

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0249 CAF**

ROSA L. BOTELLO,
Complainant

v.

FORD MOTOR COMPANY,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Rosa L. Botello (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged defects in her 2013 Ford Focus. Complainant asserts that the vehicle jerks during acceleration and when it is placed in park and the engine makes grinding and clicking noises intermittently. 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 not have an existing warrantable defect, and Complainant is not eligible for 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 July 30, 2014, in Corpus Christi, Texas before Hearings Examiner Edward Sandoval and closed on August 13, 2014. Complainant was represented by her friend, Robert Garcia, at the hearing. Both Complainant and Mr. Garcia testified during the hearing. Respondent was represented by Kurt Kindler, Field Service Engineer. Also present at the hearing for Respondent was 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 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 Focus from Sames Ford Lincoln, in Corpus Christi, Texas on October 16, 2012, with mileage of 3 at the time of delivery.⁵ On the date of hearing the vehicle's mileage was 19,243. 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 the vehicle has made unusual noises and jerking during acceleration ever since she first purchased it. She did not think that the noises and jerking were unusual until her friend, Robert Garcia, drove the vehicle. On February 19, 2013, Mr. Garcia took the vehicle in question to Respondent's authorized dealer in order to address some concerns with the vehicle. Mr. Garcia advised the service advisor that he sometimes heard a grinding noise from the left

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

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 dated October 16, 2012.

⁶ Respondent Ex. 3, New Vehicle Limited Warranty.

rear of the vehicle when he turned or accelerated while driving. In addition, Complainant felt that the vehicle had a gas leak, since she saw fuel leaking on the ground. The vehicle was in the dealership for six days during this visit. The service technicians assigned to inspect the vehicle could not duplicate the grinding noise complained of by Complainant. In addition, they could not find any sign of a fuel leak. The vehicle was returned to Complainant without any repairs being made. The vehicle's mileage when it was taken to the dealership on this occasion was 5,206.⁷

On January 9, 2014, Mr. Garcia took the vehicle to an authorized dealership because Complainant felt the vehicle's transmission was slipping. The vehicle was inspected and it was determined that there was a problem with the transmission and that the "transmission was slipping on takeoff."⁸ Respondent had issued a Technical Service Bulletin (TSB) to deal with transmission issues for the Focus for model years 2012-2014.⁹ Pursuant to the TSB, the technician reprogrammed the Powertrain Control Module (PCM), the Transmission Control Module (TCM) and searched for leaks in the transmission. A leak was discovered at the base of the clutch housing. The repair order did not indicate that the leak was repaired.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 13,349. The vehicle was returned to Complainant on January 10, 2014.

On April 22, 2014, Mr. Garcia again took the vehicle to Respondent's authorized dealership for the same issues regarding engine noises and the vehicle jerking. The vehicle was inspected by a service technician who was unable to duplicate Complainant's concerns. The vehicle's mileage when it was first delivered to the dealer on this occasion was 17,027.¹¹ The vehicle was returned to Complainant on April 29, 2014, with no repairs having been made.

On June 12, 2014, Respondent had made arrangements with Complainant to have the vehicle inspected in order to verify the complaints. Respondent had arranged for Complainant to receive a rental vehicle while her vehicle was being inspected. However, when Complainant arrived at the dealership, she refused to leave her vehicle because she wanted to receive a loaner vehicle from the dealership and not a rental vehicle. As a result, Respondent did not have an opportunity for final inspection of Complainant's vehicle.

⁷ Complainant Ex. 2, Repair Order dated February 25, 2013.

⁸ Complainant Ex. 3, Repair Order dated January 9, 2014.

⁹ Respondent Ex. 2, Technical Service Bulletin (TSB) 13-9-4 issued September 5, 2013.

¹⁰ Complainant Ex. 3, Repair Order dated January 9, 2014.

¹¹ Complainant Ex. 4, Repair Order dated April 22, 2014.

During a test drive of the vehicle, Mr. Garcia indicated that he felt that the vehicle was not safe to drive because of the transmission's performance. He is concerned with the hesitation that the vehicle exhibits when he or the Complainant are driving it and accelerating when entering onto a freeway. As such, Complainant is asking for a permanent fix for the vehicle. Complainant wants a reliable vehicle to perform her daily commute.

C. Respondent's Evidence and Arguments

Kurt Kindler, Field Service Engineer, testified for Respondent. He could not address any of the issues with the vehicle because he had not had an opportunity to inspect the vehicle prior to hearing. He testified that a TSB is Respondent's way of identifying common problems with their manufactured vehicles and delivering information to technicians to aid them in repairing these problems. Respondent indicated that there were concerns with the dual clutch assembly on the DPS 6 transmission which is the transmission in Complainant's vehicle. There is a seal near the clutch that sometimes leaks which results in the clutch being covered in fluid thereby causing excessive slippage. The clutch then doesn't provide a direct application between the transmission and engine which can result in the jerking and hesitation described by Complainant. There is a minimal amount of slippage which Respondent has determined is normal and when the diagnostic tools show codes beyond the acceptable parameters this would be determined to be an issue. When Complainant took her vehicle to the dealer to be repaired on January 9, 2014, it was determined that the Parameter Identifiers (PIDS) were within the acceptable range and no repairs were performed. However, the PCM and TCM were reprogrammed and updated.¹² The leak listed on the repair order for January 9, 2014, was not in the location addressed by TSB 13-9-4, since it was at the base of the clutch housing and would not leak into the clutch and wouldn't affect the transmission shifting. Mr. Kindler indicated that the repair order did not indicate that the leak was repaired, although it should have been.

Brett Castleberry, Field Service Engineer, also testified. He stated that Complainant was concerned with a "shudder" in the vehicle, while TSB 13-9-4 addressed the issue of the transmission slipping. The purpose of the clutch is to prevent the transmission from driving the vehicle when you don't want it to. When a person applies pressure on the acceleration pedal of a vehicle, it engages the clutch and the clutch will slip to a certain degree. This occurs with every clutch in every vehicle. The purpose of the test in the TSB is to establish a threshold for dealerships' technicians to be able to interpret whether the vehicle has a problem. Respondent's engineers have assigned a value saying that the clutch under the conditions being tested (which is the accelerator input up to 30%) has an amount of slippage that is within the normal range. If it

¹² Complainant's Ex. 3, Repair Order dated January 9, 2014.

goes beyond that, then it's an indicator of clutch contamination. The only way that the clutch can slip more than is desirable is when it's been contaminated by something that's a lubricant which in this case would be engine oil or transmission fluid. So, in the repair order dated January 9, 2014, the fact that it was within the parameters indicated that the clutch had not been contaminated and no damage was done to the clutch. However, when a person talks about the vehicle "shuddering" they're not talking about clutch slippage but about the feeling of the vehicle.

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 October 16, 2012, and presented the vehicle to an authorized dealer of Respondent due to her concerns with the transmission on the following dates: February 19, 2013, January 9, 2014, and April 22, 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 following the date of the second repair attempt." Complainant has not met the requirements of this test. Complainant did not present the vehicle for repairs to an authorized dealer for Respondent on two occasions within the first year or 12,000 miles from purchase. As such, Complainant was unable to establish 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 failed to provide Respondent with a final opportunity to cure the defect, since they failed to leave the vehicle at the authorized dealership for inspection on June 12, 2014, for personal reasons.

In addition, the transmission issues may not constitute a "serious safety hazard" as defined in the Occupations Code. Section 2301.601(4) of the Code provides that "'serious safety hazard' means a life-threatening malfunction or nonconformity that: (A) substantially impedes a person's ability to control or operate a motor vehicle for ordinary use or intended purposes; or (B) creates a substantial risk of fire or explosion." The transmission issues testified to by Complainant did not substantially impede her ability to control or operate her vehicle for ordinary uses nor did they create a substantial risk of fire or explosion. The vehicle is operable. It has not stalled out or died due to the transmission not operating as intended. Therefore, the hearings examiner finds that there is no defect with the vehicle's transmission as defined in the Occupations Code and, as such, repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for 3 years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for 5 years or 60,000 miles. On the date of hearing, the vehicle's mileage was 19,243 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Rosa L. Botello (Complainant) purchased a new 2013 Ford Focus on October 16, 2012, from Sames Ford Lincoln, in Corpus Christi, Texas, with mileage of 3 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 19,243.
4. At the time of hearing the vehicle was still under warranty.
5. Ever since purchasing the vehicle, Complainant has noticed that the vehicle's engine made grinding noises and that the vehicle would sometimes jerk when being driven.
6. Complainant took her vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle, on the following dates:

- a. February 19, 2013 to February 25, 2013, at 5,206 miles;
 - b. January 9, 2014 to January 10, 2014, at 13,349 miles; and
 - c. April 22, 2014 to April 29, 2014, at 17,027 miles.
7. Complainant's concerns regarding the vehicle could only be duplicated during the January 9, 2014, visit by the dealer's service technicians.
 8. During the January 9, 2014, repair attempt, the vehicle was determined to be operating within the parameters specified by Respondent. The only repairs performed were to update and reprogram the Powertrain Control Module and the Transmission Control Module.
 9. On May 16, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 10. On June 18, 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.
 11. The hearing convened on July 30, 2014, in Corpus Christi, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by her friend, Robert Garcia in the hearing. Complainant also testified. Respondent was represented by Kurt Kindler, Field Service Engineer, and Brett Castleberry, Field Service Engineer. The hearing adjourned on that day. The record closed on August 13, 2014.

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 failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

SIGNED August 28, 2014.



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