

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0010590 CAF**

JERRY JUDKINS,	§	
Complainant	§	
	§	
v.	§	BEFORE THE OFFICE
	§	
JAGUAR LAND ROVER NORTH	§	
AMERICA, LLC,	§	OF
Respondent	§	
	§	
and	§	ADMINISTRATIVE HEARINGS
	§	
JP MORGAN CHASE BANK. NA,	§	
Intervenor	§	

DECISION AND ORDER

Jerry Judkins (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 Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant’s vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 8, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed after the inspection and test drive. The hearing reconvened on June 23, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on July 9, 2021. John Mongogna, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² 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.”³ 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.⁴ 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.⁵

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

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁶

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.”⁷

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.⁸

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

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

⁷ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

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:

[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.¹⁰

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.¹¹

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.¹² 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.¹³

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;¹⁴ (2) the respondent was given an opportunity to cure the defect or

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

¹⁴ 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

nonconformity;¹⁵ 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.¹⁶

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.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁹ 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.²⁰ Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent authorizes 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ 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 for relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

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.²⁶ 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

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

or similar written documents).²⁷ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁸

B. Summary of Complainant’s Evidence and Arguments

On September 14, 2019, the Complainant, leased a new 2019 Jaguar I-Pace from Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 115 miles on the odometer at the time of delivery. Land Rover Dallas assigned the lease to JP Morgan Chase Bank, NA (Intervenor). The vehicle’s limited warranty provides bumper to bumper coverage for five years or 60,000 miles, whichever occurs first.

On or about February 4, 2020, the Complainant’s attorney provided a written notice of defect to the Respondent. On April 23, 2020, the Complainant filed a complaint with the Department alleging that: the Lane Keep Assist (LKA) system did not function properly; the LKA did not detect un-signalized lane changes a majority of the time; the LKA engaged without warning and provided unwanted steering input when not nearing lane markings; the system could not be turned off, unlike previously told; the regenerative braking system did not provide consistent braking input; and the paint and window trim were damaged prior to delivery. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
10/3/2019	110	Buff and fix paint on parts of the car.
10/31/2019	2,474	Car will pull by itself. Cannot turn lane assist off. Brakes turn off by themselves.
11/11/2019	2,585	Lane assist pulls car into oncoming traffic. Fix paint that was not fixed previously. Right rear tire light is on.
11/18/2019	2,992	Regenerated braking not working at times. Lane assist randomly turning steering. Paint needed a touch up. Hood not centered.
12/30/2019	3,250	Lane assist pulls car into oncoming traffic. System turns back on after being turned off.
01/03/2020	4,139	Lane assist randomly activated. Pulled car into oncoming traffic.
03/31/2020	4,506	Battery is dead and will not charge.

The Complainant stated that he immediately noticed several issues with the car the first day he had it. He explained that he noticed lots of unwanted input from the vehicle so he took the

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

²⁸ 43 TEX. ADMIN. CODE § 215.208(b)(1).

car into the dealer two days after delivery of the car and asked how to adjust the features. He recalled that the salesperson showed him how to adjust the features and stated that they would stay off. He further stated that he immediately noticed paint issues on the car, and the dealership kept the car for two to three weeks just to fix the paint issues.

The Complainant explained that he would see an indicator light on the dashboard and he would receive steering input while driving straight. He clarified that this occurred without coming to the edge of the road and with LKA supposed to be turned off. He claimed that the system did not work consistently because it would sometimes activate when driving straight and sometimes would not activate when drifting to the edge of the road. He confirmed that the system would turn back on when the engine was cycled although he was told at the dealership that this would not happen. He testified that the system has moved him out of his lane and into oncoming traffic.

The Complainant recounted that he brought the car in for service a second time in October 2019, complaining that the car would pull in and out of lanes even though LKA was off. He was not able to identify any certain condition that caused the issue to occur. He did mention instances when the steering system activated while driving straight within his lane. He stated that when he would bring the car in for repairs the dealer would state there was an update needed. He confirmed that the dealer stated each time that the update had been completed.

The Complainant stated that the next time the car was brought to the dealership, they kept it for over a month for issues with the paint and the regenerative braking. He recounted a time when the regenerative braking did not function with as much force as it normally did and he had to apply manual brakes to avoid hitting a gate.

The Complainant next testified that he returned the car to the dealership because of continued issues with the Emergency Lane Keeping (ELK) system. He described that the system did not give any unwanted inputs while on a highway but when he started driving on a two-lane road, the system activated and attempted to pull the car into oncoming traffic. He stated that the dealership called the Respondent and explained the issues and the Respondent said the car was functioning as intended. He claimed the dealership did not test drive the vehicle at all during this time. He expressed that after that trip to the dealership he had not driven the car except for the previous test drive with the Hearings Examiner because he believed the vehicle was unsafe to drive.

The Complainant showed a video that he had recorded replicating the issue. The video showed the car driving straight down the road when the ELK activated and pulled the car into oncoming traffic without driver input.

The Complainant confirmed that the issues are still present in the car and the Respondent has not corrected them. In the three to four months prior to the hearing, the car has been at the dealership and was towed to the hearing site on the day of the test drive.

The Complainant clarified that the paint issues had not been fixed. He testified that the dealership had tried to repair the issue but they had only made the paint issue worse. On cross-examination, he confirmed that the last time the vehicle was brought in to the dealer for paint issues was in December of 2019.

When questioned on why his complaint did not mention the ELK system, the Complainant answered that he was not aware of the ELK system at the time he filed the complaint. He elaborated that he first discovered the ELK system when he started researching the issues he was having.

The Complainant confirmed that he charged the car nightly and it had 100% charge in the mornings. He also confirmed that the tire with the nail in it had been replaced. When asked about his driving habits, the Complainant reported that he did not use adaptive cruise control or blind spot monitoring. He acknowledged that he is a fast (“spirited”) driver.

On redirect examination, the Complainant stated that the Respondent never corrected him or clarified the difference between ELK and LKA when he brought the car in to the dealer. He asserted that there were several software updates and faults that were found during repairs that were never mentioned to him by the dealership.

The complainant testified that the last time he noticed any issues with the regenerative braking was right before the last time he took the car into the shop for that issue because he stopped using the regenerative braking after that. He stated that the last time he noticed a problem with the ELK system was during the original test drive. He expressed a preference for a repurchase of the vehicle.

C. Inspection

At the time of the initial inspection of the subject vehicle on December 8, 2020, the odometer read 5,179 miles before the test drive. Mr. Judkins pointed out where the body panels

showed scratches in the paint where what appeared to be concrete dust had been buffed out. During the test drive, the regenerative braking did not slow the vehicle as much as expected, even on the highest setting. Mr. Judkins purposely allowed the car to drift over the center line, outer lane line, and the lane dividing lanes and the ELK did not activate. The car did not correct when Mr. Judkins allowed the car to drift without his hands on the steering wheel. However, the car did correct the steering seemingly at random while driving straight. When Mr. Judkins turned the LKA on, the car was still able to drift over the median without correcting. The first test drive ended with 5,259 miles on the odometer.

A second inspection occurred on June 23, 2021, with the odometer displaying 5,278 miles before the test drive. Mr. Judkins again pointed out panels showing scratches apparently due to concrete dust from a construction site by the dealership. During the test drive, Brandon Sangster, Customer Satisfaction Senior Technical Specialist for the Respondent, noted that with the vehicle fully charged, the regenerative braking provides less braking force because the power (generated by the brakes) has nowhere to go. He elaborated that LKA can be turned off but ELK resets (switches on) every time the vehicle turns on. He added that LKA would not work when not tracking the lane boundaries (the instrument panel displayed green lines representing the lane boundaries when tracking and gray lines when not tracking). The hearing examiner asked if ELK steered the vehicle away from the road edge, whether ELK would also react to the center line. Mr. Sangster answered that it would not. He explained that LKA keeps the vehicle between both sides of a lane while ELK keeps the vehicle from leaving the road. The regenerative braking appeared to function as intended. The LKA also seemed to work as designed. The ELK system activated and provided steering feedback without crossing the white line. The test drive ended with 5,368 miles on the odometer. Both test drives occurred primarily on major arterial roads and to a lesser extent on freeways and frontage roads. In particular, the vehicle was driven on SH 289 on both test drives. The Complainant had noted that ELK activated consistently on a stretch of SH 289 in the Prosper, Texas area.

D. Summary of Respondent's Evidence and Arguments

Mr. Sangster testified that he was familiar with the car in question because he drove the same model daily. Mr. Sangster confirmed that he visited the dealership where the car was taken for repairs and reviewed the records of the repairs. He clarified that the fault codes found did not

relate to the LKA feature or the ELK system. He explained that fault codes were common and stored information anytime something exceeded parameters. He affirmed that none of the codes on the vehicle related to the LKA or the ELK. He further established that updates and recalls did not necessarily indicate a safety issue. He expressed that after the test drive, he did not believe there was anything wrong with the regenerative braking. He also reported that he did not believe the damage to the paint would substantially impair the use or value of the car. Regarding the Complainant's video, Mr. Sangster observed that the ELK operated as intended. He stated that if the Complainant had maintained his hands on the wheel the car would not have drifted over the yellow line. He pointed out where the owner's manual warned about driving in a safe manner and he agreed that driving without hands on the wheel was unsafe. Mr. Sangster commented that he did not find any warrantable defect in any of the car's systems, including the regenerative braking. He did not notice anything wrong with the car.

On cross-examination, Mr. Sangster clarified the difference between the LKA (for staying within a lane) and the ELK system (for staying on the roadway). He affirmed that during the test drive, the ELK feature engaged when the vehicle had not crossed the lane boundary (although he was right upon it) and was not near the road edge. He conveyed that LKA system uses the painted road markings to determine its boundaries and the ELK system uses the painted road markings and the edges of the concrete or grass to determine its boundary. He expressed that he did not know the exact inputs that the system uses to determine when to activate.

Mr. Sangster believed that the dealership would be aware of which system the Complainant was having issues with (LKA versus ELK) based on the Complainant's description when he brought the car in for repairs. Mr. Sangster noted in the invoices where the dealership updated the LKA module. Mr. Sangster noted that he had never seen the car until the day before the hearing. He also explained that the Respondent did not allow travel during the pandemic until May of 2021.

On redirect examination, Mr. Sangster agreed that there were probably thousands of different types of road edges. He affirmed that the ELK system was working as designed during the test drive.

E. Analysis

In this case, a preponderance of the evidence does not show that the subject vehicle has a defect covered under warranty (warrantable defect). Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that:

JLRNA warrants that during the warranty period, if a 2019 Model Year Jaguar vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service at an authorized Jaguar retailer; any component covered by this warranty found to be defective in materials or workmanship will be repaired, or replaced, without charge, with a new or remanufactured part distributed by JLRNA, at its sole option.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.³² A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards,

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³⁰ Respondent's Ex. 2, Passport to Service.

³¹ 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.").

³² *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd* in part on other grounds, *rev'd* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

causing that vehicle to differ from other vehicles of the same kind.³³ In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.³⁴ Stated another way, 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. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁵ Design characteristics, including design defects, exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.³⁶ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁷ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing), are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

³³ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) (“A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.”).

³⁴ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

³⁵ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd in part on other grounds*, *rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986) (“Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.”).

³⁶ 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).

³⁷ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

As described below, the evidence does not show that the complained of issues are more likely than not warranted manufacturing defects.

1. **Emergency Lane Keeping (ELK)/Lane Keeping Assist (LKA)**

In this case, the complained of ELK/LKA performance appears as likely to be an unwarranted design issue as a warranted manufacturing issue. Although the complaint describes the primary issue as a problem with LKA, the record indicates that the complaint concerns ELK, a driving aid similar to but not the same as LKA. Though the dealership's explanations about LKA and ELK appear to have initially caused some confusion, the Complainant subsequently learned about ELK's operation. The Complainant recognized that the corrective steering occurring with LKA turned off resulted from ELK, since he normally drove with LKA off. While LKA can be switched off ("Press the button to switch the system on and off."),³⁸ ELK "automatically switches on every time the vehicle is switched on."³⁹ ELK provides corrective steering input "if it determines the vehicle is getting too close to a road edge."⁴⁰ In comparison, LKA either provides steering input or vibrates the steering wheel "if it determines the vehicle is in danger of crossing a road lane boundary."⁴¹

The owner's handbook reflects that LKA and ELK have inherent limitations. The vehicle's owner's handbook warns that:

Despite the vehicle being fitted with driving aids, the driver is still responsible for driving with due care and attention. The driver should also observe all road markings.

....

Driving aids may not function at all speeds, or in all weather conditions.

....

The sensors and camera used by the driving aids may become impaired by mud, rain, frost, ice, snow, road spray, etc. The driving aids ability to detect a risk may subsequently be affected and may give false indications.⁴²

³⁸ Respondent's Ex. 1, I-PACE Owner's Handbook, 173.

³⁹ Respondent's Ex. 1, I-PACE Owner's Handbook, 174.

⁴⁰ Respondent's Ex. 1, I-PACE Owner's Handbook, 174.

⁴¹ Respondent's Ex. 1, I-PACE Owner's Handbook, 173.

⁴² Respondent's Ex. 1, I-PACE Owner's Handbook, 171 (emphasis added).

With regard to ELK specifically:

The emergency lane keeping system is not active when:

- The brake pedal is pressed.
- The vehicle's speed is below 40 mph (64 km/h) or above 75 mph (120 km/h).
- The windscreen area in front of the rear-view mirror becomes blocked by stickers, mud, snow, debris, etc.
- Driving in lanes narrower than 8 ft (2.5 m) or wider than 17 ft (5.2 m).
- A fault occurs in the system.

The emergency lane keeping system does not perform to its best ability in adverse weather conditions. For example, heavy fog, rain, or snow.⁴³

Similarly, with regard to LKA:

The Lane Keep Assist (LKA) system is not active when:

- The brake pedal is pressed.
- A direction indicator is being used.
- The vehicle's speed is below 60 km/h (37 mph) or above 180 km/h (112 mph).
- The windshield area in front of the rear-view mirror becomes blocked by stickers, mud, snow, debris, etc.
- . . .
- Driving in lanes narrower than 8 ft (2.5 m) or wider than 17 ft (5.2 m).
- A fault occurs in the system.

The LKA system:

- May not detect unmarked road edges.
- Does not perform to the best of its ability in adverse weather conditions. For example, heavy fog, rain, or snow.⁴⁴

Moreover, Mr. Sangster's testimony elaborates that LKA uses painted road markings to determine the applicable boundaries and ELK uses painted road markings and the edges of the concrete or grass to determine the applicable boundary. As reflected above, a multitude of factors affect the performance of ELK and LKA, such as anything obscuring the view of the vehicle's camera, the

⁴³ Respondent's Ex. 1, I-PACE Owner's Handbook, 174.

⁴⁴ Respondent's Ex. 1, I-PACE Owner's Handbook, 173.

condition of the lane markings and road edge, vehicle speed, and lane width. As described in the owner's handbook, ELK responds when it determines the vehicle is getting too close to a road edge and LKA responds when it determines the vehicle is in danger of crossing a road lane boundary. However, the owner's handbook does not quantify what constitutes "too close to a road edge" or "danger of crossing a road lane boundary." Moreover, Mr. Sangster did not know the precise inputs that determine when a system activates. Additionally, with respect to ELK, Mr. Sangster explained that when ELK steers the vehicle away from the road edge (without LKA turned on), the vehicle will continue moving towards/over the median unless the driver intervenes since ELK only reacts to the road edge and not lane boundaries. Considering the available evidence, the complained of vehicle performance appears consistent with the design of the vehicle.

In sum, a multitude of factors normally affect the functioning of ELK and LKA as designed, such that these systems may not activate or may not operate optimally under various conditions. And with ELK, its design will cause the vehicle to continue moving away from the edge, towards the opposite side without driver intervention. As outlined in the discussion of warrantable defects, an intended design may produce unintended and unwanted results. Nevertheless, the operation of ELK and LKA, including the undesirable of aspects, constitutes a design issue, which the warranty does not cover, as opposed to a warranted manufacturing defect. In conclusion, the performance of ELK and LKA appears as likely to result from the vehicle's design as from any warrantable defect.

2. Regenerative Braking

The evidence shows that the braking force from regenerative braking will normally decrease with the vehicle fully charged, since the electricity generated when braking would have nowhere to be stored. Significantly, the Complainant fully charged the vehicle every night. In sum, the reduced braking force here appears to result from the normal function of the regenerative braking system and not from any manufacturing defect.

3. Paint and Window Trim

As explained above, the vehicle's warranty only applies to manufacturing defects. However, the scratches on the paint and trim appear attributable to post-manufacturing conditions at the dealership and the dealer's attempted repair and not to problems occurring during the

manufacturing process at the factory. Consequently, the scratched paint and trim cannot support any relief.

III. Findings of Fact

1. On September 14, 2019, the Complainant, leased a new 2019 Jaguar I-Pace from Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 115 miles on the odometer at the time of delivery.
2. Land Rover Dallas assigned the lease to JP Morgan Chase Bank, NA (Intervenor).
3. The vehicle's limited warranty provides bumper to bumper coverage for five years or 60,000 miles, whichever occurs first.
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
10/3/2019	110	Buff and paint parts of the car.
10/31/2019	2,474	Car will pull by itself. Cannot turn lane assist off. Brakes turn off by themselves.
11/11/2019	2,585	Lane assist pulls car into oncoming traffic. Fix paint that was not fixed previously. Right rear tire light is on.
11/18/2019	2,992	Regenerated braking not working at times. Lane assist randomly turning steering. Paint needed a touch up. Hood not centered.
12/30/2019	3,250	Lane assist pushes car into oncoming traffic. System turns back on after being turned off.
01/03/2020	4,139	Lane assist randomly activated. Pulled car into oncoming traffic.
03/31/2020	4,506	Battery is dead and will not charge.

5. On or about February 4, 2020, the Complainant's attorney, provided a written notice of defect to the Respondent.
6. On April 23, 2020, the Complainant filed a complaint with the Department alleging that: the Lane Keep Assist (LKA) system did not function properly; the LKA did not detect un-signaled lane changes a majority of the time; the LKA engaged without warning and provide unwanted steering input when not nearing lane markings; the system could not be turned off, unlike previously told; the regenerative braking system did not provide consistent braking input; and the paint and window trim were damaged prior to delivery.
7. On August 3, 2020, 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.

8. The hearing in this case convened on December 8, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed after the inspection and test drive. The hearing reconvened on June 23, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on July 9, 2021. John Mongogna, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent.
9. The vehicle's odometer displayed 5,179 miles at the time of the first inspection on December 8, 2020. The vehicle's odometer displayed 5,278 miles at the time of the second inspection on June 23, 2021.
10. The vehicle's warranty was in effect at the time of the hearing.
11. At the time of the initial inspection of the subject vehicle on December 8, 2020, Mr. Judkins pointed out where the body panels showed scratches in the paint where what appeared to be concrete dust had been buffed out. During the test drive, the regenerative braking did not slow the vehicle as much as expected, even on the highest setting. Mr. Judkins purposely allowed the car to drift over the center line, outer lane line, and the lane dividing lanes and the ELK did not activate. The car did not correct when Mr. Judkins allowed the car to drift without his hands on the steering wheel. However, the car did correct the steering seemingly at random while driving straight. When Mr. Judkins turned the LKA on, the car was still able to drift over the median without correcting.
12. A second inspection occurred on June 23, 2021. Mr. Judkins again pointed out panels showing scratches apparently due to concrete dust from a construction site by the dealership. During the test drive, Mr. Sangster, Customer Satisfaction Senior Technical Specialist, noted that with the vehicle fully charged, the regenerative braking provides less braking force because the power (generated by the brakes) has nowhere to go. He elaborated that LKA can be turned off but ELK resets (switches on) every time the vehicle turns on. He added that LKA would not work when not tracking the lane boundaries (the instrument panel displayed green lines representing the lane boundaries when tracking and gray lines when not tracking). The hearings examiner asked if ELK steered the vehicle

away from the road edge, whether ELK would also react to the center line. Mr. Sangster answered that it would not. He explained that LKA keeps the vehicle between both sides of a lane while ELK keeps the vehicle from leaving the road. The regenerative braking appeared to function as intended. The LKA also seemed to work as designed.

13. The owner's handbook explains that ELK responds when it determines the vehicle is getting too close to a road edge and LKA responds when it determines the vehicle is in danger of crossing a road lane boundary. However, the owner's handbook does not quantify what constitutes "too close to a road edge" or "danger of crossing a road lane boundary."
14. A variety of factors (such as anything obscuring the view of the vehicle's camera, the condition of the lane markings and road edge, vehicle speed, and lane width) normally affect the functioning of ELK and LKA as designed, such that these systems may not activate or may not operate optimally.
15. ELK, by design, will cause the vehicle to continue moving away from the edge, towards the opposite side, unless the driver intervenes.
16. The braking force from regenerative braking will normally decrease with the vehicle fully charged, since the electricity generated when braking would have nowhere to be stored. The Complainant fully charged the vehicle every night.
17. The scratches on the paint and trim appear attributable to concrete dust from construction near the dealership and the dealer's attempted repair aggravating the scratches.

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 replacement or repurchase. Replacement and repurchase relief only apply to new vehicles. TEX. OCC. CODE § 2301.603.
8. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
9. 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.
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

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

SIGNED September 7, 2021



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