

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0213 CAF**

**VIVIAN D. MCDOWELL,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Vivian D. McDowell (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Chrysler Town & Country minivan. Complainant asserts that the vehicle's transmission "clunks" and "bangs" when shifting gears. FCA US LLC (Respondent) argued that the vehicle does not have any defects 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 and the record was closed on October 21, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant was represented by Margaret M. Connolly, attorney. Complainant, Vivian D. McDowell, appeared and testified at the hearing. Respondent was represented by Matthew Beatty, attorney. Stuart Ritchey, Technical Advisor, appeared and testified for Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2014 Chrysler Town & Country minivan from Gillman Chrysler-Jeep-Dodge in Houston, Texas (Gillman) on April 24, 2014, with mileage of 170 at the time of delivery.⁷ On the date of hearing the vehicle's mileage was 12,921. At this time, Respondent's warranty coverage for the vehicle remains in place, with coverage for three (3) years or 36,000 miles from the date of purchase, whichever comes first. In addition, Respondent's powertrain warranty provides for coverage for the powertrain for five (5) years or 100,000 miles from the date of purchase.

Complainant testified that she feels that there is a problem with the vehicle's transmission. She stated that she hears a "clunk" whenever she's driving the vehicle and shifts gears. This occurred 17 times in 20 days from February 15, 2015 to March 15, 2015. Complainant testified that she is afraid to drive the vehicle, since she doesn't know if the transmission is going to go out while she's driving. In addition to the clunking noise, Complainant testified that she feels the vehicle shaking or shimmying when she's driving it.

Complainant testified that she first noticed a problem with the vehicle's transmission in October of 2014. On October 31, 2014, Complainant took the vehicle to Gillman for repair. Complainant informed the dealer's service advisor that she was having transmission issues with the vehicle and informed them of the sounds she was hearing when she shifted gears. In addition, Complainant asked that an oil change and multi-point inspection be performed on the vehicle. Complainant does not know whether the dealer's service advisor inspected the vehicle's transmission. (The repair order for the vehicle did not indicate that any work was performed on the vehicle's transmission.⁸) The vehicle's mileage when Complainant turned it over to the

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 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.

⁷ Complainant Ex. 1, Buyer's Order and Odometer Disclosure Statement dated April 24, 2014.

⁸ Complainant Ex. 2, Repair Order dated October 31, 2014.

dealer was 10,134.⁹ Complainant received a rental vehicle from the dealer while her vehicle was being repaired.

Complainant testified that after getting the vehicle back, she continued to intermittently hear a clanking noise from the transmission when she shifted gears while driving the vehicle. On December 5, 2014, Complainant took the vehicle to Gillman for repair. In addition to her concern regarding the clanking noise from the transmission, Complainant informed the dealer's service advisor that she heard a rattle noise from the front of the vehicle, the driver's side seat squeaked when she sat or moved in it, and the engine was making a whining noise.¹⁰ The dealer's service technician determined that the noise from the transmission was normal for the vehicle.¹¹ In addition, he could not duplicate Complainant's concerns regarding the rattle noise or the whining noise from the engine.¹² So, no action was taken on these issues. In regards to the driver's side squeaking, the technician added lubricant to the seat gear and rail which resolved the issue.¹³ The vehicle's mileage at the time of the repair was 10,682.¹⁴ The vehicle was in the dealer's possession for seven days. Complainant was provided with a rental vehicle from the dealer for this period of time.

After the December 5, 2014, repair visit, the vehicle drove fine for a while. However, after a few weeks Complainant started to hear the clunking noises from the transmission again. So, on March 9, 2015, she took the vehicle to Gillman for repair. The dealer's service technician could not find any problems with the vehicle's transmission during this repair visit.¹⁵ The vehicle's mileage at the time of the repair was 12,305.¹⁶ The vehicle was in the dealer's possession for a day. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On March 17, 2015, Complainant mailed a letter to Respondent informing them of her dissatisfaction with the vehicle.¹⁷ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on April 7, 2015.¹⁸

After filing the Lemon Law complaint, Complainant was contacted by Respondent's representative in regard to a final repair attempt on the vehicle. The final repair attempt was conducted on June 2, 2015, at Gillman. After inspecting the vehicle, Respondent's technical

⁹ *Id.*

¹⁰ Complainant Ex. 3, Repair Order dated December 5, 2014.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 4, Repair Order dated March 9, 2015.

¹⁶ *Id.*

¹⁷ Complainant Ex. 6, Letter to Chrysler Group Customer Care dated March 17, 2015.

¹⁸ Complainant Ex. 5, Lemon Law Complaint dated April 7, 2015. Complainant signed and dated the complaint on March 31, 2015. However, the complaint was not received by the Texas Department of Motor Vehicles until April 7, 2015, which is the effective date of the complaint.

advisor determined that the vehicle was operating as designed.¹⁹ No repairs were performed on the vehicle. The vehicle's mileage on this occasion was 12,382.²⁰ The vehicle was in the dealer's possession for six days. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant testified that the vehicle was shaking on the date of hearing when she drove it to the hearing location. Complainant had not driven the vehicle very much in the weeks leading up to the hearing because she was afraid to drive it. She's afraid that the transmission will go out and leave her stranded.

During cross-examination, Complainant testified that she has two complaints about the vehicle: the clunking noise from the transmission and the vehicle shaking and shimmying when she's driving. None of the repair orders indicated that she had a concern with the vehicle shaking. In addition, Complainant testified that she is more concerned with the clunking noise than the vehicle shaking.

During the October 31, 2015, repair visit, Complainant asked the dealer's service advisor if they had checked the vehicle's transmission. She could not recall what the advisor's response was. Complainant also testified that she could not remember if she asked the service advisor to inspect the vehicle's transmission during this repair visit.

Complainant testified that she told the dealer's service advisor on December 5, 2014, that the vehicle was shaking when she was driving it. However, this was not included on the repair order. Complainant did not question the service advisor as to why the shaking issue was not included on the repair order. When the vehicle was returned to Complainant, she was told by the dealer's representatives that nothing was wrong with the vehicle. She was told that the noise she was hearing was a normal condition of the vehicle.

Complainant testified that she could not recall if she raised the issue of the vehicle shaking when she took the vehicle to the dealer for repair on March 9, 2015. Complainant did indicate to the dealer's service advisor that she had concerns with the vehicle's transmission.

Complainant testified that she could not recall if she raised the issue of the vehicle shaking or shimmying during the final repair attempt on June 2, 2015.

Complainant testified that the vehicle has never failed on her. She's never been stranded when driving the vehicle.

¹⁹ Complainant Ex. 7, Repair Order dated June 2, 2015.

²⁰ *Id.*

C. Respondent's Evidence and Arguments

Stuart Ritchey, Technical Advisor, has worked for Respondent for over 29 years. He's worked as a technical advisor for Respondent since 1995. He has a four year degree in automotive technology. He has Automotive Service Excellence (ASE) certifications in eight disciplines.

Mr. Ritchey testified that he performed the final repair attempt on Complainant's vehicle. The final repair attempt took place on June 2, 2015, at Gillman. Mr. Ritchey stated that during the repair, he first performed a visual inspection of the vehicle and then attached a scan tool to the vehicle to ascertain whether there were any fault codes stored in the vehicle's computer. He cold started the vehicle and then shifted the gears to try to recreate Complainant's concern. Mr. Ritchey test drove the vehicle and kept an eye on the tachometer to ascertain if the engine's RPM's were fluctuating. Mr. Ritchey testified that he did not see anything abnormal while taking the test drive. In addition, there were no fault codes stored in the vehicle's computer. Mr. Ritchey testified that he did not hear any abnormal clanking noises when shifting gears. In addition, he did not feel that there were any throttle issues with the vehicle. He did not feel a shimmy or shake in the vehicle when he was test driving it. However, he did state that the powertrain (transmission) can have slack and if the driver shifts fast enough, then they can force a clunking sound, but it is not a loud clunk.

Mr. Ritchey testified that he feels that the vehicle is working as designed. He did not find any issues with the vehicle and did not hear any loud clunking noise. He does not feel that there is a defect with the vehicle. In addition, he does not feel that there are any safety issues with the vehicle.

D. Analysis

Under the 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 the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on January 7, 2014 and presented the vehicle to Respondent's authorized dealer due to her concerns with the vehicle's transmission making a loud clunking noise when she shifts gears on: October 31, 2014; December 5, 2014; and March

9, 2015. 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 2301.605(a)(1) specifies 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.” The evidence presented at the hearing establishes that Complainant has not met the requirements of this test since Complainant has presented the vehicle for repair three times since the date of purchase. As such, Complainant has not met the presumption that Respondent has been provided with a reasonable number of attempts to repair the vehicle.

At the time of hearing, Complainant also raised the issue of the vehicle shaking or shimmying. However, she did not include this issue in the original Lemon Law complaint. Since the issue was not included on the complaint, it cannot be addressed in this decision.

In order to grant repurchase or replacement relief, Complainant must have provided Respondent with a reasonable number of repair attempts to conform the vehicle to its warranty. Since Respondent was not provided an adequate opportunity to repair the vehicle, the hearings examiner cannot award repurchase or replacement relief.

Respondent’s express warranty applicable to Complainant’s vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 100,000 miles. On the date of hearing, the vehicle’s mileage was 12,921 and it remains under this warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainants’ request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Vivian D. McDowell (Complainant) purchased a new 2014 Chrysler Town & Country minivan on April 24, 2014, from Gillman Chrysler–Jeep–Dodge in Houston, Texas, with mileage of 170 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent) issued a warranty for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 100,000 miles.
3. The vehicle’s mileage on the date of hearing was 12,921.

4. At the time of hearing the vehicle was still under warranty.
5. Complainant took the vehicle to Respondent's authorized dealer, Gillman Chrysler-Jeep-Dodge in Houston, Texas, in order to address her concerns with the vehicle's transmission making an usual clunking noise when shifting gears on the following dates:
 - a. October 31, 2014, at 10,134 miles;
 - b. December 5, 2014, at 10,682 miles; and
 - c. March 9, 2015, at 12,305 miles.
6. On October 31, 2014, no work was performed on the vehicle's transmission by the dealer's service technician, despite Complainant's request that it be looked at.
7. On December 5, 2014, the dealer's service technician determined that the noise heard by Complainant was normal and no repairs were performed for this issue.
8. On March 9, 2015, the dealer's service technician could not find any problem with the vehicle's transmission, so no repairs were performed for this issue.
9. On March 31, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On June 2, 2015, Respondent's technical advisor, Stuart Ritchey, performed a final repair attempt on the vehicle. Mr. Ritchey determined that the vehicle's transmission was operating as designed.
11. On June 18, 2015, 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.
12. The hearing in this case convened and the record was closed on October 21, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant was represented by Margaret M. Connolly, attorney. Complainant, Vivian D. McDowell, appeared and testified at the hearing. Respondent was represented by Matthew Beatty, attorney. Stuart Ritchey, Technical Advisor, appeared and testified for 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. 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 Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a 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, 2301.603.
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 §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED November 16, 2015



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