

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0007 CAF**

**CATHERINE BAXTER,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Catherine Baxter (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Ford Focus equipped with a PowerShift 6-Speed Automatic Transmission. The Complainant asserted that: the vehicle intermittently produced a grinding noise while accelerating; the vehicle rolled backwards on inclines; and that the clutch shuddered excessively, resulting in the vehicle surging and hesitating. Ford Motor Company (Respondent) argued that the vehicle had been repaired with respect to the excessive clutch shudder and that the other issues were not defects, but rather usual characteristics of the Focus's PowerShift transmission. The hearings examiner concludes that the Complainant failed to timely file her Lemon Law complaint, making the vehicle ineligible for replacement/repurchase relief and that the complained of issues are not manufacturing defects subject to warranty repair or replacement/repurchase relief.

I. Procedural History, Notice and Jurisdiction

Matters of notice were not contested and are addressed only in the Findings of Fact and Conclusions of Law. Matters of jurisdiction are addressed in the Analysis section. The hearing in this case convened on December 18, 2014, in Fort Worth, Texas before Hearings Examiner Anne K. Perez. Michael (Mike) Burns represented the Complainant and Mike Baxter testified for the Complainant. Melinda Steiner, Consumer Legal Analyst, represented Respondent and David Green, Field Service Engineer, testified for the Respondent. The hearing record was closed on June 22, 2015, on the deadline for the Respondent's written submission.

II. Discussion

A. Applicable Law

As an initial matter, to qualify for replacement/repurchase relief, a complainant must commence a Lemon Law complaint “not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.”¹ Furthermore, a warranty must apply to the alleged defect. The Lemon Law only requires repurchase or replacement of a vehicle when the manufacturer is “unable to conform a motor vehicle to an applicable express warranty.”² Additionally, warranty repair relief under Texas Occupations Code § 2301.204 requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”³

B. Complainant’s Evidence and Arguments

The Complainant purchased a new 2013 Ford Focus from North Central Ford (Dealer) in Richardson, Texas on September 18, 2012.⁴ At the time of purchase, the vehicle’s odometer read 20 miles.⁵ The Respondent’s New Vehicle Limited Warranty covers the powertrain for 60 months or 60,000 miles, whichever comes first, beginning from the date of delivery to the first retail purchaser or the day it was first put into service, whichever occurred first.⁶

The Complainant was the sole driver of the vehicle. The Complainant testified that she had continuously experienced three issues with the vehicle:

- (1) The vehicle stuttered and stalled (clutch shudder) in stop-and-go traffic and when making left turns;
- (2) The vehicle made clicking metal sounds and grinding sounds; and

¹ TEX. OCC. CODE § 2301.606(d) (emphasis added).

² TEX. OCC. CODE § 2301.604(a) (emphasis added).

³ TEX. OCC. CODE § 2301.204 (emphasis added).

⁴ Complainant’s Ex. 2, Texas Motor Vehicle Retail Installment Sales Contract.

⁵ Complainant’s Ex. 2, Texas Motor Vehicle Retail Installment Sales Contract.

⁶ Complainant’s Ex. 13, 2013 Model Year Ford Warranty Guide at 2, 8 and 10-11.

(3) The vehicle rolled backwards on inclines if the brake was not applied. The Complainant testified that she estimated that the vehicle rolled back as far as four feet.⁷

The Complainant viewed these issues as safety hazards, since she could collide with other vehicles during clutch shudder episodes or back into others while on inclines, such as a ramp in a parking garage.

On April 20, 2013, the Complainant took her vehicle to the Dealer for an oil change. The Complainant testified that at this service visit, she mentioned her concerns with the transmission to a Dealer employee. The employee did not have an answer for her.⁸ On November 9, 2013, the Complainant returned to the Dealer for another oil change and a tire rotation. The Complainant testified that an employee at the Dealer told her that the clutch shudder and grinding noises were normal.⁹

The Complainant then brought her vehicle back to the Dealer on February 8, 2014, to address the same transmission issues, which became more prevalent after the Complainant began commuting fifteen to twenty minutes in traffic to work in Denton, Texas. The service invoice indicated that the Dealer's technician inspected for a transmission leak, performed an Integrated Diagnostic System (IDS) clutch adaptive learn, and road tested the vehicle. The vehicle tested "OK" according to the service advisor.¹⁰

The transmission issues persisted, which led the Complainant to return to the dealer on April 9, 2014. The service invoice stated, "Condition described is normal operating parameter for this transmission."¹¹ The Complainant's father, Mike Baxter, testified that he asked the service advisor, Tyler Davis, whether he would let his children drive a vehicle with so much clutch shudder. Mr. Davis replied in the negative. Mr. Baxter had gone driving with the Complainant in February 2014 and felt the transmission knocking and slipping, which caused his concern.

⁷ Complainant's Ex. 11, BBB Auto Line Customer Claim Form dated April 12, 2014.

⁸ Complainant's Ex. 6, North Central Ford's Invoice 725127 dated April 20, 2013.

⁹ Complainant's Ex. 7, North Central Ford's Invoice 746005 dated November 9, 2013.

¹⁰ Complainant's Ex. 8, North Central Ford's Invoice 753856 dated February 10, 2014.

¹¹ Complainant's Ex. 9, North Central Ford's Invoice 759475 dated April 10, 2014.

Not satisfied with Mr. Davis' response, the Complainant contacted the Better Business Bureau. After filing a customer claim form via the BBB Auto Line,¹² the Complainant sent a letter to Ford by certified mail requesting a final repair of her vehicle.¹³ At the Dealer on July 1, 2014, David Green, Ford Field Service Engineer, inspected the vehicle for issues with the clutch and rolling backwards on inclines. The Complainant and her father wished to be present but testified that they did not receive a phone call notifying them of Mr. Green's arrival. The inspection occurred without the Complainant and her father present. Mr. Green concluded, "Vehicle is operating within design intent."¹⁴

The Complainant received a letter from Ford in August stating that the PowerShift 6-speed Automatic Transmission found in Complainant's vehicle may "exhibit excessive transmission clutch shudder during light acceleration."¹⁵ The letter extended the limited warranty on the clutch and certain transmission parts to seven years or 100,000 miles.¹⁶ After receiving this letter, the Complainant filed a Lemon Law claim against Ford, alleging defects with the transmission that posed a serious safety hazard. The Texas Department of Motor Vehicles received the Complainant's Lemon Law Complaint Form on September 3, 2014.¹⁷

During a post-hearing conference on June 3, 2015, the Complainant testified that on January 19, 2015, she took her vehicle for a repair attempt (clutch replacement) by the Respondent, which occurred on January 20, 2015, and she picked up the vehicle on January 28, 2015. The Complainant testified that the vehicle's rolling backwards on inclines and acceleration-related issues (unpredictable surging and hesitating) did not improve after the latest repair attempt.

C. Respondent's Evidence and Arguments

First, Ford argued that the Office of Administrative Hearings did not have jurisdiction over the claim because the Complainant's failed to comply with the requirements of Texas Occupations

¹² Complainant's Ex. 11, BBB Auto Line Customer Claim Form dated April 12, 2014.

¹³ Complainant's Ex. 12, letter from Complainant to Ford Motor Company dated May 22, 2014.

¹⁴ Complainant's Ex. 10, North Central Ford's Invoice 767165 dated July 1, 2014.

¹⁵ Complainant's Ex. 4, letter from Ford to Complainant dated August 2014.

¹⁶ Complainant's Ex. 4, Letter from Ford to Complainant dated August 2014.

¹⁷ Complainant's Ex. 1, Lemon Law Complaint Form.

Code § 2301.606(d). Second, Ford asserted that the vehicle functioned as designed and therefore had no defect as required under Texas Occupations Code § 2301.604(a).

At the hearing, Mr. Green addressed each of the Complainant's issues, reviewed his report from July 1, 2014, and inspected the vehicle. The vehicle had 45,309 miles at the time of the inspection.

Mr. Green explained the clutch shudder and grinding noises. He testified that conventional automatic transmissions were fluid driven, which meant they had no mechanical links. In contrast, the "hybrid" automatic-manual transmission on the Ford Focus had mechanical links commonly found in manual transmissions. Relying on a report prepared by Ford, Mr. Green testified that a "trailer-hitching feel" and "take-off shudder" may occur in the PowerShift 6-speed Automatic Transmission, especially during "multiple on/off throttle pedal maneuvers."¹⁸ The Complainant's daily commute required "multiple on/off throttle pedal maneuvers."¹⁹ Mr. Green then explained that grinding noises were common during "trailer-hitching" events.²⁰

Mr. Green then addressed the Hill Start Assist issue. According to the Ford Focus Owner's Manual, the vehicle should remain stationary on a slope for two to three seconds after the driver removes her foot from the brake pedal.²¹ If the driver takes her foot off the brake and does not accelerate within that time frame, the vehicle will roll backwards by design. The vehicle was designed to roll backwards because the clutch could overheat if the vehicle was held in place for longer than three seconds.

During the test drive at the hearing, Mr. Green utilized Ford's IDS to better assess the problems the Complainant identified. Mr. Green noted that quickly depressing and releasing the accelerator would result in the clutch disengaging and engaging, resulting in shuddering. During the test drive, the Hill Start Assist was tested multiple times on a steep hill. The vehicle held for approximately two seconds (consistent with the owner's manual). However, Mr. Green recorded

¹⁸ Respondent's Ex. 1, PowerShift 6-Speed Transmission Operating Characteristics.

¹⁹ Respondent's Ex. 1, PowerShift 6-Speed Transmission Operating Characteristics.

²⁰ Respondent's Ex. 1, PowerShift 6-Speed Transmission Operating Characteristics.

²¹ Complainant's Ex. 14, 2013 Focus Owner's Manual at 187.

440 rpm of clutch slippage at one point, which exceeded the threshold specification of 250 rpm, so the clutch qualified for replacement. The Respondent replaced the clutch in January 2015.

Mr. Green testified that the clutch shudder, grinding noises, and rollback were all common characteristics of the Ford Focus's PowerShift 6-speed Automatic Transmission. Accordingly, Ford did not recognize these issues as defects.

D. Analysis

The vehicle in this case does not qualify for replacement/repurchase or warranty repair. As an initial matter, the Complainant did not timely file the complaint for replacement/repurchase relief. Additionally, the evidence indicates that the vehicle does not have an existing warrantable defect, which makes warranty repair relief (as well as replacement/repurchase relief) inapplicable.

1. Filing Deadline

The Complainant did not timely file a complaint for replacement/repurchase relief. The Lemon Law requires that a "proceeding under this subchapter must be commenced not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner."²² In other words, filing a complaint more than six months after any of these three events: (1) the expiration date of the warranty, (2) 24 months after delivery, or (3) 24,000 miles after delivery, precludes replacement or repurchase relief. The Dealer delivered the vehicle to the Complainant on September 18, 2012, at 20 miles. The vehicle had 25,461 miles (25,441 miles after delivery) at the time of the vehicle's oil change on November 9, 2013. Accordingly, the vehicle exceeded 24,000 miles before November 9, 2013. The Department received the Lemon Law complaint on September 3, 2014, 298 days, approximately 10 months, after the vehicle reached 25,461 miles, accordingly, over 298 days (10 months) had passed since the vehicle reached 24,000 miles. Since the Complainant filed her complaint over six months after the date the vehicle exceeded 24,000 miles, the vehicle does not qualify for replacement/repurchase relief.

²² TEX. OCC. CODE § 2301.606(c) (emphasis added). Although the Respondent characterized the deadline for filing a Lemon Law complaint as jurisdictional, the statute does not specify that the deadline is jurisdictional and does not specify a consequence for noncompliance. Accordingly, the deadline, though mandatory, is not jurisdictional. *In re United Services Automobile Association*, 307 S.W.3d 299, 308 (Tex. 2010).

2. Warrantable Defect

To qualify for warranty repair (as well as for replacement or repurchase), the law requires the existence of a warrantable defect, a defect or condition/nonconformity covered by an applicable warranty.²³ Under 43 TEX. ADMIN. CODE § 215.206.66(d), the Complainant bears the burden of proving by a preponderance of evidence that a warrantable defect exists. In this case, the evidence shows that the characteristics associated with the vehicle's transmission are not warrantable defects, but are inherent to the vehicle's design. Therefore, neither warranty repair nor replacement/repurchase relief apply in this case.

Ford's warranty states that it applies to malfunctions or failures due to a "manufacturing defect in factory-supplied materials or factory workmanship."²⁴ Accordingly, for the warranty to apply, the complained of issue must result from a manufacturing defect (such as the use of an out-of-specification part or incorrect assembly) and not from the vehicle's design, in which case the issues would occur regardless of the quality of the vehicle's parts or assembly (i.e., repair will not resolve a design issue; rather, design issues require redesigning). However, the evidence in this case indicates that the vehicle's issues (shuddering, hesitation, and rolling backwards) arise from the design of the vehicle's PowerShift transmission and not from any manufacturing defect. The evidence shows that Ford's PowerShift transmission, which includes components like a manual transmission, exhibits characteristics like a manual transmission. In particular, Ford's documentation explained that the PowerShift Transmission, because of its design, commonly exhibited the characteristics described by the Complainant, such as double clicking metal sounds, low speed grinding, trailer-hitching feel, etc.²⁵ Additionally, the 2013 Focus Owner's Manual indicated that the vehicle may roll backwards on inclines:

This feature [Hill Start Assist] makes it easier to pull away when your vehicle is on a slope without the need to use the parking brake. When this feature is active, the vehicle will remain stationary on the slope for two to three seconds after you release the brake pedal.²⁶

²³ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁴ Complainant's Exhibit 13, 2013 Model Year Ford Warranty Guide at 9 (emphasis added).

²⁵ Respondent's Exhibit 1, PowerShift 6-Speed Transmission Operating Characteristics, September 27, 2012.

²⁶ Complainant's Exhibit 14, 2013 Focus Owner's Manual at 186 (emphasis added).

Consistent with the owner's manual and other Ford documentation, Mr. Green testified that the vehicle was designed to only hold still for two or three seconds to avoid overheating the clutch. In sum, all of the existing complained of issues relate to the vehicle's transmission design.

Although the vehicle's complained of characteristics may be undesirable or problematic, these characteristics arise from the design of the vehicle, specifically the dual dry-clutch PowerShift Transmission, and not from any manufacturing defect. The Lemon Law, with its scope limited to warrantable defects, does not apply to issues arising from the design of the vehicle. Because the vehicle's existing complained of characteristics are not due to any manufacturing defects, the warranty does not apply and the vehicle does not qualify for warranty repair relief under TEX. OCC. CODE § 2301.204 (or for replacement/repurchase under TEX. OCC. CODE § 2301.604(a)).

III. Findings of Fact

1. Catherine Baxter (Complainant) purchased a 2013 Ford Focus (vehicle) on September 18, 2012, from North Central Ford in Richardson, Texas, with 20 miles at the time of purchase.
2. The vehicle's manufacturer, Ford Motor Company, the Respondent, provided a limited warranty with powertrain coverage for 60 months or 60,000 miles, whichever comes first.
3. Respondent's warranty covers malfunctions or failures due to manufacturing defects in factory-supplied materials or factory workmanship.
4. The Respondent extended the warranty on the clutch and certain transmission parts to seven years or 100,000 miles.
5. The Complainant experienced the following issues with her vehicle: clutch shudder, clicking and grinding noises, and rolling backwards on inclines.
6. The vehicle employs a dry clutch automatic transmission, which exhibits characteristics similar to that of a manual transmission.
7. Due to the transmission's design, the vehicle may: exhibit a "trailer-hitching feel" from the clutch engaging/disengaging; emit clicking and grinding noises from gear engagement and bearing rotation; and roll backwards on inclines when the Hill Start Assist deactivates to avoid overheating the clutch.

8. The vehicle's mileage on November 9, 2013, was 25,461 miles.
9. The Texas Department of Motor Vehicles (Department) received the Complainant's Lemon Law Complaint Form on September 3, 2014.
10. On October 23, 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 December 18, 2014, in Fort Worth, Texas before Hearings Examiner Anne K. Perez. Complainant, Michael (Mike) Burns represented the Complainant. Melinda Steiner, Consumer Legal Analyst, represented the Respondent. Mr. David Green, Field Service Engineer, testified for the Respondent. The hearing record was closed on June 22, 2015, on the deadline for the Respondent's written submission.
12. During the inspection and test drive at the hearing, Mr. Green found that the clutch slippage exceeded the Respondent's specifications and the vehicle qualified for a clutch replacement to alleviate some of the clutch shudder.
13. The Respondent replaced the clutch on January 20, 2015.
14. The Complainant continued to experience acceleration-related issues and rolling backwards on inclines.

IV. Conclusions of Law

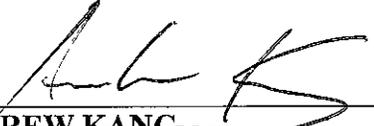
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE § 2301.601-2301.613 (Lemon Law); TEX. OCC. CODE § 2301.204.
2. Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
3. Complainant did not timely file her Lemon Law complaint. TEX. OCC. CODE § 2301.606(d).

4. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition covered by Respondent's warranty that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604.
5. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. TEX. OCC. CODE § 2301.204.
6. Complainant has not shown by a preponderance of the evidence that the vehicle has any currently existing defects subject to repair under the Respondent's warranties. TEX. OCC. CODE § 2301.204.
7. Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED July 24, 2015



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