

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0189886 CAF**

MICHAEL J. CARTER,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
AMERICAN HONDA MOTOR CO.,	§	
INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Michael J. Carter (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2018 Honda Accord. Complainant asserts that the vehicle is defective because the collision mitigation braking system warning message displays periodically on the vehicle’s dashboard display. American Honda Motor Co., Inc. (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired and Complainant is not eligible for repurchase or replacement relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice 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 was closed on January 9, 2019, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Michael J. Carter, represented himself at the hearing. Respondent was represented by Abigail Mathews, attorney with FrancisMathews PLLC. Deborah Yoder, District Parts and Service Manager, testified for Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and the repair attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner.⁶

However, if a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has 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.⁷

A “serious safety hazard” is defined as a “life-threatening malfunction or nonconformity that: (A) substantially impedes a person’s ability to control or operate a motor vehicle for ordinary use or intended purposes; or (B) creates a substantial risk of fire or explosion.”⁸

B. Complainant’s Evidence and Arguments

Complainant purchased a new 2018 Honda Accord from Honda of Spring located in Houston, Texas on April 28, 2018, with mileage of 7 at the time of delivery.^{9,10} Respondent provided a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles from the date of delivery. Complainant also provided a powertrain warranty for the vehicle

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(3) provides an alternative method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(3) requires that the vehicle be out of service for repair for a 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.

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Complainant Ex. 1, Cash Retail Buyers Order and Invoice dated April 28, 2018.

¹⁰ Complainant Ex. 2, Odometer Disclosure Statement dated April 28, 2018.

which provides coverage for the vehicle's powertrain for the first five (5) years or 60,000 miles of ownership. The vehicle's mileage on the hearing date was 10,518. The warranties for the vehicle are still in effect.

Complainant testified that the vehicle's collision mitigation braking system (CMBS) warning message displays periodically when he's driving the vehicle after approximately 10 to 40 minutes with the cruise control turned on. The warning message instructs the driver to take the vehicle to a dealer for the issue.

Complainant stated that he first mentioned the issue to a dealer representative on May 10, 2018, but no repair was performed at the time. The warning message continued to periodically display on the vehicle's dashboard for a few weeks. Complainant took the vehicle to Sterling McCall Honda of Kingwood (McCall) located in Kingwood, Texas on June 7, 2018, for repair for the issue. McCall's service technician discovered a diagnostic code on the vehicle's computer which indicated a "temporary stop of Integrated Driver Support System."¹¹ The technician cleared the code and adjusted the vehicle's brake switch to resolve the problem.¹² The vehicle's mileage on this occasion was 1,910.¹³ The vehicle was in McCall's possession for two (2) days during this repair. Complainant was provided with a rental vehicle while his vehicle was being repaired.

Complainant stated that after the repair he continued to drive the vehicle as he normally would. The CMBS warning message appeared again in July of 2018. He took the vehicle to Honda of Spring on July 11, 2018, in order to have the issue addressed. The dealer's service technician discovered the same diagnostic code on the vehicle's computer as the McCall technician found on the earlier repair.¹⁴ Honda of Spring's technician replaced and adjusted the brake switch in order to correct the issue.¹⁵ The vehicle's mileage on this occasion was 3,501.¹⁶ The vehicle was in the dealer's possession for one (1) day on this occasion. Complainant was provided with a rental vehicle while his vehicle was being repaired.

Complainant testified that the warning message continued to appear on the dash after the July repair. The message displayed eight (8) times between July 31, 2018 and September 17, 2018, which was the last date that the message displayed.

¹¹ Complainant Ex. 3, Repair Order dated June 7, 2018.

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 4, Repair Order dated July 11, 2018.

¹⁵ *Id.*

¹⁶ *Id.*

On August 14, 2018, Complainant wrote a letter to Respondent advising them of his dissatisfaction with the vehicle.¹⁷ Complainant also filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on August 14, 2018.¹⁸

Complainant testified that he received a phone call from Respondent's representative in either August or September of 2018, after the filing of the Lemon Law complaint. The representative requested that Complainant take the vehicle to one of Respondent's authorized dealers for repair for the issue about which he was complaining. Complainant agreed to allow Respondent an opportunity to repair the vehicle. He took the vehicle to McCall for the agreed repair attempt on September 21, 2018. McCall's service technician discovered the same fault code as the technicians on the earlier repairs to the vehicle.¹⁹ McCall's technician cleared the code and verified that the proper brake switch adjustments had been done to the vehicle.²⁰ After clearing the code and checking the brake switch adjustment, the technician test drove the vehicle 187 miles without being able to duplicate the issue.²¹ The vehicle's mileage was 6,087 on this occasion.²² The vehicle was in McCall's possession for four (4) days. Complainant received a rental vehicle while his vehicle was being repaired.

Complainant stated that he feels that there is currently a problem with the vehicle's cruise control. However, he has not taken the vehicle for repair for any issues with the cruise control. Complainant stated that he has changed his driving habits as a result of the problem with the cruise control. Complainant states that he has a lengthy commute to and from work. While driving on the highway on his commute, Complainant would activate the cruise control. The CMBS light would illuminate after the vehicle was driven on cruise control for 10 to 40 minutes. Complainant stated that after the final repair, there was an actual problem with the cruise control. The cruise control is supposed to keep space between himself and other vehicles by slowing down the vehicle or speeding up to the desired speed. On one occasion after September 21 it seemed as the vehicle was not slowing down as it was supposed to. As a result, Complainant turned off the cruise control on that occasion. Complainant states that now he turns the cruise control on and off depending on the traffic. Complainant testified that he has no confidence that the issue with the vehicle has been resolved.

During cross-examination, Complainant stated that he did not take part in the test drives with McCall's service technicians during the September 21 repair. Complainant has not taken the

¹⁷ Complainant Ex. 6, Letter to American Honda Motor Co., Inc. dated August 14, 2018.

¹⁸ Complainant Ex. 5, Lemon Law Complaint received August 14, 2018.

¹⁹ Complainant Ex. 7, Repair Order dated September 21, 2018.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

vehicle back to a dealer for any additional repairs for any other issue since the final repair on September 21. He has not made any attempt to sell the vehicle or to determine its market value.

C. Respondent's Evidence and Arguments

Deborah Yoder, District Parts and Service Manager, testified for Respondent. She has 21 years' experience in the automotive industry. She has previously worked for Volkswagen and Audi. Ms. Yoder has been in her current position for three (3) years. She does not have a technical background.

Ms. Yoder testified that she inspected the vehicle on September 21, 2018, when it was in for repair at McCall's location. Ms. Yoder was present when McCall's technician verified the brake switch adjustment and reset the diagnostic code that appeared on the vehicle's computer. Ms. Yoder stated that the code may not have been cleared on the previous repair visit of July 11, 2018. Ms. Yoder test drove the vehicle for 47 miles under various conditions and speeds. She did not see the warning message appear during her test drive of the vehicle. In addition, Ms. Yoder tested the vehicle's cruise control and did not have any problem with it nor did the warning message appear. She stated that the vehicle was test driven over 180 miles by herself and some of McCall's service technicians during the repair visit.

Ms. Yoder stated that the vehicle has adaptive cruise control which will allow a driver to turn on the cruise control and set a speed and the cruise control will adjust the vehicle's speed to allow it to flow in traffic. The CMBS warning message is supposed to alert the vehicle's driver if something abnormal is occurring with the function. When the warning message displays the brake light will flash and the cruise control will shut down.

Ms. Yoder stated that she believes that the vehicle has been repaired. She also stated that the CMBS doesn't affect a driver's overall ability to drive or control the vehicle.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is

still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on April 28, 2018, and presented the vehicle to an authorized dealer of Respondent for repair on the following dates due to the CMBS warning message displaying: June 7, 2018; July 11, 2018; and September 21, 2018 (the final repair attempt requested by Respondent). The vehicle was repaired in September of 2018 and Complainant indicated that the warning message has not appeared since the repair performed on September 21, 2018. Complainant indicated that he has changed his driving style because he felt that the cruise control had failed to perform properly after the September 21 repair. However, he still uses the cruise control periodically and the CMBS warning message has not appeared since the last repair. Complainant did not take the vehicle for repair for the cruise control issue which is a separate issue from the issue he described on his Lemon Law complaint.

Occupations Code § 2301.603 provides that “a manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer’s converter’s or distributor’s express warranty.” Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer’s warranty. If a vehicle has been repaired then no relief can be possible. A loss of confidence in the vehicle when a defect has been cured does not warrant relief under the Lemon Law. The Lemon Law requires that in order for a vehicle to be determined to be a “lemon” the “nonconformity continues to exist” after the manufacturer has made repeated repair attempts.²³ In the present case, the evidence indicates that the issue with the CMBS warning message displaying has been repaired. Therefore, repurchase or replacement relief for Complainant is not warranted.

Respondent’s express warranty applicable to Complainant’s vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 60,000 miles. On the date of hearing, the vehicle’s mileage was 10,518 and it remains covered under the warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainant’s request for repurchase or replacement relief is denied.

²³ Tex. Occ. Code § 2301.605.

III. FINDINGS OF FACT

1. Michael J. Carter (Complainant) purchased a new 2018 Honda Accord on April 28, 2018, from Honda of Spring in Houston, Texas, with mileage of 7 at the time of delivery.
2. The manufacturer of the vehicle, American Honda Motor Company, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first, and a separate powertrain warranty for the vehicle which provides coverage for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 10,518.
4. At the time of hearing the vehicle's warranties were still in effect.
5. In May of 2018, Complainant observed that the vehicle's collision mitigation braking system's (CMBS) warning message would display on the vehicle's dashboard display when he used the vehicle's cruise control.
6. The warning message instructed Complainant to take the vehicle to a dealer to resolve the issue with the CMBS.
7. Complainant took the vehicle for repair to Respondent's authorized dealers as instructed by the warning message on the following dates:
 - a. June 7, 2018, at 1,910 miles; and
 - b. July 11, 2018, at 3,501 miles.
8. On June 7, 2018, the dealer's service technician discovered a diagnostic code on the vehicle's computer, which he cleared, and adjusted the vehicle's brake switch in order to resolve the issue.
9. On July 11, 2018, the dealer's service technician discovered a diagnostic code on the vehicle's computer and replaced and adjusted the vehicle's brake switch in order to resolve the issue, as he determined that the brake switch was faulty.
10. On August 14, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

11. On August 14, 2018, Complainant mailed a letter to Respondent advising them that he was dissatisfied with the vehicle.
12. Respondent performed a final inspection and repair attempt on the vehicle on September 21, 2018, at Sterling McCall Honda of Kingwood (McCall) located in Kingwood, Texas.
13. On September 21, 2018, McCall's service technician discovered a diagnostic code on the vehicle's computer, which he cleared, and he verified that the brake switch adjustment was correct.
14. The CMBS warning message has not displayed on the vehicle's dashboard since before the repair on September 21, 2018.
15. On October 1, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
16. The hearing in this case convened and the record was closed on January 9, 2019, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Michael J. Carter, represented himself at the hearing. Respondent was represented by Abigail Mathews, attorney with FrancisMathews PLLC. Deborah Yoder, District Parts and Service Manager, testified for Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED January 16, 2019.



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES