

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0007338 CAF**

LAWRENCE SMITH,	§	
Complainant	§	
	§	
v.	§	BEFORE THE OFFICE
	§	
VOLKSWAGEN GROUP OF AMERICA,	§	
INC.,	§	OF
Respondent	§	
	§	
and	§	ADMINISTRATIVE HEARINGS
	§	
VW CREDIT LEASING, LTD.,	§	
Intervenor	§	

DECISION AND ORDER

Lawrence Smith (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Volkswagen Group of America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. 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 May 19, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed to join VW Credit Leasing, Ltd. (Intervenor) as an intervenor in this case and allow VW Credit Leasing, Ltd. an opportunity to participate in the hearing. The hearing reconvened on June 3, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same

¹ TEX. GOV'T CODE § 2001.051.

day. The Complainant, represented himself. Susan Lucas, Authorized Representative, represented the Respondent and the Intervenor.

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

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.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 October 6, 2020, the Complainant, leased a new 2020 Audi A7 from Audi Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 36 miles on the odometer at the time of delivery. Audi Dallas assigned the lease to VW Credit Leasing, Ltd. The vehicle’s limited warranty provides coverage for four years or 50,000 miles, whichever occurs first.

On or about March 1, 2021, the Complainant provided a written notice of defect to the Respondent. On March 1, 2021, the Complainant filed a complaint with the Department alleging that the brakes squealed horribly, and the computer system had various issues including: not remembering mobile settings and devices, memory seating was not activated, auto sense activating and braking the car when there were no obstacles in front of the car, lane departure system resisting lane change even with the blinker on, and fuel consumption at 10 mpg. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
11/23/20	1,306	Brakes making noise; check engine light
12/21/20	1,758	Brakes squealing at slow speed; vehicle only getting 10 mpg
1/25/21	2,668	Vehicle hesitates and bogs down; pre sense slammed while turning with traffic 40 ft in front of him; computer system says traffic signal unavailable; vehicle jerked into another lane while lane assist was not on; computer system states that emergency service not available and then vehicle stutters
4/21/21	5,738	Pre sense activates when there is nothing in front of the vehicle; when adjusting volume, vehicle says system unavailable; vehicle states traffic signal unavailable; lane departure will activate even when turned off and refuses to change lanes; computer system states that emergency service not available and then vehicle stutters; vehicle hesitates and bogs down at slow speed; brakes squealing

Several of the Complainant’s original issues had been resolved before the hearing. He testified that the memory seating was fixed by the dealer. He also explained that the fuel consumption issue and the brakes had been fixed. However, he stated the “computer system”

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

overall was still not working properly, including the lane assist and the Bluetooth connection. The Respondent's opportunity to cure occurred on April 21, 2021.

The Complainant also mentioned several problems that he had been experiencing that were not listed in the complaint. He noted that the low tire pressure warning had turned on during a drive to Austin. He stated that he had the tires checked at two independent tire shops and they stated the tire pressure was normal; however, the dealership found the tires were low and reset the warning. He listed several issues that he claimed were a part of the computer system not working properly including, adaptive cruise assist being unavailable, a warning stating that no traffic sign information was available, and traffic sign recognition not functioning properly.

The Complainant described issues with the auto sense feature engaging when it had no reason too because there was nothing in front of the car. He explained that the auto sense would engage when there is a car that is 4 to 6 car lengths away. He stated that the activation of the feature has almost caused him to be rear ended 2 or 3 times. He first noticed the issue within 5 weeks from the purchase of the car he most recently noticed the issue on the day before the hearing. He claimed that the issue occurred every other day that he drives it.

He described issues with lane departure system not allowing a lane change even when his turn signal was on and the lane departure system was off. He explained that the system would resist the lane change and he would have to force the car to change lanes even when there was no car in the other lane. He testified that he does not turn on the system because he does not trust it. He most recently noticed the issue this the weekend before the hearing.

The Complainant described the issues with the Bluetooth system. He stated that when he would try to adjust the volume the system would say the device was currently unavailable. He explained that the issue normally goes away when he restarts the car. He first noticed the issue in December 2020, and he most recently noticed the Bluetooth issues the weekend before the hearing. He noted that he had experienced this issue around three times since he's had the car.

He testified that the car would display a warning stating that the adaptive cruise control was not available. He first noticed the warning on May 12, 2021 and he has noticed it 2 or 3 times since that date with the most recent occurrence the week before the hearing.

The Complainant explained the system would state that the traffic sign information was unavailable or that there was no traffic sign information available. He first noticed the issue the first week he had the car and he most recently noticed the issue the day before the hearing. He claimed that it was a daily issue and the error occurred multiple times a day.

He further clarified the low tire pressure light issue by saying it only occurred one on May 9, 2021. He wondered why the pressure would be low when the outside temperature was 76 degrees and he had driven for 2.5 hours. The rear tires were replaced on May 19, 2021 for an unrelated issue of a nail in the tire.

The Complainant expressed a preference to have the car repurchased and that he had no desire to have the car replaced. On cross-examination, he confirmed that he had no aftermarket products installed on the car. He clarified that everything on the car was from the manufacturer.

The Complainant also added that he was given loaner vehicles to drive when his car was in the shop. However, he stated that the loaner vehicles were too small for him to fit comfortably. He confirmed that at one point he was given a vehicle that was similar size to his own that he kept for 18 days. However, that Audi A8 had several issues that he reported to the dealership including, the oil light issues, acceleration issues, and windshield wiper fluid indicator light. He agreed that the loaner car he was given was not helpful.

C. Inspection

Upon inspection before the test drive at the hearing, the odometer displayed 7,678 miles. After starting the vehicle, while in the parking lot, a “No traffic sign information available” message appeared on the instrument cluster. During the test drive, the Complainant noted that pre sense frequently activated when driving behind tow trucks. The Complainant attributed a hesitation in changing lanes to steering intervention by the vehicle. The test drive ended with 7,697 miles on the odometer.

D. Summary of Respondent’s Evidence and Arguments

Scott Melvin, Technical Field Manager for the Respondent, testified about the features of Audi pre sense. He stated the system is an interactive safety system that interacts with different systems including the ABS module. The system can predict dangerous situations from the rear or the side and will give a warning when it interacts, explaining the purpose of the interaction. He

stated that the car has an MMI (Multi Media Interface) setting that can be adjusted to avoid unwanted intervention.

Mr. Melvin claimed that when the lane keeping feature is turned off there should be no interaction with the system. He explained that the system will turn itself off when it does not feel the driver's hands on the wheel. He described that the system will display two green lines on the display when the feature is active, if the system loses sight of one of the lines it will turn yellow, and if it loses sight of both lines it will deactivate.

When asked, Mr. Melvin answered that some level of brake noise is normal and to be expected. He noted that Audi would not compromise braking integrity and efficiency. He confirmed the level of discomfort is subjective. He clarified that most of the brake noise complaints came from SUV drivers and that he had not heard of any passenger car brake noise complaints in a long time. He noted that there were more complaints in more humid areas.

Mr. Melvin explained that the traffic sign recognition system worked by receiving information from the navigation system and from the front camera. He pointed out that the owner's manual states that the system can be limited in situations of low visibility or where they system is not receiving good data. He elaborated that traffic light information is transmitted by different cities and if the city does not provide the information, the system will say no traffic light information is available.

Mr. Melvin testified that there could be situations that the steering wheel would give feedback even with lane departure off. He specifically mentioned that swerve assist could activate to help a driver avoid a dangerous situation. He did not believe the steering feedback was strong enough to overcome a driver's input. He clarified that the feedback was like a gentle correction on the steering wheel rather than steering.

Next, Mr. Melvin listed several reasons that the Bluetooth functionality would be unavailable. He included software updates for iPhones and androids, as well as outside influences, such as other devices plugged in. He stated that radio tower interference has been discussed as a possible issue but has never been confirmed.

Lastly, Mr. Melvin claimed that he had never experienced the adaptive cruise control system brake suddenly when there is a speed limit change. He explained that the car normally

coasts to slow down. He did clarify that this car's system should be a smoother deceleration, but earlier systems could be more abrupt if you were close to a vehicle in front of you. He further clarified that the system should stay at the speed it was set at and should not change speed based on the speed limit.

On cross-examination, Mr. Melvin stated that he believed that the higher instance of brake noise complaints in SUVs could be due to the heavier weight of the vehicles but he wasn't sure. When questioned, he answered that the SUVs use a slightly different braking system and that he received more complaints about SUVs than he did smaller cars. He elaborated that the rust build-up on the brake rotors could happen if the car sat for two or three days.

Mr. Melvin stated that he did not know which cities broadcast the traffic light information. He also did not know if the Complainant's car had the traffic light system. He noted that the system may also not be activated.

Mr. Melvin reiterated that the traffic sign recognition would not work in limited visibility situations but that it should work when there is good visibility. He explained that if the warning states that the traffic signal is unavailable, then it means that the system cannot pick up a sign or hasn't seen a sign in a while.

Mr. Melvin then clarified that the car did not always give a warning when a system was activated. He stated that the car will work to keep the driver safe. He agreed that there should be no steering interaction when the turn signal is activated. He also agreed that the pre sense system should not go off at a slow speed when the only car is eight car lengths in front of the driver.

E. Analysis

The available evidence does not show that the vehicle more likely than not has a manufacturing defect that qualifies for relief. 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 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 generally states that: "The warranty covers any repair or replacement to correct a defect in manufacturer's material and workmanship (i.e., a mechanical defect)."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, 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 A defectively

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

³⁰ Complainant's Ex. 9, Warranty.

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.").

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].").

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), 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.

The Complainant testified that the memory seating, fuel consumption, and brake issues were resolved, leaving the Audi pre sense, lane departure, and Bluetooth issues as the only remaining issues from the complaint to be addressed. Additionally, the Complainant identified new unpleaded issues during the hearing, including issues with the tire pressure monitor, adaptive cruise control, and traffic sign recognition. Ordinarily, issues not included in the complaint may not be considered. However, as noted in the discussion of applicable law, because the respondent did not object to the new issues, they may be addressed here.

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].").

1. Audi Pre Sense

The evidence shows that the unexpected braking by pre sense is a design issue that does not qualify for relief. Regarding pre sense, the owner's manual warns the driver to "[f]ollow the safety precautions and note the limits of the assist systems, sensors, and cameras."³⁸ In part, the owner's manual notes that "[d]ue to the system limitations when detecting the surrounding area, the systems may warn or intervene unexpectedly or too late in certain situations. The assist systems may also interpret a driving maneuver incorrectly and then warn the driver unexpectedly."³⁹ In other words, the vehicle's pre sense may unexpectedly activate because of limitations in the vehicle's design, which is not a warrantable defect that qualifies for relief.

2. Lane Departure Warning

Any unexpected lane departure intervention does not appear more likely to be a warrantable defect than an unwarranted design issue. With respect to the lane departure warning, the owner's manual instructs the driver to "[o]bserve the safety precautions and note the limits of the assist systems, sensors, and cameras."⁴⁰ The owner's manual explains that "[d]ue to the system limitations when detecting the surrounding area, the systems may warn or intervene unexpectedly or too late in certain situations. The assist systems may also interpret a driving maneuver incorrectly and then warn the driver unexpectedly."⁴¹ Accordingly the balance of the evidence does not indicate that lane departure issue more likely arises from a manufacturing defect than from the vehicle's design.

3. Bluetooth

The evidence shows that the Complainant has experienced problems with the vehicle's Bluetooth connection. However, the owner's manual advises that "[b]ecause your phone works with radio signals, a connection cannot be guaranteed under all circumstances."⁴² Accordingly, the vehicle may normally have instances when the Bluetooth connection will not function. Furthermore, the record indicates that in most instances, hardware compatibility and software

³⁸ Complainant's Ex. 11, Owner's Manual at 164.

³⁹ Complainant's Ex. 11, Owner's Manual at 135 (emphasis added).

⁴⁰ Complainant's Ex. 11, Owner's Manual at 161.

⁴¹ Complainant's Ex. 11, Owner's Manual at 135 (emphasis added).

⁴² Complainant's Ex. 11, Owner's Manual at 187.

issues underlie Bluetooth connectivity problems. However, issues arising from hardware compatibility or software relate to design and not a manufacturing defect. Additionally, outside influences, such as devices plugged into the vehicle, may interfere with Bluetooth functionality, though rarely. In sum, a preponderance of evidence does not show that the Bluetooth issue results from a warrantable defect.

4. Tire Pressure Monitoring System, Adaptive Cruise Assist, Traffic Sign Recognition

The tire pressure monitoring system, adaptive cruise assist, and traffic sign recognition issues, which the complaint did not include, cannot support any relief. As outlined in the discussion of applicable law, the Lemon Law requires written notice of the alleged defects to the Respondent to qualify for repurchase/replacement relief. However, the Complainant's March 1, 2021, notice did not specify the tire pressure monitoring system, adaptive cruise assist, or traffic sign recognition issues and the record does not otherwise show written notice of these issues provided to the Respondent. Further, the complaint did not include these issues as required for warranty repair relief.

III. Findings of Fact

1. On October 6, 2020, the Complainant, leased a new 2020 Audi A7 from Audi Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 36 miles on the odometer at the time of delivery.
2. Audi Dallas assigned the lease of the vehicle to VW Credit Leasing, Ltd. (Intervenor).
3. The vehicle's limited warranty provides bumper to bumper coverage for 4 years or 50,000 miles, whichever occurs first.
4. The warranty generally states: "The warranty covers any repair or replacement to correct a defect in manufacturer's material and workmanship (i.e., a mechanical defect)."
5. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
11/23/20	1,306	Brakes making noise; check engine light
12/21/20	1,758	Brakes squealing at slow speed; vehicle only getting 10 mpg
1/25/21	2,668	Vehicle hesitates and bogs down; pre sense slammed while turning with traffic 40 ft in front of him; computer system says traffic signal unavailable; vehicle jerked into another lane while lane assist was not on; computer system states that emergency service not available and then vehicle stutters
4/21/21	5,738	Pre sense activates when there is nothing in front of the vehicle; when adjusting volume, vehicle says system unavailable; vehicle states traffic signal unavailable; lane departure will activate even when turned off and refuses to change lanes; computer system states that emergency service not available and then vehicle stutters; vehicle hesitates and bogs down at slow speed; brakes squealing

6. The Respondents opportunity to cure occurred on April 21, 2021.
7. On or about March 1, 2021, the Complainant provided a written notice of defect to the Respondent.
8. On March 1, 2021, the Complainant filed a complaint with the Texas Department of Motor Vehicles alleging that the breaks squealed horribly, and the computer system had various issues including, not remembering mobile settings and devices, memory seating was not activated, auto sense activating and braking the car when there were not obstacles in front of the car, Lane departure system resisted lane change even with blinker on, and fuel consumption was registered at 10 mpg.
9. On April 26, 2021, 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.
10. The hearing in this case convened on May 19, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The hearing was recessed to join VW Credit Leasing, Ltd. (Intervenor) as an intervenor in this case and allow VW Credit Leasing, Ltd. an opportunity to participate in the hearing. The hearing reconvened on June 3, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The

Complainant, represented himself. Susan Lucas, Contract Representative, represented the Respondent and the Intervenor.

11. The vehicle's odometer displayed 7,678 miles at the time of the hearing.
12. The vehicle's warranty was in effect at the time of the hearing.
13. The vehicle appeared to operate normally during the test drive at the hearing.
14. The owner's manual specifies that "[d]ue to the system limitations when detecting the surrounding area, the systems may warn or intervene unexpectedly or too late in certain situations. The assist systems may also interpret a driving maneuver incorrectly and then warn the driver unexpectedly."
15. The owner's manual explains that "[b]ecause your phone works with radio signals, a connection cannot be guaranteed under all circumstances."
16. Most Bluetooth connectivity problems result from hardware compatibility and software issues.

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 Audi pre sense, lane departure, and Bluetooth issues were defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a). Further, the Complainant or a person on behalf of the Complainant did not provide sufficient notice of the tire pressure monitoring system, adaptive cruise assist, and traffic sign recognition issues to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
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 Audi pre sense, lane departure, and Bluetooth issues were covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. Further, neither the Complainant nor an agent of the Complainant notified the Respondent or Respondent's agent of the tire pressure monitoring system, adaptive cruise assist, and traffic sign recognition issues in writing. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3). Additionally, the Complainant did not specify the tire pressure monitoring system, adaptive cruise assist, and traffic sign recognition issues in the complaint. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
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 July 28, 2021



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