

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0006024 CAF**

**ROBERT EVANS,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

and

**ACAR LEASING, LTD., D/B/A GM
FINANCIAL LEASING,
Intervenor**

§
§
§
§
§
§
§
§
§
§
§
§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Robert Evans (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2017 Cadillac Escalade. Complainant asserts that the vehicle has a defect or nonconformity which causes the vehicle's transmission to jolt unexpectedly (harsh shift) when shifting between first and second gear. General Motors LLC (Respondent) argued that the vehicle is operating as designed, does not have a defect, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for 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 October 22, 2019, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Robert Evans (Complainant) represented himself at the hearing. General Motors LLC (Respondent) was represented by Clifton Green, Business Resource Manager. Bobby Shreeve, Field Service Engineer, was present and testified for Respondent. Acar Financial Leasing, Ltd., d/b/a GM Financial Leasing (Intervenor) did not participate in the hearing.

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 repair or correct the defect or condition.³ Fourth, the owner must have provided 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 these 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: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁶

B. Complainant's Evidence and Arguments

Complainant leased a new 2017 Cadillac Escalade (the vehicle) on August 29, 2017, from Ken Batchelor Cadillac (Batchelor) in San Antonio, Texas.⁷ The lease was assigned to Acar Financial Leasing, Ltd., d/b/a GM Financial Leasing at the time of the lease signing.⁸ The vehicle's

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

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)(2) and (a)(3) provide alternative methods 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)(2) applies only to a nonconformity that creates a serious safety hazard, and § 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 Complainant Ex. 1, Retail Lease Agreement dated August 29, 2017.

⁸ Complainant Ex. 2, Closed End Motor Vehicle Lease dated August 29, 2017.

mileage at the time of delivery was 18.⁹ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for four (4) years or 50,000 miles, whichever comes first.¹⁰ Respondent also provided a powertrain warranty providing coverage for the vehicle's powertrain for six (6) years or 70,000 miles.¹¹ On the date of hearing the vehicle's mileage was 32,422. At the time of hearing the vehicle's warranties were still in effect.

Complainant stated that he test drove the vehicle prior to purchasing it. He did not notice anything unusual about the way the vehicle drove during the test drive. However, about three (3) weeks after purchase, Complainant noticed that the vehicle seemed to intermittently have a harsh jolt or jerk when driving it. Complainant testified that he contacted a dealer representative about the issue on September 22, 2017, and was told that he would be put on a waiting list for a repair for the issue.¹² Complainant stated that he was never contacted by dealer personnel about the transmission issue, so he contacted them again in November of 2017. At this time, Complainant was informed by the dealer representative that he was not aware that Complainant was on the "transmission list" and that he would look into the matter.¹³ Complainant did not follow up with the dealer and was not contacted by a dealer representative regarding the issue.

Complainant took the vehicle to Batchelor for repair for the harsh shift issue on March 15, 2018. Batchelor's service technician verified the issue and performed a transmission clutch learn to the transmission and learned the C3 and C4 clutches in order to resolve the issue.¹⁴ The vehicle's mileage on this occasion was 8,409 miles.¹⁵ The vehicle was in Batchelor's possession until March 22, 2018.¹⁶ Complainant received a loaner vehicle during this repair visit.

Complainant stated that after getting the vehicle back, he still noticed that the harsh jolting from the vehicle's transmission. He experienced the problem about every other day. Sometimes it would feel as if the vehicle had been rear ended by another vehicle. Complainant took the vehicle to Batchelor for repair for the issue on March 26, 2018. Batchelor's service technician informed Complainant that they were going to have to special order a valve body assembly for the transmission in order to address the issue.¹⁷ The vehicle's mileage at the time of the repair visit was 8,566.¹⁸ The vehicle was in Batchelor's possession until March 28, 2018. Complainant was provided a loaner vehicle while his vehicle was in Batchelor's possession.

⁹ Complainant Ex. 4, Odometer Disclosure Statement dated August 29, 2017.

¹⁰ Respondent Ex. 1, New Vehicle Limited Warranty, Document ID: 4258227, undated.

¹¹ *Id.*

¹² Complainant Ex. 5, Copies of Text Messages between Complainant and Dealer Personnel.

¹³ *Id.*

¹⁴ Complainant Ex. 6, Repair Order dated March 15, 2018, p. 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 7, Repair Order dated March 26, 2018.

¹⁸ *Id.*

Complainant testified that he continued to drive the vehicle and experienced the same problem. Complainant took the vehicle back to Batchelor for repair for a brake issue on April 16, 2018. Complainant stated that at the same time, he asked about if the special ordered part had arrived and was informed that it was on back order.¹⁹ The vehicle's mileage on this occasion was 9,489.²⁰ The vehicle was in Batchelor's possession for eleven (11) days for repair for the brake issue. Complainant received a loaner vehicle at the time of the repair visit.

Complainant continued to experience the problem with the vehicle jolting when the transmission shifted between first and second gears. Complainant took the vehicle back to Batchelor for repair for the issue on May 7, 2019. On this occasion, Batchelor's service technician replaced the vehicle's transmission valve body, as the special ordered part had finally arrived at the dealership.²¹ The technician also performed a transmission service fast learn to the vehicle's transmission.²² The vehicle's mileage on this occasion was 10,172.²³ The vehicle was in Batchelor's possession for three (3) days. Complainant received a loaner vehicle while his vehicle was being repaired.

Complainant stated that the vehicle seemed to operate fine for a few days, but then the jolting issue began to occur again. He took the vehicle back to Batchelor on June 12, 2018, for repair for the harsh shift issue. Batchelor's service technician performed a transmission fast learn on the vehicle's transmission and relearned the C3 and C1 clutches on the transmission in order to resolve the issue.²⁴ The vehicle's mileage was 11,760 at the time of the repair visit.²⁵ The vehicle was in the dealer's possession until June 21, 2018. Complainant was provided a loaner vehicle while his vehicle was being repaired.

Complainant stated that the vehicle was fine for a few weeks and then the harsh shift began to occur again. Complainant did not do anything about the issue for a while. On December 4, 2018, Complainant wrote a letter to Respondent advising them of his dissatisfaction with the vehicle.²⁶ Complainant also filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 15, 2019.²⁷

¹⁹ Complainant Ex. 8, Repair Order dated April 16, 2018.

²⁰ *Id.*

²¹ Complainant Ex. 9, Repair Order dated May 7, 2019.

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 10, Repair Order dated June 12, 2018.

²⁵ *Id.*

²⁶ Complainant Ex. 12, Letter to General Motors dated December 4, 2018.

²⁷ Complainant Ex. 11, Lemon Law Complaint dated February 15, 2019.

Complainant testified that he took the vehicle to Batchelor for repair for the harsh shift issue on March 18, 2019, in response to an inspection request from Respondent. The vehicle's mileage at the time was 23,600.²⁸ The vehicle was in Batchelor's possession until March 21, 2019. Complainant was provided with a loaner vehicle while his vehicle was being inspected.

Complainant testified that he is still experiencing the harsh shift issue on a daily basis. He said that the problem occurs primarily during rush hour, in stop and go traffic. He thought initially that he was just going to deal with the issue and tried to ignore it, but his mounting frustration made him change his mind. Complainant also stated that he is frustrated with the amount of time that the vehicle has spent being repaired. He doesn't feel that he's received the expected value that he's paid for the vehicle.

Complainant testified that he did not experience the harsh shift issue during the test drive taken at the time of hearing. He said that the problem occurs more when he's been driving in stop and go traffic for an extended period of time.

During cross-examination, Complainant stated he's never been stranded by the vehicle refusing to start or dying and he's never had to have the vehicle towed. Complainant has not had any out of pocket expenses for any repairs done to the vehicle.

C. Respondent's Evidence and Arguments

1. Clifton Green's Testimony

Clifton Green, Business Resource Manager, testified for Respondent. He stated that Respondent's warranty for the vehicle provides bumper-to bumper coverage for the vehicle for four (4) years or 50,000 miles. In addition, the powertrain warranty provides coverage for the vehicle's powertrain for six (6) years or 70,000 miles.

Mr. Green stated that Respondent asked Complainant for an opportunity to inspect the vehicle after receiving notice of the Lemon Law complaint. The inspection of the vehicle was performed on March 20, 2019, at Ken Batchelor Cadillac in San Antonio. Mr. Shreeve, Field Service Engineer (FSE), performed the inspection.

After the test drive taken at the time of hearing, Mr. Green stated that he did not feel that the vehicle's transmission performed in an unusual manner. He also stated that Respondent's

²⁸ Complainant Ex. 13, Repair Order dated March 18, 2019.

warranty does not provide coverage for an issue that is a normal operating characteristic of a vehicle.

2. Bobby Shreeve's Testimony

Bobby Shreeve, Field Service Engineer, testified for Respondent. Mr. Shreeve has been in the automotive industry for 22 years. He has worked with Respondent in his current position for three (3) years. He is an Automotive Service Excellence (ASE) Certified Master Technician. In addition, Mr. Shreeve is a General Motors World Class Certified Technician.

Mr. Shreeve testified that he performed an inspection on the vehicle on March 20, 2019, at Batchelor's dealership location. The vehicle's mileage at the time of the inspection was 23,600.²⁹ Mr. Shreeve stated that he was not able to duplicate the concern raised by Complainant of a harsh shift of the vehicle's transmission at low speed. However, he feels that the harsh shift in low speed traffic is characteristic of the eight (8) speed transmission used in the vehicle. Mr. Shreeve stated that not everyone who purchases this type of vehicle with this type of transmission will have the same experience, since it can be affected by driving style. Mr. Shreeve stated that he does not feel that there is a defect with the vehicle's transmission.

After taking a test drive in the vehicle at the time of hearing, Mr. Shreeve stated that he did not feel that the vehicle or its transmission behaved abnormally. He felt that the vehicle operated as designed.

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.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. The

²⁹ Respondent Ex. 2, Evans Vehicle Legal Inspection dated March 20, 2019.

evidence presented at the hearing indicates that the harsh shift of the vehicle's transmission at low speeds is a normal characteristic of the vehicle. Respondent's warranty only covers manufacturing defects, not normal operating characteristics of the vehicle. The Lemon Law does not apply to design characteristics or design defects. As such, the hearing examiner must find that there is no evidence of a manufacturing defect with the vehicle itself. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 32,422 and it remains covered under Respondent's 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.

III. FINDINGS OF FACT

1. Robert Evans (Complainant) leased a new 2017 Cadillac Escalade on August 29, 2017, from Ken Batchelor Cadillac (Batchelor) in San Antonio, Texas with mileage of 18 at the time of delivery.
2. Batchelor assigned the lease to Acar Financial Leasing, Ltd., d/b/a GM Financial Leasing through the lease agreement signed by the parties on August 29, 2017.
3. The manufacturer or distributor of the vehicle, General Motors LLC (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for four (4) years or 50,000 miles, whichever occurs first. In addition, Respondent provided a powertrain warranty which provides coverage for the vehicle's powertrain for six (6) years or 70,000 miles.
4. The vehicle's mileage on the date of hearing was 32,422.
5. At the time of hearing the vehicle's warranties were still in effect.
6. Complainant feels that the vehicle's transmission is defective because it intermittently jolts when shifting between first and second gear (harsh shift) when he's driving the vehicle.
7. Complainant took the vehicle to Respondent's authorized dealer, Batchelor, for repair on the following dates in order to address his concern regarding the transmission's harsh shifting:

- a. March 15 2018, at 8,409 miles;
 - b. March 26, 2018, at 8,566 miles;
 - c. April 16, 2018, at 9,489 miles;
 - d. May 7, 2018, at 10,172 miles; and
 - e. June 12, 2018, at 11,760 miles.
8. On March 15, 2018, Batchelor's service technician verified the concern and conducted a transmission drive clutch learn procedure to the vehicle's transmission in an attempt to alleviate the concern.
 9. On March 26, 2018, Batchelor's service technician verified the concern and special ordered a valve body assembly in order to address the concern.
 10. On April 16, 2018, Complainant took the vehicle to Batchelor for repair for other issues with the vehicle and was informed by the dealer's service advisor that the valve body assembly was still on back order and that there was no indication as to when the dealer would receive it.
 11. On May 7, 2018, Batchelor's service technician replaced the vehicle's transmission valve body and performed a transmission service fast learn in order to resolve the issue with the harsh jolting from the vehicle's transmission.
 12. On June 12, 2018, Batchelor's service technician performed a transmission service fast learn and relearned the transmission's C3 and C1 clutches in order to resolve Complainant's concerns with the vehicle.
 13. On December 14, 2018, Complainant mailed a letter to Respondent advising them of his dissatisfaction with the vehicle.
 14. On February 15, 2019, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 15. On March 20, 2019, Bobby Shreeve, Respondent's Field Service Engineer (FSE), inspected the vehicle at the Batchelor dealership location. The vehicle's mileage was 23,600 at the time of inspection.
 16. During the inspection described in Findings of Fact #15, Mr. Shreeve determined that the transmission's harsh shift at low speeds is a characteristic of the vehicle's eight (8) speed transmission.

17. On July 17, 2019, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
18. The hearing in this case convened and the record was closed on October 22, 2019, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Robert Evans (Complainant) represented himself at the hearing. General Motors LLC (Respondent) was represented by Clifton Green, Business Resource Manager. Bobby Shreeve, Field Service Engineer, was present and testified for Respondent. Acar Financial Leasing, Ltd., d/b/a GM Financial Leasing (Intervenor) did not participate in the hearing.

IV. CONCLUSIONS OF LAW

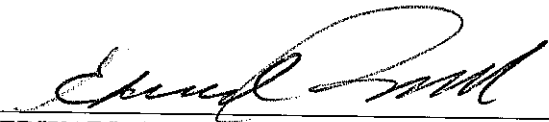
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED December 23, 2019.



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