

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 21-0016511 CAF**

**LENONIE HANLEY,  
Complainant**

**v.**

**SUBARU OF AMERICA, INC.,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Dr. Lenonie Hanley (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 Subaru of America, INC. (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's use or market value after a reasonable number of repair attempts. Consequently, the Complainant's vehicle qualifies for repurchase.

**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 telephonically on March 14, 2021, before Hearings Examiner Andrew Kang, and the record closed on March 15, 2021. The Complainant, represented herself. James Sciolla, Technical Advisory Field Manager, represented the Respondent. Charles Hosier, Senior Customer Advocacy Specialist, was also present for 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**

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

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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).

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

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.<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 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.

<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 July 3, 2020, the Complainant, purchased a new 2020 Subaru Outback from Austin Subaru, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 20 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.

On or about August 24, 2021, the Complainant provided a written notice of defect to the Respondent. On August 25, 2021, the Complainant filed a complaint with the Department alleging that the touch screen continually malfunctioned, CarPlay had issues and the screen turned black. Additionally, the passenger side trim was coming off, the car would lock while the engine was running and the keys were outside of the vehicle, and the trunk would not open when the button was pressed.

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
10/03/2020	7,148	The screen would go black occasionally.
10/27/2020	8,813	The driver's side window was not working and the radio navigation was glitching and blacking out.
11/02/2020	10,332	Radio disconnects from CarPlay and screen goes black
01/20/2021	16,211	Software update for the infotainment screen.
03/30/2021	18,249	The passenger side roof trim was coming off.
04/02/2021	18,399	The passenger side trim was coming off, the multimedia screen went blank and froze while CarPlay was being used, and the eye-sight light came on while driving causing the screen to go blank.

The Complainant testified that the trim on the vehicle had been repaired and was no longer an issue. She confirmed that the infotainment screen issues were ongoing as of the time of the hearing. She clarified that the lock out issue only happened one time and it had not been replicated.

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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).

She stated that the trunk issue is still a regular occurrence when using the button from inside of the car.

The Complainant described that the issues with the infotainment screen were that CarPlay would be unavailable and disconnect from time to time and then the screen would go blank. She noted that the screen would not come back on for a while. She testified that the issues happen frequently enough, but it is not long enough to take a picture. She claimed that the system update did not affect anything. She stated that at one point the screen went out for an hour and the temperature was very cold and she could not change it. She explained that when the screen went out, several other features went out because they were controlled by the screen. She pointed out that she could not use voice controls with the screen out. She added that the screen went out one time while she was using the rear-view camera. She recalled that the dealership told her that the issue was caused by her apple watch so she stopped wearing it for several months and the issue did not improve. She stated that the malfunction happened randomly and could last from as little as 30 seconds to as long as an hour. She estimated that the malfunctions happened on average for longer than a minute. She most recently noticed the issue the week before the hearing. She confirmed that she had an iPhone 13 currently paired to the vehicle but the issue started when she had an iPhone 11.

She explained that the trunk had an issue with opening it from inside the vehicle. She clarified that most times she could open the trunk from the outside. She testified that she was unable to open the trunk while the car was running and then all of the doors locked. She continued that she was unable to use the key fob to open the trunk and she had to use the manual key to open the car. She recalled that she most recently noticed the issue the week before the hearing. She noted that she had to use the button on the back on the vehicle in order to open the trunk. She noted that she did not notice the problem often because she modified her behavior so she did not have to use the trunk.

The Complainant confirmed that she was the only driver of the vehicle. She stated that she drove the vehicle every day for around six miles but she did not drive the vehicle for long distances. She claimed that she had a total of roughly ten repair visits for the issues in her vehicle. She noted that she received a loaner vehicle all of her repair visits except for a visit on October 27, 2020. The Complainant expressed a preference for repurchase of her vehicle.



On cross-examination, Complainant confirmed that she had her windshield replaced in January 2021. She confirmed that the window was replaced by a glass shop, but that it was replaced with OEM glass. She admitted that the glass shop also recalibrated the EyeSight system. She explained that the damage to the leather on the door panels was caused by dog scratches. She confirmed that the door panels had not been replaced.

In her rebuttal, the Complainant stated that she had the issue with the infotainment screen occur with multiple different phones and phone cords attached as well as when no phone was attached to the car. She also testified that the trunk did not work when the button was pressed or the wave feature used. She also added that she did not use a Bluetooth connection when in the car and only used the wired connection for her phone.

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

James Sciolla, Technical Advisory Field Manager, testified for the Respondent. Mr. Sciolla looked through the pictures and videos that the complainant submitted. On cross-examination, Mr. Sciolla explained that the head unit was not replaced because the dealership was unable to duplicate the issue. He also explained that the information that was downloaded from the systems was sent to the Respondent's engineering staff and there was no issue found. Mr. Sciolla claimed that the issue was caused by the way the phone attempted to connect with the system.

In his closing statements, Mr. Sciolla stated that the issues with the EyeSight and rear automatic braking are common when Safelite replaced the windshield. He also claimed that he believed the issues with the trunk were caused by the Complainant not operating the button correctly because she held the button longer than she should. He established that the trunk worked properly when the button was pressed correctly. He added that if the vehicle is repurchased, the damage to the door panels should be considered in the value of the vehicle.

### **D. Analysis**

As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every Lemon Law element by a preponderance of the evidence. In this case, a preponderance of the evidence shows 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.<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. Rather, the Lemon Law requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that: "Under these warranties, parts that malfunction or fail during the warranty period as a result of a manufacturing defect will be repaired without charge. The servicing Authorized SUBARU Retailer also will replace, without charge, all lubricants and fluids which become contaminated as a result of making any such repairs."<sup>30</sup> According to these terms, the warranty only applies to manufacturing defects.<sup>31</sup>

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> Stated another way, a

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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, New Vehicle Warranty.

<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.").

<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

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 characteristics, including design defects, exist in the vehicle's specifications and do not arise from any error during manufacturing.<sup>36</sup> Accordingly, a design 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 or dealer representations and improper dealer repairs, 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. In the present case, the vehicle has warrantable defects as discussed below.

## 1. Trim

The Complainant confirmed that the trim issue had been successfully repaired. Accordingly, the trim nonconformity is not a continuing issue requiring resolution here.

## 2. Lockout

The Complainant explained that the spontaneous lockout occurred once but has not occurred again. Accordingly, a preponderance of the evidence does not show that the lockout issue continues to exist.

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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].”).

**3. Infotainment Screen**

The available evidence shows that the infotainment screen/system more likely than not has a defect. Though the use of a phone may cause the malfunction, the record shows that the malfunction would occur even without a phone connected by wire or Bluetooth. Given that the infotainment screen affects the use of multiple vehicle functions, including the air conditioning and safety features, such as the rearview camera, this defect substantially impairs the use and value of the vehicle under the reasonable purchaser standard.

**4. Trunk**

The record indicates that the trunk malfunction is more likely than not a warrantable defect. Though the failure to open the trunk using the key fob could be caused by pressing the button too long, the evidence shows that the trunk also failed to open using the wave function, indicating the existence of a nonconformity. Nevertheless, this malfunction is not a substantial impairment given that the trunk may still be opened by pressing the trunk button on the vehicle.

**III. Findings of Fact**

1. On July 3, 2020, the Complainant, purchased a new 2020 Subaru Outback from Austin Subaru, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 20 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.
3. The warranty states in part: "Under these warranties, parts that malfunction or fail during the warranty period as a result of a manufacturing defect will be repaired without charge. The servicing Authorized SUBARU Retailer also will replace, without charge, all lubricants and fluids which become contaminated as a result of making any such repairs."

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

Date	Miles	Issue
10/03/2020	7,148	The screen would go black occasionally.
10/27/2020	8,813	The driver's side window was not working and the radio navigation was glitching and blacking out.
11/02/2020	10,332	Radio disconnects from CarPlay and screen goes black
01/20/2021	16,211	Software update for the infotainment screen.
03/30/2021	18,249	The passenger side roof trim was coming off.
04/02/2021	18,399	The passenger side trim was coming off, the multimedia screen went blank and froze while CarPlay was being used, and the eye-sight light came on while driving causing the screen to go blank.

5. On or about August 24, 2021, the Complainant provided a written notice of defect to the Respondent.
6. On August 25, 2021, the Complainant filed a complaint with the Department alleging that the touch screen continually malfunctions and there are issues with CarPlay and the screen turning black. Additionally, the car would lock while the engine was running and the keys were outside of the vehicle and the trunk would not open when the button was pressed.
7. On October 29, 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.
8. The hearing in this case convened telephonically on March 14, 2021, before Hearings Examiner Andrew Kang, and the record closed on March 15, 2021. The Complainant, represented herself. James Sciolla, Technical Advisory Field Manager, represented the Respondent. Charles Hosier, Senior Customer Advocacy Specialist, was also present for the Respondent.
9. The vehicle's odometer had 32,995 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.

11. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	\$37,005.05
Delivery mileage	20
Mileage at first report of defective condition	7,148
Mileage on hearing date	32,995
Useful life determination	120,000

Purchase price, including tax, title, license & registration	\$37,005.05			
Mileage at first report of defective condition	7,148			
Less mileage at delivery	-20			
<b>Unimpaired miles</b>	7,128			
Mileage on hearing date	32,995			
Less mileage at first report of defective condition	-7,148			
<b>Impaired miles</b>	25,847			
<i>Reasonable Allowance for Use Calculations:</i>				
Unimpaired miles	7,128	÷	120,000	× \$37,005.05 = \$2,198.10
Impaired miles	25,847	÷	120,000	× \$37,005.05 × 50% = \$3,985.29
<b>Total reasonable allowance for use deduction</b>				<b>\$6,183.39</b>
Purchase price, including tax, title, license & registration	\$37,005.05			
Less reasonable allowance for use deduction	-\$6,183.39			
Plus filing fee refund	\$35.00			
Plus incidental expenses	\$0.00			
<b>TOTAL REPURCHASE AMOUNT</b>	<b>\$30,856.66</b>			

#### 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 or a person on behalf of the Complainant provided sufficient notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainant timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).
9. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

## V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;

2. The Respondent shall repurchase the subject vehicle in the amount of **\$30,856.66**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
3. The parties shall complete the return and repurchase of the subject vehicle within **20 days** after the date this Order becomes final under Texas Government Code § 2001.144.<sup>38</sup> However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

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<sup>38</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.



Parties should note that though the record contains evidence of damage to the rear door panels, the record does not indicate the loss in value due to such damage. Consequently, the repurchase amount has not been adjusted. However, a party may request reconsideration of the repurchase amount to address the damage.

**SIGNED May 26, 2022**

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line.

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