

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0191 CAF**

**FRANK L. HOLOBINKO,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Frank L. Holobinko (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in his 2013 Ford F-150. The Complainant claimed that the vehicle made an intermittent popping noise. Ford Motor Company (Respondent) argued that the noise was not a defect, but was inherent to the engine's design. The hearings examiner concludes that the Complainant failed to prove the existence of a warrantable defect in the vehicle. Accordingly, the Complainant's vehicle is not eligible for repurchase or 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 and the record closed on June 23, 2015, in Texarkana, Texas, before Hearings Examiner Andrew Kang. The Complainant, Frank L. Holobinko, represented himself. Maria Diaz, Consumer Affairs Legal Analyst, represented the Respondent. Assad Bashir, Technical Specialist, 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.

B. Complainant’s Evidence and Arguments

The Complainant purchased a new 2013 Ford F-150 from McLarty Ford (Dealer) of Texarkana, Texas, on April 26, 2014.³ The vehicle’s odometer showed 33 miles at the time of purchase.⁴ The vehicle’s powertrain warranty lasts for three years or 36,000 miles, whichever comes first; the emissions defects warranty lasts for three years or 36,000 miles, whichever comes first; and the emissions performance warranty lasts for two years or 24,000 miles, whichever comes first.⁵

The Complainant testified that he primarily drove the subject vehicle and that his wife may have driven the vehicle a few miles. The Complainant stated that he drove the vehicle daily and that he drove to and from work. The Complainant stated that the vehicle produced a random and frequent popping noise. The Complainant stated that between March and April of 2015 the noise occurred “constantly” and he could hear the noise while stopped and when idling, but the noise subsequently occurred occasionally. When the noise occurred, he explained that the vehicle would emit a pop every three to four seconds, varying in volume. He noted that the noise did not affect the vehicle’s performance.

On the morning of October 2, 2014, the Complainant heard a thumping noise in the left wheel well area while his vehicle idled. At the Dealer, the technician told the Complainant that the wastegates opening and closing caused the noise; the technician detected no other sound.⁶ On October 13, 2014, the Complainant brought the vehicle back to the Dealer because he heard a

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ Complainant’s Ex. 1, Motor Vehicle Purchase Order.

⁴ Complainant’s Ex. 3, Odometer Disclosure Statement.

⁵ Complainant’s Ex. 14, 2013 Model Year Ford Warranty Guide at 8, 12.

⁶ Complainant’s Ex. 6, Repair Order 233884 dated October 4, 2014.

popping noise in the engine area. The noise would occur after the engine had warmed up. The technician replaced the right turbocharger assembly because the technician believed the noise originated from there. The technician also replaced the exhaust flange due to frozen studs.⁷

Replacing the turbocharger assembly did not eliminate the noise, so the Complainant returned to the Dealer on October 21, 2014. During this visit, the technician diagnosed the source of the popping noise as the right catalytic converter shell. The technician replaced the catalytic converter and the technician could not duplicate the noise.⁸ On January 13, 2015, the Complainant again heard a noise coming from the engine area. At the Dealer, the technician replaced the catalytic converter and the noise was not detected.⁹

On February 4, 2015, the Complainant mailed written notice to the Respondent, providing the Respondent with a final opportunity to repair the vehicle.¹⁰ On March 4, 2015, a Ford service engineer investigated the issue of the popping or thumping noise in the vehicle's engine area. The Ford field service engineer concluded that the vehicle was operating properly.¹¹ The Complainant filed a Lemon Law complaint on March 12, 2015, citing the popping noise.¹²

C. Respondent's Evidence and Arguments

Assad Bashir, a technical consultant for the Respondent, testified that the Complainant's Ford F-150's EcoBoost engine can make the complained of noise. Mr. Bashir has held his position as a technical consultant with Ford's Customer Service Division since 2010. In this position, Mr. Bashir assists customer service managers and customers when a customer or dealer on a customer's behalf contacts Ford, and he works with Ford Engineering as a liaison between engineering and customer service. Prior to his current position, Mr. Bashir worked with Ford's extended service plans. Before coming to Ford he worked as an independent mechanic, certified in automatic transmissions, gas and diesel engines.

⁷ Complainant's Ex. 7, Repair Order 234460 dated October 17, 2014.

⁸ Complainant's Ex. 8, Repair Order 234982 dated November 26, 2014.

⁹ Complainant's Ex. 10, Repair Order 239734 dated January 21, 2015.

¹⁰ Complainant's Ex. 13, Written Notice to Respondent.

¹¹ Complainant's Ex. 11, Repair Order 242613 dated March 13, 2015.

¹² Complainant's Ex. 12, Lemon Law Complaint Form.

Mr. Bashir testified that the operation of various components of the vehicle's EcoBoost engine can make a popping noise. He explained that the Complainant's vehicle has a twin turbo charged V6 with direct injection and variable cam timing, together referred to as EcoBoost, which provides the power of a larger engine, like a V8, with a smaller V6 engine. Mr. Bashir explained that the EcoBoost engine's wastegates, which open to reduce (turbo) boost pressure at certain times, and turbo bypass valves can make popping noises. Mr. Bashir also testified that the most likely cause of the noise was the operation of the EcoBoost engine's variable cam timing. The noise also depended on driving conditions, ambient temperatures, and other factors of that nature. Mr. Bashir noted that the Complainant first noticed the vehicle making noise with the vehicle standing after driving 20 miles on the freeway, which was consistent with what the variable cam timing would do under those conditions. As temperatures rise, to reduce emissions, the EcoBoost system uses cam timing to create "overlap", which opens the intake valve earlier and leaves the exhaust valve open later to draw exhaust gas back into the combustion chamber to burn remaining hydrocarbons. Previously, engines employed an EGR (exhaust gas recirculation) valve to recirculate the exhaust gas into the combustion chamber to burn remaining hydrocarbons. Variable cam timing can accomplish what the EGR valve did by changing when the valves open and close (creating overlap). The overlap creates a "scavenging effect" in which the exhaust gas in the manifold, just before the catalytic converter, gets drawn back into the combustion chamber and re-burns the gas to burn any hydrocarbons leftover from the combustion process. Mr. Bashir noted that the engine coolant would have to be at the right temperature for the vehicle to create the overlap condition, which would explain why the condition was not always evident. Mr. Bashir concluded that the overlap can create the noise described by the Complainant. Mr. Bashir noted that the field service engineer (at the March 4, 2015, inspection) reached this same conclusion after comparing the noise of the Complainant's vehicle with other like vehicles and finding that the noise was comparable.

During the inspection and test drive, Mr. Bashir explained that the noise would more likely occur after driving the vehicle for a while, since the condition depends on the heat (which ambient weather conditions may affect), and getting the vehicle to operating temperature and then letting the vehicle sit at idle to reduce airflow. While idling, the vehicle produced a dull, hollow thumping/popping sound (which the Complainant identified as the complained of

condition), which comported with the warm ambient conditions and low airflow conducive to the noise as explained by Mr. Bashir.

D. Analysis

Repurchase/replacement under the Lemon Law and warranty repair do not apply to all problems with a vehicle, such as conditions caused by the design of the vehicle. Under the Texas Occupations Code, repurchase/replacement and warranty repair only apply to defects covered by an applicable warranty.¹³ Moreover, Ford's warranty provides that "Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship."¹⁴ In this case, the complained of noise appears to result from the particular design of the vehicle's EcoBoost system and not from a manufacturing defect. During the inspection at the hearing, the vehicle produced a popping noise while idling in warm ambient temperatures, consistent with Mr. Bashir's description of the EcoBoost's overlap condition designed to burn excess hydrocarbons. Furthermore, prior instances of the complained of noise also appear consistent with the overlap condition. Although the noise may be undesirable, the evidence indicates that the noise results from the design of Ford's EcoBoost system and not from a manufacturing defect. However, to qualify for repurchase or replacement or warranty repair relief, the law requires the existence of warrantable defect. Since the complained of condition arises from the intended design of the vehicle and not from any defective materials or workmanship, the Complainant's vehicle is not eligible for replacement or repurchase or warranty repair relief.

III. Findings of Fact

1. On April 26, 2014, Frank L. Holobinko (Complainant) purchased a new Ford F-150 with 33 miles on the odometer from McLarty Ford (Dealer) of Texarkana, Texas.

¹³ TEX. OCC. CODE §§ 2301.204, 2301.603 and 2301.604(a).

¹⁴ Complainant's Ex. 14, 2013 Model Year Ford Warranty Guide at 9 (emphasis added). The manufacturer similarly covers emissions defects and emissions performance. Complainant's Ex. 14, 2013 Model Year Ford Warranty Guide at 18 and 19.

2. The vehicle's powertrain warranty lasts for three years or 36,000 miles, whichever comes first; the emissions defects warranty lasts for three years or 36,000 miles, whichever comes first; and the emissions performance warranty lasts for two years or 24,000 miles, whichever comes first.
3. The Complainant took the vehicle to the Dealer on the following dates to address the vehicle's popping noise:
 - a. October 2, 2014, at 9,812 miles;
 - b. October 13, 2014, at 10,133 miles;
 - c. October 21, 2014, at 10,356 miles;
 - d. January 13, 2015, at 14,592 miles; and
 - e. March 4, 2015, at 16,755 miles.
4. During the inspection at the hearing, the vehicle produced a popping noise while idling.
5. The popping noise resulted from the design of the vehicle's EcoBoost engine.
6. On March 12, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
7. 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.
8. 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 June 23, 2015, in Texarkana, Texas, before Hearings Examiner Andrew Kang. The Complainant, Frank L. Holobinko, represented himself. Maria Diaz, Consumer Affairs Legal Analyst, represented the Respondent. Technical Consultant Assad Bashir 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 defect covered by the Respondent's warranty. 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 August 20, 2015



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