

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0013083 CAF**

**MITZY GARCIA,  
Complainant**

**v.**

**JAGUAR LAND ROVER NORTH  
AMERICA, LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Mitzy Garcia (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 her vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for 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 January 13, 2021, in El Paso, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 29, 2021. The Complainant, represented himself herself. John Chambless, attorney, represented the Respondent.

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<sup>1</sup> 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.<sup>2</sup> 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>3</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>4</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>5</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

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<sup>2</sup> TEX. OCC. CODE § 2301.603.

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.604(a).

<sup>5</sup> 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.”<sup>6</sup>

**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>7</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>8</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

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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).

<sup>7</sup> *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.”).

<sup>8</sup> 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.<sup>9</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:

[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>10</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>11</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>12</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>13</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>14</sup> (2) the respondent was given an opportunity to cure the defect or

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>10</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>11</sup> TEX. OCC. CODE § 2301.605(c).

<sup>12</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>13</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>14</sup> 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;<sup>15</sup> 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.<sup>16</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>17</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>18</sup>

## 3. Burden of Proof

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

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<sup>15</sup> 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 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. 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.

<sup>16</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>17</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>18</sup> TEX. OCC. CODE § 2301.603(a).

<sup>19</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>20</sup> *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.<sup>21</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 for relief under the lemon law.”<sup>22</sup> However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.<sup>23</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>24</sup> Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.<sup>25</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>26</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

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<sup>21</sup> “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.”).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<sup>23</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

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

<sup>26</sup> TEX. OCC. CODE § 2301.604.

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

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

On January 3, 2020, the Complainant, purchased a new 2020 Land Rover Evoque from Garcia Midlands Motors, LLC, a franchised dealer of the Respondent, in El Paso, Texas. The vehicle had 12 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On July 7, 2020, the Complainant provided a written notice of defect to the Respondent. On July 1, 2020, the Complainant filed a complaint with the Department alleging issues with: the suspension, cosmetic damage by the dealer, windshield wiper sensors, touchscreens, and rear camera. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
06/09/20	5,678	Front suspension clunk noise; lower screen will black out
06/30/20	5,867	Thumping noise
08/17/20	7,389	Screens do not sync; back up camera sometimes does not turn on
11/16/20	12,795	Suspension makes loud clunking noise; lower screen will black out; back up camera will appear in drive; driver side rear bumper tab damaged

The Complainant testified that the suspension issue may involve the lower control arms or brakes and they all sounded strange. The brakes always made noise and the suspension noise which could be heard on the videos was the worst. Other times, she could not record the exact sound from the bottom of the vehicle. The vehicle would never smoothly drive; something could always be heard. She first heard the noise around May (2020) but could not get an appointment with the dealer until June 9, 2020. The noise could be heard daily. The noise cannot be heard over the radio but can be heard with the radio off. The Complainant explained that the first time she took the vehicle to the dealer, the dealer damaged the vehicle when washing it, loosening the bumper from the bracket and damaging the molding on a window. She elaborated that the damage to the molding was not visible but not corrected the right way and the bumper will still come loose but can be

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<sup>27</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>28</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

pushed back into place. The Complainant testified that she believed the windshield wiper sensor issue had been resolved since the issue had not recurred after repair. The Complainant explained that the touchscreen issue occurred mostly with the lower screen, which controls climate. The lower touchscreen would completely black out. The dealer attributed the touchscreen issue to Apple CarPlay. She first noticed this issue in the first week of June (2020) and last noticed it about a week before the hearing when the climate control went blank. The screen would go blank about every two or three weeks. The screen would usually stay blank until restarting the vehicle the next day. The application on the screen did not affect screen synchronization. The climate controls probably last blacked out in the last week of December (2020). The screens were last unsynchronized around the first week of November (2020). She noticed that the failure to synchronize usually occurred with the phone connected. She did not notice the issue when not using the phone. Apple CarPlay would be on the upper screen and something else would be on the lower screen. With respect to the rear camera, the Complainant described that the rear camera did not appear on the upper screen when shifting into reverse. Though the rear sensors functioned, the camera would not show. She first noticed the camera issue about July 2020 and last noticed it the Sunday before the hearing.

Upon clarification questions, the Complainant elaborated that the lower screen also controlled the heated seats and the driving mode. She clarified that the touchscreen would stay blank when restarting the vehicle. Instead she would have to wait for hours or until the next day for the screen to come back on. The Complainant noted that she did not receive a loaner vehicle until August (2020).

On cross-examination, the Complainant testified that she did not get a loaner vehicle for the June 9, 2020, visit due to COVID-19. She understood that the issues did not affect the vehicle's performance. She affirmed that the dealer had damaged the bumper and window molding.

### **C. Inspection**

Upon inspection before the test drive, the vehicle had 14,525 miles on the odometer. During the test drive, the vehicle did not appear to exhibit any suspension noise but did exhibit a metallic rattling noise from the rear of the vehicle. The test drive ended with 14,536 miles on the odometer. A closer inspection of the rear bumper revealed loose sheet metal along the bumper. The vehicle otherwise operated normally.

### D. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law (or Warranty Performance Law for repair relief) by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence does not show that the subject vehicle meets the criteria for repurchase or replacement. However, the vehicle has a defect covered under warranty (warrantable defect) that qualifies for repair relief.

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.<sup>29</sup> 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 the 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 Land Rover 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; 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.

The warranty period for the vehicle begins on the date of the first retail sale, or on the date of entry into demonstrator or company service, whichever occurs first. The basic warranty period is for four (4) years or until the vehicle has been driven 50,000 miles, whichever occurs first.<sup>30</sup>

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

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<sup>29</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>30</sup> Respondent's Ex. 1, Passport to Service.

<sup>31</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.").

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.<sup>32</sup> A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> Design defects/characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.<sup>36</sup> Accordingly, a design defect/characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.<sup>37</sup> Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which

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<sup>32</sup> *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.").

<sup>33</sup> *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.).

<sup>34</sup> *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].").

<sup>35</sup> *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.").

<sup>36</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).

<sup>37</sup> *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].").

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.

### **1. Suspension Noise**

As an initial matter, the Department's precedents hold that a noise by itself does not constitute a substantial impairment or a safety hazard.<sup>38</sup> Moreover, the repair history only shows three repair visits for the suspension noise issue. However, the relevant statutory presumption requires at least four repair attempts. Further, the facts in this case do not otherwise warrant finding a reasonable number of repair attempts. Given the considerations above, the suspension noise cannot support repurchase or replacement. To qualify for repair relief, a preponderance of the evidence must show that the alleged nonconformity currently exists. Testimony shows that the suspension noise occurred daily. However, the vehicle did not produce the alleged suspension noise during the test drive. Additionally, the rattling noise from the loose sheet metal in the bumper may have obscured the nature of the complained of noise.<sup>39</sup> In sum, the suspension noise as alleged does not appear more likely than not to exist. Consequently, the suspension noise does not qualify for repair relief.

### **2. Cosmetic Damage by the Dealer**

As explained above, the warranty only covers manufacturing defects. However, the damage caused by the dealer did not arise from manufacturing at the factory but occurred after manufacturing. Consequently, the damage attributable to the dealer cannot support any relief.

### **3. Windshield Wiper Sensors**

The Complainant testified that she believed this issue had been resolved and that the issue did not reoccur after repair. Because this issue does not presently exist, it cannot support any relief.

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<sup>38</sup> E.g., Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, Final Order Denying § 2301.604 Relief (Motor Vehicle Division Dec. 11, 2008); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, Proposal for Decision (Oct. 9, 2008).

<sup>39</sup> Note: the rattling from the loose sheet metal was not included in any notice, complaint, or repair attempts and therefore cannot support any Lemon Law or Warranty Performance Law relief but may nevertheless be covered under the warranty.

#### 4. Touchscreen

The repair history shows no more than three repair visits for touchscreen issues. However, the relevant statutory presumption for reasonable repairs requires four or more attempts. Therefore, the touchscreen issue does not support granting repurchase or replacement relief. Further, the facts in this case do not otherwise warrant finding a reasonable number of repair attempts. With regard to any repair relief, the dealer represented that the touchscreen issue related to Apple CarPlay, i.e., software. In addition, the Complainant did not notice the screen synchronization issue when not using the phone. However, software glitches relate to problems with the design as opposed to manufacturing.<sup>40</sup> Given these considerations, the touchscreen issues appear as likely to arise from unwarranted design issues as from warranted manufacturing issues.

#### 5. Rear Camera

The repair history shows no more than two repair visits for the rear camera issues. However, the relevant statutory presumption for reasonable repairs requires four or more attempts. Therefore, the touchscreen issue does not support granting repurchase or replacement relief. Further, the facts in this case do not otherwise warrant finding a reasonable number of repair attempts. Every video concerning the rear camera view failing to appear shows Apple CarPlay active on the lower touchscreen, suggesting a software issue, like the touchscreen issue above. However, in the video of the rear camera view staying on when not in reverse, the lower touchscreen displayed the “Terrain Response” and not Apple CarPlay. Accordingly, the rear camera view staying of while out of reverse appears to be a warrantable defect that qualifies for repair relief.

### III. Findings of Fact

1. On January 3, 2020, the Complainant, purchased a new 2020 Land Rover Evoque from Garcia Midlands Motors, LLC, a franchised dealer of the Respondent, in El Paso, Texas. The vehicle had 12 miles on the odometer at the time of purchase.

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<sup>40</sup> See *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1208, 1224 (C.D. Cal. 2010) (“making detailed factual allegations regarding ‘at least three design defects,’ including ‘inadequate fault detections systems,’ ‘components [that] are highly susceptible to malfunctions . . . such as short circuits, software glitches, and electromagnetic interference,’ and the ‘lack of a brake override system’”) (footnotes omitted).

2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. In part, the subject vehicle's warranty states that:

JLRNA warrants that during the warranty period, if a Land Rover 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; 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.

The warranty period for the vehicle begins on the date of the first retail sale, or on the date of entry into demonstrator or company service, whichever occurs first. The basic warranty period is for four (4) years or until the vehicle has been driven 50,000 miles, whichever occurs first.

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

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
06/09/20	5,678	Front suspension clunk noise; lower screen will black out
06/30/20	5,867	Thumping noise
08/17/20	7,389	Screens do not sync; back up camera sometimes does not turn on
11/16/20	12,795	Suspension makes loud clunking noise; lower screen will black out; back up camera will appear in drive; driver side rear bumper tab damaged

4. On July 7, 2020, the Complainant provided a written notice of defect to the Respondent.
5. On July 1, 2020, the Complainant filed a complaint with the Department alleging issues with: the suspension, cosmetic damage by the dealer, windshield wiper sensors, touchscreens, and rear camera.
6. On September 25, 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 January 13, 2021, in El Paso, Texas, before Hearings Examiner Andrew Kang, and the record closed on January 29, 2021. The Complainant, represented himself herself. John Chambless, attorney, represented the Respondent.

8. The vehicle's odometer displayed 14,525 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. During the test drive, the vehicle did not appear to exhibit any suspension noise but did exhibit a metallic rattling noise from the rear of the vehicle. A closer inspection of the rear bumper revealed loose sheet metal along the bumper. The vehicle otherwise operated normally.
11. The vehicle's rear camera view will stay on even when shifted out of reverse.

#### **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 issues concerning the suspension noise, cosmetic damage by the dealer, windshield wiper sensors, touchscreens, and rear camera not turning on do not qualify for replacement or repurchase. The Complainant did not prove these issues were 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. The vehicle did not have a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).

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. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
10. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. Specifically, the rear-view camera stays on with the vehicle shifted out of reverse. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
11. 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the rear-view camera staying on with the vehicle shifted out of reverse. Upon this Order becoming final under Texas Government Code § 2001.144:<sup>41</sup> (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted

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<sup>41</sup> This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

**SIGNED April 1, 2021**



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