

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 23-0005442 CAF**

**ANDREA and BRENT FOSS,
Complainants**

v.

**HISUN MOTORS CORP., USA,
Respondent**

§
§
§
§
§
§
§

**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Andrea Foss and Brent Foss (Complainants) 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 their vehicle distributed by Hisun Motors Corp., USA (Respondent). A preponderance of the evidence shows that the subject vehicle qualifies for repurchase.

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 March 22, 2023, in Denison, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented themselves. James (Jamie) Cheek, Vice President of Operations, represented the Respondent.

¹ Tex. Gov't Code § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”³ In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.⁴ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁵

b. Substantial Impairment of Use or Value

i. Impairment of Use

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

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).

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 Complainants.¹⁹ The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.²⁰ Accordingly, the Complainants 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 § 206.66(d); see *Vance v. My Apartment Steak House, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984) (“[A] civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action.”).

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 and limits what may be addressed 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 Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²³ The parties may expressly or impliedly consent to hearing issues not included in the complaint.²⁴ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁵

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants 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 *See* Tex. Gov’t Code §§ 2001.141(b)-(c), 2001.051-2001.052; Tex. R. Civ. P. 301.

²⁴ 43 Tex. Admin. Code § 215.42; Tex. R. Civ. P. 67.

²⁵ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

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 Complainants’ Evidence and Arguments

On March 30, 2022, the Complainants, originally purchased a new 2021 Hisun Sector 750 from Jeff’s Auto Sales, an authorized dealer of the Respondent, in Sherman, Texas. On September 19, 2022, Respondent replaced the original vehicle with a 2022 Hisun Sector 750. The vehicle had about 1 mile on the odometer at the time of replacement. The vehicle’s limited warranty provides coverage for two years.

On or about December 5, 2023, the Complainants provided a written notice of defect to the Respondent. On January 4, 2023, the Complainants filed a complaint with the Department alleging issues with oil leaking from the air intake area, oil leaking from wires on top of the engine, bolts on the exhaust manifold missing/stripped, multiple rubber covers/items falling apart, loose drive axle in the front making a vibrating noise, and the parking brake alarm not working.

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

Date	Miles	Issue
December 5, 2022 - January 24, 2023		oil leaking from air intake area, oil leaking from group of wires on top of engine, bolts on exhaust manifold missing/stripped, multiple rubber covers/items randomly falling apart, drive axle in the front is loose making a vibrating noise, parking brake alarm does not work

Mrs. Foss’s testimony reflected that the issues regarding the manifold bolts, and parking brake alarm were resolved. Mrs. Foss testified that Complainants first noticed oil leaking from the air intake area about two to three weeks after receiving the subject vehicle. The vehicle ran rough with oil coming from the hose at top. They last noticed the problem on the Sunday before the hearing. Complainants first noticed oil leaking from the group of wires on top of engine from the beginning of their possession of the vehicle. They last noticed the issue the Sunday before the

²⁷ 43 Tex. Admin. Code § 215.209(a).

²⁸ 43 Tex. Admin. Code § 215.208(b)(1).

hearing. Mrs. Foss explained that the issue with multiple rubber covers/items randomly falling apart was partly fixed—the rubber boot on the drive shaft—but the cover on the CVT belt fell apart. Mrs. Foss believed they first noticed the problem on October 27, 2022. They last noticed the issue the Sunday before the hearing. Mrs. Foss described that at idle, the drive axle in the front made a vibrating noise, which stopped when putting a hand on it. They noticed this issue from the very beginning of possession. They last noticed the issue the Sunday before the hearing. Mrs. Foss stated that the vehicle had one visit to an authorized dealer, which lasted 73 days.

Mr. Michael Sligar, a retired ASE master technician, testified that the smoke from the vent tube was excessive. The area where the tube goes into intake snorkel was wet with oil, which was excessive. The vent tube was the only source of oil. Mr. Sligar opined that the (piston) rings may have an issue. He noted that a new motor with visible smoke through the vent tube was excessive. The intake coupler was two feet away from the motor, so the oil could not be from the motor. Mr. Sligar estimated that the vehicle had a useful life of 25,000 miles.

On cross-examination, Mrs. Foss testified that they changed the oil at 10 hours and the transmission fluid at 20 hours. She confirmed that they used a Hisun filter. Mr. Sligar pointed out that though the engine would run, the transmission was not involved since the vehicle was not mobile.

On rebuttal, Mrs. Foss testified that Jeff's Auto Sales, an authorized dealer of the Respondent, took the subject vehicle to someone named Tate in Durant (Oklahoma) for repair. After the receiving the vehicle back, Mrs. Foss cleaned the vehicle, but there was significantly more oil than now. Mrs. Foss noted the warranty they were given did not have the exclusions in the warranty available online.

C. Inspection

Upon inspection at the hearing, the odometer displayed 435 miles. Oil could be seen on the top of the engine and at the air intake. The front drive axle exhibited some vibration. The vehicle could not move on its own power because of the damaged/missing CVT belt.

D. Summary of Respondent's Evidence and Arguments

Mr. Cheek pointed out that Mr. Sligar did not work on UTVs. Mr. Cheek testified that Hisun had one claim with a full payout in February. An authorized dealer only looked at one item. The other items were not covered under warranty, which fell under wearable items.

Upon clarification questions, Pedro Anguiano, Senior Technician, noted that the vehicle's warranty covers 500 hours or 3,100 miles but he did not know about the useful life.

When asked if not changing the transmission fluid at 20 hours would make the CVT belt go bad, Mr. Anguiano replied it would have no effect. Mr. Cheek added that the CVT belt was not a warranted item.

E. Analysis

To qualify for repurchase or replacement, a vehicle must have a defect covered under warranty (warrantable defect) that creates a serious safety hazard or substantially impairs the use or market value of the vehicle after a reasonable number of repair attempts. In addition, the Respondent must have been given written notice of the defect and an opportunity to cure the defect. 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, the complaint includes the following issues: oil leaking from air intake area, oil leaking from group of wires on top of engine, bolts on exhaust manifold missing/stripped, multiple rubber covers/items randomly falling apart, drive axle in the front is loose making a vibrating noise, parking brake alarm does not work. The issues regarding the manifold bolts, and parking brake alarm were resolved. Only the oil leak issues need to be addressed here because they are determinative of this case. In this case, a preponderance of the evidence shows that the subject vehicle qualifies for relief.

1. Warrantable Defect

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to defects covered under warranty (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

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

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. The subject vehicle's warranty generally states that:

Warranty is limited to defects in material or workmanship, but only when the consumer sale is made in the country to which distribution is authorized by us. Keep in mind that warranty covers repairs that are needed within the warranty period because of defects in material and workmanship. Installation errors, accidents, normal wear, and a variety of other causes that affect the product are not covered.³⁰

The warranty also specifies the following exclusions:

This limited warranty does not cover routine maintenance items, tune-ups, adjustments, normal wear and tear, plastic, painted or coated parts, windshields, damage caused by abuse, abnormal use, operation of the product in a manner inconsistent with the recommended operation section of the Owner's Manual, neglect, accident, submersion, improper service, use of accessory or part not manufactured or sold by us, operation with fuels, oils or lubricants that are not suitable for the use with the product (see the Operation and Maintenance Manual), alteration or removal of parts, water entering the engine through the fuel intake, air intake or exhaust system, or damage to the product from insufficient cooling. This warranty also does not cover any vehicle, component, or part that has been altered structurally, modified, neglected, improperly maintained or used for racing, competition or purposes other than for which it was designed, these action(s) void the warranty. Expenses related to towing, storage, rental inconvenience, insurance coverage, loan payments, loss of time, loss of income, or any other type of incidental or consequential damages are not covered by this Limited Warranty.³¹

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³²

³⁰ Complainant's Ex. 15, Warranty.

³¹ Complainant's Ex. 15, Warranty.

³² 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.³³ 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.³⁴ 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.³⁵ Stated another way, a defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁶ Design characteristics, including design defects, exist in the vehicle's specifications and do not arise from any error during manufacturing.³⁷ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁸ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics or dealer representations and improper dealer repairs,

³³ *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.").

³⁴ *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.").

³⁵ *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].").

³⁶ *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.").

³⁷ 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).

³⁸ *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].").

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 evidence indicates that the oil leaks more likely than not result from a manufacturing defect.

2. Serious Safety Hazard or Substantial Impairment of Use or Market Value

None of the issues fall within the Lemon Law's definition of a serious safety hazard. However, under the reasonable prospective purchaser standard, the oil leaks substantially impair the market value of the vehicle.

3. Reasonable Repair Attempts

The repair history shows that the subject vehicle has been out of service for repair for over 30 days in the first 24,000 miles/two years. Accordingly, the vehicle meets the statutory presumption for reasonable repair attempts.

4. Complaint and Written Notice Requirement

As explained in the discussion of applicable law, issues must be included in the complaint to qualify for repair relief and the respondent must have been provided written notice to qualify for repurchase or replacement. Here, the record shows the oil leak issues were included in the complaint and written notice was provided to meet the requirements for repurchase or replacement. Further, the respondent had an opportunity to repair as shown by the December 5, 2022, repair.

5. Conclusion

As explained above, to qualify for repurchase or replacement, a vehicle must have a warrantable defect that creates a serious safety hazard or substantial impairment of use or value, reasonable repair attempts, as well as written notice of the defect. In this case, the vehicle qualifies for repurchase.

III. Findings of Fact

1. On March 30, 2022, the Complainants, originally purchased a new 2021 Hisun Sector 750 from Jeff's Auto Sales, an authorized dealer of the Respondent, in Sherman, Texas. On September 19, 2022, Respondent replaced the original vehicle with a 2022 Hisun Sector

750. The replacement vehicle had about one mile on the odometer at the time of replacement.

2. The vehicle's limited warranty provides coverage for two years.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 5, 2022 - January 24, 2023		oil leaking from air intake area, oil leaking from group of wires on top of engine, bolts on exhaust manifold missing/stripped, multiple rubber covers/items randomly falling apart, drive axle in the front is loose making a vibrating noise, parking brake alarm does not work

4. On or about December 5, 2022, the Complainants provided a written notice of defect to the Respondent.
5. On January 4, 2023, the Complainants filed a complaint with the Department alleging issues with oil leaking from the air intake area, oil leaking from wires on top of the engine, bolts on the exhaust manifold missing/stripped, multiple rubber covers/items falling apart, loose drive axle in the front making a vibrating noise, and the parking brake alarm not working.
6. On March 7, 2023, 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 March 22, 2023, in Denison, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented themselves. James (Jamie) Cheek, Vice President of Operations, represented the Respondent.
8. The vehicle's odometer displayed 435 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.

10. Upon inspection at the hearing, oil could be seen on the top of the engine and at the air intake. The front drive axle exhibited some vibration. The vehicle could not move on its own power because of the damaged/missing CVT belt.

11. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license & registration	\$12,760.22
Delivery mileage	1
Mileage at first report of defective condition	183 ³⁹
Mileage on hearing date	435
Useful life determination	25,000

Purchase price, including tax, title, license & registration	\$12,760.22				
Mileage at first report of defective condition	183				
Less mileage at delivery	-1				
Unimpaired miles	182				
Mileage on hearing date	435				
Less mileage at first report of defective condition	-183				
Impaired miles	252				
<i>Reasonable Allowance for Use Calculations:</i>					
Unimpaired miles	182	÷	25,000	×	\$12,760.22 = \$92.89
Impaired miles	252	÷	25,000	×	\$12,760.22 × 50% = \$64.31
Total reasonable allowance for use deduction	\$157.21				
Purchase price, including tax, title, license & registration	\$12,760.22				
Less reasonable allowance for use deduction	-\$157.21				
Plus filing fee refund	\$35.00				
Plus incidental expenses	\$42.75 ⁴⁰				
TOTAL REPURCHASE AMOUNT	\$12,680.76				

³⁹ The evidence did not include the actual mileage on the date of repair, December 5, 2022. However, a proxy mileage was calculated (interpolated) based on the mileage on dates reflected in the record.

⁴⁰ The title fees for the replacement vehicle are reimbursed here as an incidental expense.

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 Tex. Admin. Code § 206.66(d).
6. The Complainants or a person on behalf of the Complainants 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 Complainants timely filed the complaint commencing this proceeding. Tex. Occ. Code § 2301.606(d).
9. The Complainants' vehicle qualifies for replacement or repurchase. A warrantable defect that creates a serious safety hazard or 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).

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' 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 Complainants. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainants. 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 **\$12,680.76**. The refund shall be paid to the Complainants 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 Complainants. 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 Complainants 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 § 2001.144.⁴¹ However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainants 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;

⁴¹ 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.

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.

SIGNED May 26, 2023



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