

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0011906 CAF**

DANIEL CLARK, Complainant	§ § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
GENERAL MOTORS LLC, Respondent		

DECISION AND ORDER

Daniel Clark (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 manufactured by General Motors 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 July 29, 2020, by video conference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Clifton Green, business resource manager, represented the Respondent.

¹ 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.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a 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.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

⁶ *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.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 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.

¹⁴ 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

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

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.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ 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.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know 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.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV'T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On September 5, 2019, the Complainant, purchased a new 2019 Chevrolet Silverado from Apple-Sport Chevrolet, a franchised dealer of the Respondent, in Waco, Texas. The vehicle had 29 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.

be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

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

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

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

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

On May 29, 2020, the Complainant provided a written notice of defect to the Respondent. On May 30, 2020, the Complainant filed a complaint with the Department alleging that the infotainment system would black out and reboot, and the rear window leaked causing interior damage. The Complainant stated that the rear window leak had been resolved, leaving only the infotainment issue to be addressed here. In relevant part, the Complainant took the subject vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
October 28, 2019	1,891	Radio resets
December 5, 2019	3,714	Radio display flickering/showing bars
January 6, 2020	6,605	Radio display flickering/restarting
January 20, 2020	6,900	Display flickering
May 28, 2020	9,550	Radio resets

The Complainant testified that the rear window was successfully repaired but the infotainment system continued to have issues restarting. He explained that the infotainment system would randomly restart. He noted that the wi-fi function was grayed out on the display, after the last repair; he estimated this happened about one out of three or four drives after getting the vehicle back on July 15, 2020. When asked about the the infotainment system going blank or rebooting before the last repair, the Complainant approximated this occurred about weekly but sometimes more frequently. He described that the infotainment system may exhibit audio or graphic distortion, become unresponsive for 15 to 30 seconds, power off and stay off for 30 to 45 seconds. The infotainment system will show the Chevrolet logo and start up. The Complainant first noticed the rebooting at approximately 600 miles, about two weeks into ownership, late September 2019. He eventually took the vehicle in for the first repair on November 19, 2019. He affirmed he took possession of the vehicle on September 5, 2019. He elaborated that the infotainment problem disrupted all entertainment, navigation, and hands-free functions—anything supported by the infotainment system. The Complainant noted that the vehicle currently had 9,955 miles. He elaborated that the blacking out/rebooting appeared random.

On cross-examination, the Complainant confirmed that the vehicle did not have any aftermarket items installed. He also affirmed that the infotainment system was the only current concern. He responded that the malfunctions did not prevent driving but impaired the vehicle's value.

C. Summary of Respondent's Evidence and Arguments

Irfaun Bacchus, field service engineer, testified that infotainment system problem was a known issue related to software compatibility. However replacement radio had the latest software. The dealer could not duplicate the rebooting. The vehicle did not have any diagnostic trouble codes (DTCs) and the power and ground to the radio were verified. Mr. Bacchus explained that the radio was replaced because the radio already had the latest software, making errors less likely. The dealer would only need to program the radio, basically entering the VIN so the radio will communicate with the vehicle. He elaborated that the wi-fi issue related directly to the dealer's failure to reset the Manufacturing Enable Counter. Not resetting the counter can also cause other issues, including glitching. He added that the Complainant's phone may contribute to the issues. Apple has had known issues with iOS 13. Mr. Bacchus elaborated that the dealer did not follow the proper procedure the first time, which may contribute to all of the Complainant's concerns.

On cross-examination, Mr. Bacchus confirmed that the grayed out (disabled) wi-fi may be one symptom of not programming the radio properly. Mr. Bacchus acknowledged that the software was up to date but whether the dealer followed procedures could not be confirmed.

D. Analysis

As an initial matter, to qualify for any relief, the vehicle must have a defect covered by warranty. Lemon Law relief does not apply to all problems that may occur with a vehicle but only to defects covered by warranty (warrantable defects)²⁷ that continue to exist, even after repair.²⁸ In part, the warranty generally states that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period. Needed repairs will be performed using new, remanufactured, or refurbished parts."²⁹ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³⁰ A manufacturing defect is

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

²⁸ TEX. OCC. CODE § 2301.605.

²⁹ Respondent's Ex. 5, New Vehicle Limited Warranty.

³⁰ 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

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, such as incorrect assembly or the use of a broken part. Manufacturing defects occur during the manufacturing process, before leaving the plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as improper dealer repairs (which occur after manufacturing) are not warrantable defects.

In this case, the evidence shows that after a dealer replaced the infotainment system, it exhibited a new issue: the wi-fi appeared grayed out. The grayed-out wi-fi indicates that the dealer did not properly program/reset the infotainment system. Significantly, the same failure to program/reset the infotainment can also cause other malfunctions, such as the rebooting identified by the Complainant. Additionally, the iPhone's operating system has been linked to malfunctions with the infotainment system. Given the totality of the evidence, a preponderance of the evidence does not show that the currently existing infotainment issues arise from a warrantable defect. In particular, a preponderance of the evidence shows that the dealer's failure to properly reset the Manufacturing Enable Counter, not a manufacturing defect, disabled the wi-fi. Moreover, the same improper dealer repair (as well as the Complainant's phone's operating system), appears as likely to have caused the infotainment problems as any manufacturing defect. Consequently, the vehicle does not qualify for any relief.

III. Findings of Fact

1. On September 5, 2019, the Complainant, purchased a new 2019 Chevrolet Silverado from Apple-Sport Chevrolet, a franchised dealer of the Respondent, in Waco, Texas. The vehicle had 29 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.

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.").

3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
October 28, 2019	1,891	Radio resets
December 5, 2019	3,714	Radio display flickering/showing bars
January 6, 2020	6,605	Radio display flickering/restarting
January 20, 2020	6,900	Display flickering
May 28, 2020	9,550	Radio resets

4. On May 29, 2020, the Complainant provided a written notice of defect to the Respondent.
5. On May 30, 2020, the Complainant filed a complaint with the Department alleging that the infotainment system would black out and reboot, and the rear window leaked causing interior damage. The Complainant stated that the rear window leak had been resolved, leaving only the infotainment issue to be addressed.
6. On July 15, 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.
7. The hearing in this case convened on July 29, 2020, by video conference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Clifton Green, business resource manager, represented the Respondent.
8. The vehicle's odometer displayed 9,955 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. After a dealer replaced the infotainment system, the wi-fi appeared grayed out (disabled).
11. Failure to properly program/reset the infotainment system may disable the wi-fi.
12. The operating system on the Complainant's iPhone (iOS 13) may cause the infotainment system to malfunction.

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 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.
8. 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.
9. 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 October 6, 2020



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