

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0178933 CAF**

**BULLDOG CONTRACTORS LLC,  
Complainant**

v.

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Bulldog Contractors LLC (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 its vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by warranty. 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 on August 24, 2018, in Longview, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Sandra Keller represented and testified for the Complainant. Jeff Keller testified for the Complainant. Kevin Phillips, Business Resource Manager, represented and testified for the Respondent. David Piper, Field Service Engineer, testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

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

##### a. Serious Safety Hazard

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

##### b. Substantial Impairment of Use or Value

###### i. Impairment of Use

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

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

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

**ii. Impairment of Value**

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

**c. Reasonable Number of Repair Attempts**

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

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and 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.<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 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.<sup>8</sup>

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:

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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).

[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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</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>12</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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> 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.<sup>15</sup>

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

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</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>12</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>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

## 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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.<sup>16</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>17</sup>

## 3. **Burden of Proof**

The law places the burden of proof on the Complainant.<sup>18</sup> The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that every required fact is more likely than not true.<sup>19</sup> If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainant cannot prevail.

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

The complaint identifies the issues to be addressed in this proceeding.<sup>20</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>21</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

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<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>20</sup> “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.<sup>24</sup> Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).<sup>25</sup>

### A. Complainant's Evidence and Arguments

On March 16, 2017, the Complainant, purchased a new 2017 Chevrolet Express Cutaway Van from Classic Chevrolet Buick GMC, a franchised dealer of the Respondent, in Granbury, Texas. The vehicle had 10 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On August 17, 2017, the Complainant provided a written notice of defect to the Respondent. On August 17, 2017, the Complainant filed a complaint with the Department alleging that the air conditioning (AC) compressor cycled on and off every 10 to 15 seconds; the air from the vents was 40 to 60 degrees (Fahrenheit); and the AC did not keep the vehicle cool.

Mrs. Keller testified that the temperature in the vent was more like 60 degrees and not 40 degrees as described in the complaint. She noted that the Spartan body and door were aftermarket items installed by the dealer. The cooling issue first became apparent a couple of days before the July 3, 2017, repair visit on the way to a job in Dallas. Mr. Keller explained that the AC compressor cycled more than normal as compared to any other vehicle. Mrs. Keller added that the compressor went on and off about every 10, 15, or 20 seconds. She stated that the temperature in the cabin was 78 degrees with the temperature 95 degrees outside, about a 20-degree difference, which was not

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<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

comfortable. She confirmed that the air became warmer when the compressor turned off and became cooler when turned on. However, the compressor did not stay on long enough to recover (to cool sufficiently). This AC issue did not have any known fix available. Mr. Keller stated that he last noticed the cooling problem when parked outside the hearing location. He noted that when driving, he preferred having the windows down rather than having the AC on. The cabin did not feel like it was cooling during 100-degree days. Mr. Keller stated that the temperature in the cabin was well over 80 degrees.

On cross-examination, Mrs. Keller addressed some apparent inconsistencies of the dates on the repair orders, noting that one of the dealers did not close the repair order even though the vehicle was not at the dealership. Mr. Keller confirmed that one dealer provided a loaner vehicle for a day.

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

Mr. Piper explained that the primary purpose of air conditioning was to dehumidify the air, which naturally drops the temperature. During a prior test drive, he observed that driving up hill, the AC compressor would cycle. He noted that the compressor stayed disengaged most of the time. A service bulletin came out to recalibrate the engine control module (ECM) to keep the compressor engaged longer. Mr. Piper reviewed his inspection report. He did not find any refrigerant leaks; updated the ECM to limit the compressor off time to allow cooling/dehumidifying of the cabin and to protect from damage from overspeed; found that the vent air temperature fluctuated; noted that the vehicle was low on refrigerant by about a half pound (a dealer intentionally undercharged the AC trying to resolve the issues). With respect to the chassis cab build, the vent temperatures would fluctuate the most but the compressor's on-time cannot be increased because the compressor cannot tolerate the load. Mr. Piper confirmed that any like make, model, year, gas engine-equipped vehicle would perform similarly.

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

Upon inspection at the hearing, the vehicle's odometer displayed 17,560 miles. The ambient temperatures remained in the low 90-degree range during the test drive. The air from the vents would become warmer when the air conditioning compressor cycled off but provided sufficiently cool air to keep the cabin cool.

### D. Analysis

The evidence shows that the problems identified by the Complainant result from the vehicle's design. However, the warranty does not apply to design issues. As a result, the Lemon Law does not provide any relief. To qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).<sup>26</sup> 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 or performance. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the vehicle's warranty generally provides 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." According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>27</sup> 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. Unlike manufacturing defects, issues that do not arise from manufacturing are not warrantable defects. Design characteristics result from the vehicle's specified design, which exists before manufacturing, and not from any error during manufacturing.<sup>28</sup>

In the present case, the record shows that the air conditioner compressor frequently cycled off and blew warmer air so that the air conditioner did not cool the vehicle to a comfortable temperature in extreme heat. However, the evidence also shows that the compressor cycles off according to its design to avoid damaging the compressor and to prevent freezing the evaporator

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<sup>26</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>27</sup> Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *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>28</sup> 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." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

coil. In other words, the manufacturer intentionally designed the vehicle to cycle off the compressor as described, but this had the side effect of unsatisfactory cooling on very hot days. Nevertheless, the limited warranty does not guarantee satisfactory performance or design but only warrants that the vehicle does not have a manufacturing defect (a defect in material or workmanship). Here, the design of the vehicle (not any defect from manufacturing) caused the unsatisfactory cooling performance in hot weather. Whether a manufacturing defect or the vehicle's design caused the unsatisfactory cooling is legally significant. The Lemon Law only applies to warranted defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide any relief for the unsatisfactory cooling resulting from the vehicle's design.

### **III. Findings of Fact**

1. On March 16, 2017, the Complainant, purchased a new 2017 Chevrolet Express Cutaway Van from Classic Chevrolet Buick GMC, a franchised dealer of the Respondent, in Granbury, Texas. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. On or about August 8, 2017, the Complainant, a person on behalf of the Complainant, or the Department provided a written notice of defect to the Respondent.
4. On August 17, 2017, the Complainant filed a complaint with the Department alleging that the air conditioning (AC) compressor cycled on and off every 10 to 15 seconds; the air from the vents was 40 to 60 degrees; and the AC did not keep the vehicle cool.
5. On November 8, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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 on August 24, 2018, in Longview, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Sandra Keller represented and testified for the Complainant. Jeff Keller testified for the Complainant.

Kevin Phillips, Business Resource Manager, represented and testified for the Respondent. David Piper, Field Service Engineer, testified for the Respondent.

7. The vehicle's odometer displayed 17,560 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. Upon inspection at the hearing, the vehicle's odometer displayed 17,560 miles. The ambient temperatures remained in the low 90-degree range during the test drive. The air from the vents would become warmer when the air conditioning compressor cycled off. The vehicle otherwise appeared to operate normally.
10. During extremely hot weather, the AC does not cool the vehicle satisfactorily. By design, the compressor cycles off to avoid damaging the compressor and to prevent freezing the evaporator coil. When cycling off, the AC blows warmer air from the vents. The compressor's on-time cannot be increased because the compressor cannot tolerate the load.

#### IV. Conclusions of Law

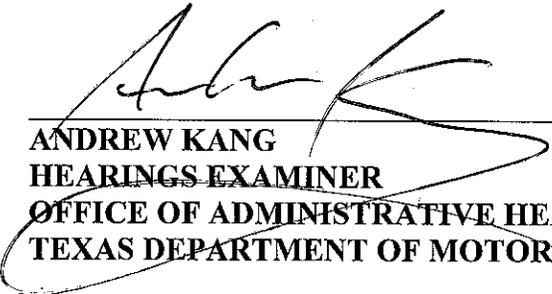
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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, repurchase or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 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 September 12, 2018**



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