and vibration from the engine laboring (lugging) to accelerate the vehicle. Mr. Morris specifically pointed out that the engine may be lugging during acceleration at low rpms. Moreover, the Complainant expressed the belief that four cylinders were inadequate for powering the subject vehicle. The Complainant's observation here comports with the design and resulting function of the vehicle's AFM system. Nevertheless, even if a consumer finds the design to perform poorly, design issues are not warrantable defects subject to the Lemon Law.

III. Findings of Fact

1. On October 7, 2015, the Complainant, purchased a new 2016 Chevrolet Suburban from Turner Chevrolet, a franchised dealer of the Respondent, in Crosby, Texas. The vehicle had 12 miles on the odometer at the time of purchase.

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

1. The vehicle's limited warranty provides bumper to bumper coverage of the vehicle for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever occurs first.
2. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
March 2, 2016	7,084	Vibration in steering wheel at 35 mph
April 6, 2016	8,037	Vibration in steering wheel at 30 mph
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February 2, 2017	20,934	Vibration in steering at low speeds after V-4 is active

3. On December 15, 2016, the Complainant mailed a written notice of defect to the Respondent.
4. On January 11, 2017, the Complainant filed a Lemon Law complaint with the Department alleging vibration in the gas pedal, steering wheel, and driver's side floor with drone noise and an exhaust tone change when operating in V-4 mode.
5. On May 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.
6. The hearing in this case convened and the record closed on June 22, 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 Gary Hays, Service Manager for Turner Chevrolet testified for the Respondent.
7. The vehicle had 26,284 miles on the odometer upon inspection at the hearing before the test drive. During the test drive, the vehicle exhibited vibration/noise at about 30 to 35 mph in V 4 mode when accelerating from about 1,000 rpms. The vehicle did not exhibit such vibration/noise at highway speeds.

8. The vehicle's warranty was in effect at the time of the hearing.

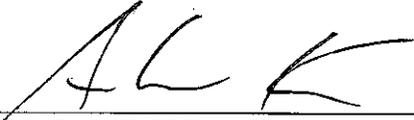
IV. Conclusions of Law

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 defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED August 21, 2017



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