

**TYTEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0133 CAF**

**REYES CONSTRUCTION,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Reyes Construction (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in its 2013 Dodge Ram 3500. The Complainant asserted that the vehicle's engine made a knocking noise. FCA US LLC (Respondent) argued that the knocking noise was not a warrantable defect. The hearings examiner concludes that the Complainant did not prove the existence of a warrantable defect. Therefore, the Complainant's vehicle does not qualify for repurchase or replacement.

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 and the record closed on July 8, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. Steven Stricklin, attorney, represented the Complainant. Andres Reyes, owner of Reyes Construction, testified for the Complainant. David "Dave" Polsinelli, attorney, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for the Respondent.

II. Discussion

A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer is "unable to conform a motor vehicle to an applicable

express warranty.”¹ Additionally, warranty repair under Section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”² Accordingly, for a vehicle to be eligible for repurchase or replacement, or even warranty repair, the vehicle must have a defect under an applicable warranty (warrantable defect). The Complainant must prove the existence of a warrantable defect by a preponderance, that is, the evidence must show that a warrantable defect more likely than not exists.³

Further, for a vehicle to qualify for replacement or repurchase, a warrantable defect must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle despite a “reasonable number of attempts” at repair.⁴ The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that 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 Under the Lemon Law, a rebuttable presumption is established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁶

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

⁶ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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.

However, the statutory presumption does not preclude otherwise finding that a reasonable number of attempts to repair the vehicle have been undertaken.⁷

B. Complainant's Evidence and Arguments

The Complainant purchased a new 2013 Dodge Ram 3500 from Brown Dodge Chrysler Jeep (Brown) of Devine, Texas, on August 28, 2013. The vehicle's mileage at the time of purchase was 20.⁸ The vehicle came with basic limited warranty coverage for three years or 36,000 miles from the date of delivery, whichever comes first.⁹

Mr. Reyes testified that even during the pre-purchase test drive at the dealership, the engine was louder than that of other trucks that he owned in the past. However, Brown told Mr. Reyes that the sound was normal and would go away after the engine had broken in. The sound did not subside but instead grew louder. Random individuals at the gas station and auto parts store noticed the knocking and brought it to Mr. Reyes's attention.

On August 4, 2014, Mr. Reyes returned to Brown, stating that his engine made a knocking noise. Brown could not duplicate the problem so Mr. Reyes retrieved the vehicle. The mileage at this visit is unknown since Brown apparently combined two service visits into a single invoice.¹⁰

Seeking a second opinion, Mr. Reyes took the vehicle to Lone Star Chrysler Dodge Jeep (Lone Star) in San Antonio, Texas, on August 11, 2014, at 5,641 miles. The technician there heard the knocking noise and tried to correct it by replacing a torn serpentine belt. However, replacing the belt did not reduce the noise. The technician also ran an injector kill test.¹¹ Mr. Reyes testified that he tried to trade in the vehicle at this time, but that Lone Star would not accept the vehicle due to concerns with the noise.

On September 1, 2014, Mr. Reyes returned the vehicle to Brown for the same knocking issue. Brown could not duplicate the concern. The vehicle had 5,721 miles at the time Mr. Reyes

⁷ "[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.'" *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

⁸ Complainant's Ex. 8, Finance Statement.

⁹ Complainant's Ex. 9, 2013 Ram Truck 1500/2500/3500 Diesel Warranty Information.

¹⁰ Complainant's Ex. 2, Service Invoice 84160 (no invoice date).

¹¹ Complainant's Ex. 3, Service Invoice 233014 dated August 30, 2014.

retrieved the vehicle on September 9, 2014.¹² On September 4, 2014, the Complainant sent written notice of the defect to the manufacturer. Mr. Reyes made one final visit to Brown on September 19, 2014 at 6,040 miles. During this visit, Brown again failed to duplicate the knocking noise.¹³

On October 23, 2014, at 6,137 miles, Mr. Reyes brought the vehicle, at the Respondent's request, to Allways Atascosa Dodge (Allways) in Pleasanton, Texas. A technician inspected the vehicle; the technician noted that the knocking noise was a "little louder than normal." The technician indicated that he would need to remove the valve cover to inspect further, but Mr. Reyes declined further testing and consequently the technician performed no further work.¹⁴

At the hearing, the vehicle was taken for a test drive. Mr. Reyes stated that he ordinarily heard the noise after driving the vehicle and then idling. A knocking noise could be heard. The mileage at the time of the hearing, before the test drive, was 7,268 miles.

C. Respondent's Evidence and Arguments

Mr. Ritchey has worked for the Respondent for over 29 years and has been a technical advisor since 1994. He has a four year automotive technology degree with a business minor. He is also certified in numerous areas, including engines and engine performance, through the National Institute for Automotive Service Excellence (ASE).

On July 1, 2015, Mr. Ritchey inspected the vehicle at Allways. An Allways technician participated in this inspection. Both Mr. Ritchey and the technician heard a knocking noise. The technician indicated that the noise came from the injector pump. Mr. Ritchey testified that he did not believe the noise was a defect. He explained that he heard the same noise from the engines of numerous Dodge Ram 3500s. During the inspection, Mr. Ritchey had the technician at Allways compare the Complainant's vehicle to a new 2015 Dodge Ram 3500. But the vehicles did not exhibit any difference in engine noise. Mr. Ritchey noted that the 2013 and 2015 Dodge Ram 3500s had the same engine. The vehicle's mileage at the time of inspection was 7,143. Mr. Ritchey checked the vehicle for low oil causing excessive engine vibration. The electronic gauge on the

¹² Complainant's Ex. 2, Service Invoice 84160 (no invoice date).

¹³ Complainant's Ex. 4, Service Invoice 85353 (no invoice date).

¹⁴ Complainant's Ex. 5, Service Invoice 54755 dated November 11, 2014.

dashboard showed the oil level as normal.¹⁵ However, the engine's dipstick showed the oil level as low.¹⁶ Mr. Ritchey explained that low oil levels could cause engine issues, including loud knocking.

During cross examination, Mr. Reyes affirmed that the vehicle never broke down, that he never had any loss of control of the vehicle and he never had any concern of fire or explosion because of the complained of noise. In sum, the Respondent concluded that the vehicle had no warrantable defect and that the noise was normal for a diesel engine.

D. Analysis

To qualify for Lemon Law relief, a vehicle must have a warrantable defect. The Complainant bears the burden of proving that the alleged defect exists. Although Mr. Reyes observed that the Complainant's vehicle produced a different noise than other diesel vehicles he had operated in the past, a preponderance of the evidence does not show that the present vehicle's noise is a defect. Mr. Ritchey testified that the noise was normal and that other Dodge Ram 3500s made the same sound. During the inspection at Allways, Mr. Ritchey had the Allways technician compare the Complainant's vehicle side-by-side with a new 2015, Dodge Ram 3500 and the vehicles exhibited the same noise. During the inspection at the hearing, the vehicle did make the complained of noise, but this noise did not appear out of the ordinary. Furthermore, as confirmed by Mr. Reyes and as observed during the test drive at the hearing, the noise did not have any noticeable effect on the vehicle's performance. Though the sound from the Complainant's vehicle may differ from the sound of other diesel vehicles, the evidence does not support that the complained of sound from the Complainant's vehicle is a warrantable defect outside of normal parameters for this particular model. Accordingly, the Complainant's request for repurchase or replacement relief is denied.

¹⁵ Respondent's Ex. 3, photo of oil gauge on dashboard.

¹⁶ Respondent's Ex. 5, photo of dipstick.

III. Findings of Fact

1. The Complainant purchased a new 2013 Ram 3500 from Brown Dodge Chrysler Jeep (Brown) of Devine, Texas, on August 28, 2013. The vehicle's mileage at the time of purchase was 20.
2. The manufacturer's basic limited warranty covers the vehicle for three years or 36,000 miles from the date of delivery, whichever comes first.
3. The vehicle had 7,268 miles at the time of the hearing.
4. The Complainant took the vehicle for repair to address the knocking noise issue on the following dates and with the following vehicle miles:
 - a. August 4, 2014, at unknown miles;
 - b. August 11, 2014, at 5,641 miles;
 - c. September 1, 2014, at 5,721 miles;
 - d. September 19, 2014, at 6,040 miles; and
 - e. October 23, 2014, at 6,137 miles.
5. During the inspection on July 1, 2015, Mr. Stuart Ritchey noted that the vehicle performed normally and sounded like other Ram 3500s.
6. At the July 1, 2015, inspection checking the vehicle's dipstick revealed a low engine oil level.
7. Low engine oil levels can cause knocking.
8. During the inspection at the hearing, the hearings examiner heard the complained of noise, but the noise did not appear unusual.
9. The vehicle did not exhibit any unusual performance characteristics.
10. On January 20, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On February 3, 2015, the Complainant mailed written notice of the issues to the Respondent.
12. On April 16, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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 in this case convened and the record closed on July 8, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. Steven Stricklin, attorney, represented the Complainant. Andres Reyes, owner of Reyes Construction, testified for the Complainant. Dave Polsinelli, attorney, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for the Respondent.

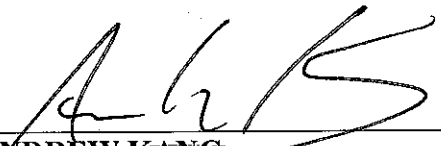
IV. Conclusions of Law

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant failed to prove that the vehicle has a warrantable defect. TEX. OCC. CODE § 2301.604(a).
7. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.
8. The 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 the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED September 4, 2015



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