

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 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

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 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).

¹⁵ 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.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 Complainant.¹⁸ 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.¹⁹ 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.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 to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

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).

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).

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.²⁴ 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 verified through receipts or similar written documents.²⁵

A. Complainant's Evidence and Arguments

On May 28, 2016, the Complainant, leased a new 2016 Jeep Model from Richardson Chrysler Jeep Dodge Ram, a franchised/authorized dealer of the Respondent, in Richardson, Texas. The vehicle had 499 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first and powertrain coverage for 60 months or 60,000 miles, whichever occurs first. On November 29, 2017, the Complainant filed a complaint with the Department alleging that: (1) the sunroof (sunshade) malfunctioned and (2) the transmission randomly shifted gears and the vehicle would go into reverse and roll backwards. The complaint identified December 1, 2017, as the date a written notice of the defects was provided to the Respondent. However, Ms. Ashford indicated that her father was the person with knowledge of that notice.

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
August 17, 2016	2,320	Transmission locked up at stop
October 13, 2016	4,163	Shifter gets stuck
February 27, 2017	8,134	TCM and PCM flash
August 7, 2017	13,075	Sunroof hangs and makes popping noise; gear shifter sticking, going into random gears, shifting into neutral when in drive; sunshade not retracting properly, hangs without tension
	15,882	Sunshade catching and making popping noise; sunshade hangs low and buffets with windows open;
	16,161	Sunshade hangs low and catches, buffets with windows down, folds on itself when retracting
	17,957	Vehicle randomly changes gears

Ms. Ashford affirmed that she was the primary driver of the vehicle. In describing the shifting issue, she explained that while in drive, she would feel the gas pedal shift or shake and then feel the vehicle roll backwards. This first occurred in August of 2016 and would occur intermittently, about once every three months. The issue last occurred about two months ago.

Ms. Ashford confirmed that the gear shift locking related to the shifting issue. She elaborated that the vehicle will display a flashing message to shift into gear or turn off²⁶ and the gear range (PRND) light will not illuminate on the gear selector or the instrument cluster. She stated that she last noticed this issue possibly two weeks before the hearing. Ms. Ashford explained that she could not get a loaner vehicle through the dealer because of her age.

Ms. Ashford testified that when pressing the button for the panoramic sunroof, the shade would move all the way back. The first time the malfunction happened, she heard a grinding noise and closed the sunroof. Two days later, she heard the sunroof make a popping noise and the sunroof would hang. The sunroof was fixed, but still made the grinding noise when going back. In addition, having the windows down caused the sunshade to move. She first noticed the sunroof issue in the summer of 2017 and the issue continued to occur as of the hearing.

Upon clarifying questions, Ms. Ashford testified that the vehicle would possibly roll back a couple of inches, and the rolling back happened twice. She stated that the sunshade last actually

²⁶ Complainant's Ex. 8 shows the message as "Shift to P then desired gear."

got stuck about a month ago. She confirmed that the sunshade had bunched up but went back normally after pressing the sunshade button. Ms. Ashford affirmed that when rolling backwards, the vehicle was on a sloped street, but not a huge incline. She also elaborated that the shift message would pop up with the vehicle not fully warm, while on the driveway.

B. Respondent's Evidence and Arguments

Mr. Witters testified that at his inspection of the vehicle on April 20, 2018, he drove the vehicle under different conditions but never duplicated any problems. Additionally, no diagnostic trouble codes (DTCs) were flagged. Mr. Witters explained that when first starting the vehicle, the modules are not completely "awake" yet. Though he drove the vehicle in multiple scenarios and shifted multiple times, he duplicated no abnormal transmission shifting. He noted that the repair orders did not indicate that the issue was ever duplicated. The sunshade was made of fabric, so it may move with the windows down. The sunshade did not exhibit any nonconformities in either full forward or full back positions. The vehicle had a fault in November, but not since then. Mr. Witters elaborated that the shifter was cable operated, with the shifter connected by a cable to a hydraulic valve on the transmission. To go into reverse, the valve must be physically moved. The vehicle's transmission is not fully electronic and not capable of moving the valve autonomously. Additionally, the shifter has a lockout to prevent shifting from neutral or drive into reverse. Mr. Witters checked the lockout and found no issues. The cable was routed correctly from the shifter to the transmission and was in (proper) adjustment. He opined that the vehicle appeared safe and he did not see any diagnostic trouble codes or malfunction indicators for transmission or shifter issues. Mr. Witters explained that the condition shown in the Complainant's photos could happen when shifting before the modules wake up. If the same issue occurred while driving down the road, a DTC would be associated with it.

Upon clarifying questions, Mr. Witters testified that the parking pawl disengages when operated as he demonstrated. Even if a gear is not selected, the parking pawl is already released. However, the vehicle can be configured to automatically set the parking brake on every key cycle. The vehicle has a hill hold assist feature that holds the vehicle after releasing the brake, but at some point, the hill hold assist will let go. The vehicle's engine does not produce enough torque to hold the vehicle in place. As a result, the vehicle will roll backwards slowly, probably a few inches, but not like a standard transmission "free fall."

C. Inspection

Upon inspection before the test drive at the hearing, the vehicle's odometer displayed 19,885 miles. The vehicle was driven around a parking lot and on a freeway and service roads. The sunroof's fabric sunshade unrolled (closed) normally, but crumpled when rolling up (opening). Ms. Ashford pointed out that this did not occur in the past. When asked about issues with the glass sunroof itself, Ms. Ashford stated that it never had any issues. But the sunshade occasionally made a grinding noise when the sunshade was about to balk. She noted that in the photos in an email sent to Ms. Kershaw, the shift message popped up just after starting the vehicle, as she was pulling out of the dealership parking lot.

D. Analysis

The law requires that the Complainant prove by a preponderance that the vehicle has a warrantable defect. However, the evidence does not show that the vehicle more likely than not has a warrantable defect. Rather, the design of the vehicle appears as likely to have caused the complained of issues as any manufacturing defect. Accordingly, the vehicle does not qualify for relief.

Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁷ 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. In part, the warranty generally states that: "The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your vehicle when it left the manufacturing plant that is defective in material, workmanship or factory preparation." According to these terms, the warranty only applies to manufacturing defects, i.e., defects in materials, workmanship, and the like.²⁸ A manufacturing defect is an isolated

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204

²⁸ 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

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, such as characteristics of the vehicle's design (which exists before manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.²⁹ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design issues. However, the problems in this case appear just as likely to be design characteristics as manufacturing defects.

Even though an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect. With respect to the malfunctioning sunshade, the wrinkling/crumpling/bunching appears to result from the design of the sunshade, specifically, the fabric material used in the sunshade's design. In this case, the fabric's flexibility appears to allow the sunshade to crumple, as opposed to a rigid design. Regarding the shifting issue, the evidence shows that, because of the vehicle's design, shifting before the modules have had time to wake up will result in the message to "Shift to P then desired gear." Essentially, the vehicle is confirming the driver's intended action. This is consistent with Ms. Ashford's testimony that she would see the message before the vehicle warmed up while still in the driveway. Further, unlike a fully electronic shifter, the valve in the transmission linked by cable to the shifter, must physically move to shift the transmission into reverse gear. Nevertheless, the evidence reflects that under certain conditions, the vehicle may move backwards, even though not in reverse gear, due to the design of the vehicle. Although the vehicle includes a hill hold assist feature to prevent moving backwards, this feature only holds the vehicle for a limited time and the subject vehicle's engine does not produce sufficient torque to hold the vehicle, so the vehicle can move backwards. However, this is a limitation in the design shared by all like vehicles and not a defect from manufacturing.

or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

²⁹ 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).

III. Findings of Fact

1. On May 28, 2016, the Complainant, leased a new 2016 Jeep Model from Richardson Chrysler Jeep Dodge Ram, a franchised/authorized dealer of the Respondent, in Richardson, Texas. The vehicle had 499 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first and powertrain coverage for 60 months or 60,000 miles, whichever occurs first.
3. The vehicle's warranty states: "The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your vehicle when it left the manufacturing plant that is defective in material, workmanship or factory preparation." The warranty covers manufacturing defects but does not apply to issues relating to design.
4. On November 29, 2017, the Complainant filed a complaint with the Department alleging that the transmission randomly shifts gears; the panoramic sunroof malfunctions; the vehicle went into reverse and rolled backwards; and after shifting into park and turning the vehicle off and on, the gear shift was difficult to shift back to drive.
5. On March 20, 2018, 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 Monday, May 21, 2018, at 1:00 p.m. in Fort Worth, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Morghan Ashford, the Complainant's daughter, represented and testified for the Complainant. Tamara Ashford, the Complainant's spouse, testified for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented and testified for the Respondent. Matt Witters, Technical Advisor, testified for the Respondent.
7. The vehicle's odometer displayed 19,885 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.

9. During the inspection at the hearing, the vehicle's fabric sunshade extended (closed) normally, but would wrinkle and bunch up when retracting (opening).
10. The sunshade's fabric design allows the sunshade to wrinkle and crumple.
11. The vehicle may display the message "Shift to P then desired gear" when attempting to shift before the vehicle's modules are "awake." By design, the vehicle, is confirming the driver's intended action.
12. The vehicle may move backwards under certain conditions even with the transmission in drive due to the design of the vehicle.

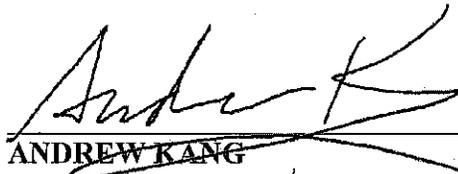
IV. Conclusions of Law

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 or repurchase. 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 July 20, 2018

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line.

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