

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0246 CAF**

LINDA BRIENO,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Linda Brieno (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged defects in her 2013 Ford Fiesta. Complainant asserts that the vehicle sputters, shakes, makes noises, and delays the change of gears. Ford Motor Company (Respondent) argued that Complainant has not met the repurchase requirements set forth in the Occupations Code and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect, and Complainant is eligible for replacement relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice 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 August 13, 2014, in Austin, Texas before Hearings Examiner Edward Sandoval and closed that same day. Complainant represented herself at the hearing. Respondent was represented by Brett Castleberry, Field Service Engineer.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a 2013 Ford Fiesta from Red McCombs Ford, in San Antonio, Texas on February 16, 2013, with mileage of 953 at the time of delivery.⁵ On the date of hearing the vehicle's mileage was 30,723. At this time, Respondent's warranty coverage for the vehicle remains in place, with "bumper to bumper" coverage for three years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides for coverage for the powertrain for five years or 60,000 miles.⁶

Complainant testified that in July of 2013, she noticed that the vehicle seemed to sputter, shake, make unusual noises and that the gear changes seemed to be delayed. She immediately took the vehicle to Respondent's authorized dealer, Leif Johnson Ford, Truck City on July 23, 2013. Respondent had previously issued a Technical Service Bulletin (TSB 13-4-5) regarding transmission issues with 2011 through 2013 Fiestas.⁷ The vehicle was inspected and the clutch assembly was replaced per the TSB. In addition, the computer software on the vehicle was reprogrammed and Complainant was advised that she should give the vehicle about 500 miles for it to get used to her driving habits. The vehicle was returned to Complainant on August 9, 2013. The vehicle's mileage when it was taken to the dealership on this occasion was 10,110.⁸ Complainant was provided with a loaner vehicle while her vehicle was being repaired.

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁵ Complainant Ex. 1, Motor Vehicle Buyer's Order and Odometer Disclosure Statement dated February 16, 2013.

⁶ Complainant Ex. 6, New Vehicle Limited Warranty.

⁷ Respondent Ex. 4, Technical Service Bulletin 13-4-5, dated April 8, 2013.

⁸ Respondent Ex. 2, Repair Order dated July 23, 2013.

On September 9, 2013, Complainant took the vehicle to an authorized dealership because she felt the vehicle was again making noises and not shifting properly. Complainant informed the service adviser that the vehicle's transmission was sputtering and that it felt like it was slipping. Respondent had issued another TSB to address concerns with the transmission in these vehicles.⁹ Pursuant to the TSB, the technician reprogrammed the Transmission Control Module (TCM) and performed an "adaptive transmission relearn drive cycle."¹⁰ No other repairs on the vehicle were performed at this time. The mileage on the vehicle when Complainant took it to the dealership on this occasion was 12,920.¹¹ The vehicle was returned to Complainant on September 12, 2013. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

On October 14, 2013, Complainant again took the vehicle to Respondent's authorized dealership for the same issues. The vehicle was inspected by a service technician. The repair order did not indicate that any repairs were made. However, Complainant was advised verbally that the software in the vehicle had been updated. The vehicle's mileage when it was first delivered to the dealer on this occasion was 14,391.¹² The vehicle was returned to Complainant on October 22, 2013. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

In March of 2014, Complainant was driving the vehicle when she heard it make a loud pop. She immediately took the vehicle to a dealership in San Antonio, Texas where she was advised that since the Leif Johnson dealership had been dealing with her transmission issues, it would be best to take the vehicle to that dealership again. On March 19, 2014, Complainant took the vehicle to Respondent's authorized dealership due to the noises she had been hearing. After the repairs were performed, Complainant was advised that the "solenoid" on the vehicle was replaced. The work order indicates that some work was performed to the "actuator assembly – clutch."¹³ The vehicle's mileage when it was delivered to the dealer on this occasion was 22,387.¹⁴ The vehicle was returned to Complainant on April 2, 2014. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

⁹ Respondent Ex. 5, Technical Service Bulletin (TSB) 13-9-4 issued September 5, 2013.

¹⁰ Complainant Ex. 2, Repair Order dated September 9, 2013.

¹¹ *Id.*

¹² Complainant Ex. 3, Repair Order dated October 14, 2013.

¹³ Complainant Ex. 4, Repair Order dated March 19, 2014.

¹⁴ *Id.*

On April 16, 2014, prior to filing a Lemon Law complaint, Complainant wrote a letter to Respondent advising them of her complaints regarding the vehicle and requesting that the vehicle be repurchased, if they could not repair the transmission issues.¹⁵ Respondent had one of its Field Service Engineers, Brett Castleberry, inspect the vehicle on May 11, 2014. He kept the vehicle less than a day. Complainant was not informed of the inspection's findings.

During her rebuttal testimony, Complainant indicated that her concern with the vehicle is more the issue of the car hesitating to accelerate. She feels that it's a safety issue. When she's waiting at a light to turn left, she's scared to turn, because she doesn't want the vehicle to stop or hesitate when she's turning. She feels that's the problem with the vehicle. In addition, she feels that the noises that the vehicle makes are not normal. Also, the fact that they replaced the clutch assembly on one of her visits seems to indicate that there is a problem with the vehicle. The hesitation occurs when the vehicle shakes and rattles both during acceleration and during turns. The vehicle has not stalled on her at any time. She feels that the value of the vehicle has been decreased as a result of these issues with the transmission.

C. Respondent's Evidence and Arguments

Brett Castleberry, Field Service Engineer, testified for Respondent. He indicated that the transmission in question was installed in only two of Respondent's smallest vehicles, the Fiesta and the Focus. The transmission is unique and no other manufacturer uses it. It has unusual characteristics and behavior that a lot of Respondent's customers complain about. Most of the problems with the transmission have involved seal leakages which allow oil to leak onto the clutch. This only requires a seal leakage replacement which was done with Complainant's vehicle on July 23, 2013. On July 28, 2014, Respondent began notifying its customers that they were extending the warranty on the transmission up to 7 years or 100,000 miles.¹⁶ Mr. Castleberry indicated that when he test drove Complainant's vehicle in May of 2014, he did not feel any issues with the vehicle. He said that the transmission makes noises that a lot of people don't like. The vehicle is reliable. It's only exhibiting behavior that Complainant doesn't like. Mr. Castleberry feels that the repairs done to the vehicle were only done to appease her and not because there was anything wrong with the vehicle.

Mr. Castleberry also stated that the vehicle involves an adaptive learning strategy, where the vehicle will begin learning how the owner drives and adapt to the driving style in an effort to achieve fuel economy. While learning the driver's behavior the clutch will slip more and the shifts will be softer until the transmission has adapted to the driver. It can sometimes take up to

¹⁵ Complainant Ex. 7, Lemon Law Complaint dated May 15, 2014, with Letter to Manufacturer dated April 16, 2014.

¹⁶ Respondent Ex. 1, Ford Motor Company form letter for customer satisfaction, Program 14M01, dated August, 2014.

500 miles of driving for the transmission to adapt. It can take longer if there is more than one individual driving the vehicle. With this type of transmission, at low speed, you get a noise from the transmission. The sales people should inform the customers about the transmission and why Respondent installed it in these vehicles. It's basically a manual transmission with a couple of motors so robotically it will shift for the driver, instead of having a regular clutch pedal in the vehicle.

Mr. Castleberry inspected the vehicle on May 11, 2014. At the time, Mr. Castleberry could not duplicate Complainant's concerns and determined that the vehicle was operating properly. He did not feel that it was necessary to conduct any repairs since the concerns could not be duplicated.¹⁷ He did not see any leaks that could be affecting the clutch.

Mr. Castleberry took the vehicle on a test drive on the date of the hearing. During the drive, he experienced excessive clutch slippage while driving. It felt as if the clutch has higher than allowable slippage when shifting into second gear. He also heard "rollover" noise (noise caused by engine harmonics within the transmission) that was on the higher end than normal.

D. Analysis

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on February 16, 2013, and presented the vehicle to an authorized dealer of Respondent due to her concerns with the transmission on the following dates: July 23, 2013, September 23, 2013, October 14, 2013, and March 19, 2014. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.604(a) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately

¹⁷ Respondent Ex. 3, FSE Vehicle Inspection Report dated May 11, 2014.

following the date of the second repair attempt.” The evidence presented at the hearing establishes that Complainant has met the requirements of this test. Complainant presented the vehicle for repairs to an authorized dealer for Respondent on two occasions within the first year or 12,000 miles from purchase. Although the mileage on the vehicle at the second visit was 12,920, Complainant took possession of the vehicle with 953 miles. The Code provides that the mileage needed to establish the presumption that a reasonable number of repair attempts has been undertaken is considered to be the first 12,000 miles from the date of original delivery to the owner. Complainant has met this requirement, as the second repair attempt was conducted when the vehicle was at 11,967 miles from date of delivery. In addition, the next two repair attempts were performed within the next year and the next 12,000 miles. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter dated April 16, 2014, of the issues with the vehicle and providing them with an opportunity to cure of which Respondent availed themselves. The vehicle was inspected on May 11, 2014, by Respondent’s representative who determined that no repairs were necessary at that time.

The evidence indicates that the defect in Complainant’s vehicle creates a serious safety hazard as defined in the Code. The fact that the vehicle does not shift properly impairs Complainant’s ability to control or operate the vehicle for its ordinary use or purposes. In addition, a vehicle that hesitates upon acceleration creates safety issues when the driver is trying to correctly time acceleration to make turns or entering busy or high speed traffic. As such, Complainant has met her burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

In addition, the defect in Complainant’s vehicle substantially impairs its use and market value. The vehicle’s excessive noisiness and transmission slipping makes it less desirable to drive than comparable vehicles. In addition, it can cause the driver to decide that the vehicle is not roadworthy for extended trips which can affect its marketability due to the reduced capacity for use.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant’s request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Linda Brieno (Complainant) purchased a new 2013 Ford Fiesta on February 16, 2013 from Red McCombs Ford, in San Antonio, Texas, with mileage of 953 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper to bumper warranty for 3 years or 36,000 miles, whichever occurs first and a separate powertrain warranty for 5 years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 30,723.
4. At the time of hearing the vehicle was still under warranty.
5. After purchasing the vehicle, Complainant noticed that the vehicle would sputter, shake, and seemed to delay changing gears when she was driving it.
6. Complainant took her vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle, on the following dates:
 - a. July 23, 2013 to August 9, 2013, at 10,110 miles;
 - b. September 9, 2013 to September 12, 2013, at 12,920 miles;
 - c. October 14, 2013 to October 22, 2013, at 14,391 miles; and
 - d. March 19, 2014 to April 2, 2014, at 22,387 miles.
7. Respondent, through its authorized dealer, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
8. The defective condition of Complainant's truck creates a serious safety hazard. A vehicle that hesitates upon acceleration creates safety issues when the driver is trying to correctly time acceleration to make turns or entering busy or high speed traffic.
9. The defective condition of Complainant's vehicle substantially impairs its use and market value. The vehicle's excessive noisiness makes it less desirable to drive than comparable vehicles. In addition, it can cause the driver to decide that the vehicle is not roadworthy for extended trips which can affect its marketability due to the reduced capacity for use.

10. Complainant provided written notice of the defect to Respondent, and Respondent was given the opportunity to inspect the vehicle on May 11, 2014.
11. On May 15, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On June 24, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
13. The hearing convened on August 13, 2014, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself in the hearing. Respondent was represented by Brett Castleberry, Field Service Engineer. The hearing adjourned and the record was closed on that same day.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.

6. Complainant's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2013 Ford Fiesta. Tex. Occ. Code § 2301.604(a)(1).
11. Complainant is not entitled to reimbursement of incidental expenses. Tex. Occ. Code § 2301.604(a); 43 Tex. Admin. Code § 215.209.

IT IS THEREFORE ORDERED that:


1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by 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 this final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$13,475.89**. Complainant is not entitled to reimbursement of incidental expenses. The refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, 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, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration						\$16,043.00	
Mileage at first report of defective condition						10,110	
Less mileage at delivery						<u>-953</u>	
Unimpaired miles						9,157	
Mileage on hearing date						30,723	
Less mileage at first report of defective condition						<u>-10,110</u>	
Impaired miles						20,613	
Reasonable Allowance for Use Calculations:							
Unimpaired miles							
	<u>9,157</u>						
	120,000	X	\$16,043.00	=		\$1,224.21	
Impaired miles							
	<u>20,613</u>						
	120,000	X	\$16,043.00	X .5	=	<u>\$1,377.89</u>	
Total reasonable allowance for use deduction:							\$2,602.11
Purchase price, including tax, title, license and registration						\$16,043.00	
Less reasonable allowance for use deduction						-\$2,602.11	
Plus filing fee refund						<u>\$35.00</u>	
TOTAL REPURCHASE AMOUNT						\$13,475.89	

3. Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;¹⁸
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department; and
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

SIGNED September 3, 2014



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES

¹⁸ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.