

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0000646 CAF**

**JONATHAN HESS,  
Complainant**

v.

**VOLKSWAGEN GROUP OF AMERICA,  
INC.,  
Respondent**

and

**VW CREDIT LEASING,  
Intervenor**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Jonathan Hess (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Volkswagen Group of America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that qualifies 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 December 4, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on December 20, 2019. The Complainant, represented himself. Kim Landry, case specialist, represented the Respondent and VW Credit Leasing (Intervenor).

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

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, 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 or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;<sup>13</sup> (2) the respondent 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

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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). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

<sup>14</sup> A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); *Texas Department of Transportation, Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

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>

## 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 before the warranty's expiration.<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 of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.<sup>19</sup> Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

## 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 must 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 forming the basis of the claim

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

<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.").

for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to hearing 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>

## 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> However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”<sup>26</sup>

## B. Summary of Complainant’s Evidence and Arguments

On May 19, 2018, the Complainant, leased a new 2018 Volkswagen Jetta from Momentum VW, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 895 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides coverage for six years or 72,000 miles, whichever occurs first. On May 30, 2018, the Complainant provided a written notice of defect to the Respondent. On September 17, 2018, the Complainant filed a complaint with the Department alleging that the vehicle produced a sulfur-like or emissions related smell.

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<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<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).

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

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

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

The Complainant testified that he first noticed the smell about a week after getting car. He noticed that the smell would occur during highway driving over 50 mph and when going up hills in 2nd or 3rd gear. He last noticed the smell occurring the morning of the hearing. Initially, the dealer notified the Complainant that the odor was from Cosmoline applied to the vehicle, but the Respondent later claimed that the chemical was not Cosmoline. The Complainant did not notice the same smell when driving his mother's 2019 Jetta.

Mr. Eric Benoliel testified that during a trip from Houston to Killeen and back, he noticed the smell, which intensified while gaining speed on the highway. In response, he rolled down the windows to get air in car.

### **C. Inspection**

Upon inspection at the hearing, before the test drive, the subject vehicle had 21,175 miles on the odometer. When asked if the Complainant used the recirculate or fresh air mode, the Complainant responded that he typically used fresh air. During the test drive, the strength of the odor appeared to correspond to the engine speed (rpms). The Complainant noticed the complained of smell when accelerating after leaving the parking lot. The test drive ended at 21,187 miles, for a total of 12 miles driven.

### **D. Summary of Respondent's Evidence and Arguments**

Ms. Landry testified that the Respondent received a complaint in which the Complainant spoke about emissions odor. However, the vehicle did not use Cosmoline. Floodwax was used instead. The Respondent found that the subject vehicle operated as designed. In particular, the exhaust was not broken, the vehicle did not fail any tests, and the vehicle did not lose fuel efficiency or performance. An odor was only detected during aggressive driving on a test drive with the Complainant. The Respondent ultimately determined that the vehicle operated as designed and did not have a manufacturing defect.

On cross-examination, Ms. Landry affirmed that a technician found an odor but the Complainant declined further diagnosis. Based on conversations with the dealer, the Respondent determined that the issue was due to the Complainant's aggressive driving. Ms. Landry added that she confirmed that the chemical applied to the vehicle was not Cosmoline. The Respondent's records did not show that technicians tested for carbon monoxide or any other dangerous chemical.

Ms. Landry explained that the Respondent would ordinarily not do such testing unless requested. She asked the Complainant whether he made such a request and he stated that he did not.

### E. Analysis

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect).<sup>27</sup> The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific 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: "Except as specified in the section entitled 'Limited Coverage', this warranty covers any repair to correct a defect in manufacturer's material or workmanship (i.e., mechanical defects), except wheel alignment, tire balance, and the repair or replacement of tires." According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>28</sup> A manufacturing defect is generally 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 at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects. Design characteristics result from the vehicle's specified design, which exists before the vehicle is manufactured, and not from any error during manufacturing.<sup>29</sup> Because the warranty only covers manufacturing defects, any flaws in the design,

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<sup>27</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>28</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>29</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).



or other non-manufacturing problems, do not qualify for relief. In the present case, a preponderance of the evidence does not show that the smell issue is a warrantable manufacturing defect as opposed to a design issue.

The repair invoice for the March 13, 2019, service visit to Cherry Hill Volkswagen, confirmed that the technician duplicated the smell but did not verify the origin. Further diagnosis, including possible comparison with a similar vehicle, was needed to verify the condition but the Complainant elected not to leave the vehicle for further diagnosis. The record also shows that the Complainant did not experience the smell when driving his mother's 2019 Jetta. However, the Respondent's media information (Complainant's Ex. 13) states that the 2019 Jetta is "all-new" and "[n]ow based off the MQB platform. Because of design changes between the 2018 Jetta and 2019 Jetta, the difference in performance between the subject vehicle and the 2019 model appears as likely to result from design differences as any manufacturing defect in the subject vehicle. In sum, the evidence does not show that the complained of issue is more likely than not a warrantable manufacturing defect as opposed to a design issue.

### III. Findings of Fact

1. On May 19, 2018, the Complainant, leased a new 2018 Volkswagen Jetta from Momentum VW, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 895 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides coverage for six years or 72,000 miles, whichever occurs first.
3. On May 30, 2018, the Complainant provided a written notice of defect to the Respondent.
4. On September 17, 2018, the Complainant filed a complaint with the Department alleging that the vehicle produced a sulfur-like or emissions related smell.
5. On October 18, 2019, 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 December 4, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on December 20, 2019. The Complainant, represented himself. Kim Landry, case specialist, represented the Respondent and the Intervenor.
7. The vehicle's odometer displayed 21,175 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, before the test drive, the subject vehicle had 21,175 miles on the odometer. When asked if the Complainant used the recirculate or fresh air mode, the Complainant responded that he typically used fresh air. During the test drive, the strength of the odor appeared to correspond to the engine speed (rpms). The Complainant noticed the complained of smell when accelerating after leaving the parking lot. The test drive ended at 21,187 miles, for a total of 12 miles driven.
10. At the March 13, 2019, service visit to Cherry Hill Volkswagen, a technician confirmed the existence of the smell issue but required further diagnosis to verify the origin. However, the Complainant declined such further diagnosis.
11. A 2019 Volkswagen Jetta did not exhibit the same smell issue as the 2018 subject vehicle.
12. The 2019 Jetta was redesigned and "all-new" as compared to the 2018 model.

#### **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 Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
8. 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 February 18, 2020**



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