

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0270 CAF**

GINGER M. GRAY,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FCA US LLC	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ginger M. Gray (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Jeep Cherokee. Complainant asserts that the vehicle is defective because the vehicle’s transmission intermittently hesitates and fails to shift gears or shifts gears late. FCA US LLC (Respondent) argues that the vehicle does not have a defect and is performing as designed. The hearings examiner concludes that the vehicle has an existing warrantable defect. Therefore, Complainant is eligible for 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 September 10, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Ginger M. Gray, appeared and represented herself. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. 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 owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, Section 2301.605 of the Occupation Code specifies that there are three tests which can establish a rebuttable presumption that a reasonable number of attempts have been undertaken by a Respondent to conform a motor vehicle to an applicable express warranty. The first test provides that if the same nonconformity continues to exist after being subject to repair four or more times and: (A) 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 (B) 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, then Complainant has established that Respondent has been provided with a reasonable number of attempts to repair the vehicle.⁵ The second test applies to a nonconformity that creates a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupation Code and requires that the same nonconformity continue to exist and the vehicle has been subject to repair two or more times and: (A) at least one repair attempt was made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (B) at least one other repair attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁶ The third test provides that Complainant can establish a rebuttable presumption that a reasonable number of attempts to conform a motor vehicle to an applicable express warranty if a nonconformity continues to exist which substantially impairs the vehicle's use or market value and (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁷ However, the Occupations Code also provides that the 30 day period described by this section does not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.⁸

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁸ Tex. Occ. Code § 2301.605(c).

B. Complainant's Evidence and Arguments

Complainant purchased a new 2014 Jeep Cherokee from Helfman Dodge-Chrysler-Jeep-Ram (Helfman) in Houston, Texas, on August 11, 2014.⁸ The vehicle's mileage at the time of delivery was 24.⁹ Respondent provided a basic limited warranty for the first three (3) years or 36,000 miles on the odometer, whichever comes first. In addition, Respondent provided a five (5) year or 100,000 mile powertrain warranty for the vehicle. The vehicle's mileage on the date of hearing was 15,007.

Complainant testified that she first started noticing a problem with the vehicle's transmission around March 30, 2015. She has a one hour commute to and from work each day. She testified that while driving the vehicle in lower gears the vehicle's transmission doesn't shift properly. The vehicle's engine's RPM's will rev up, but the transmission doesn't shift gears immediately. There's a hesitation and then the transmission will have a hard shift. This happens intermittently when she's driving the vehicle and doesn't occur when she's driving over 40 miles per hour.

On March 30, 2015, Complainant took the vehicle to Helfman for a recall. The dealer's service technician performed two programming updates: one for the vehicle's transmission and one for the vehicle's airbag module, both of which were required under the recall.¹⁰ The vehicle's mileage at the time of the repair visit was 8,279.¹¹ The vehicle was in the dealer's possession for one to two days while the recall was performed. Complainant paid for a rental vehicle while her vehicle was being repaired.

On April 21, 2015, Complainant took the vehicle to Helfman because the vehicle's transmission failed. Complainant was driving the vehicle to work when the transmission locked up and the check engine light illuminated. When the transmission locked up, Complainant was instructed by the vehicle's trouble-shooting system to put the transmission in park and then to any other gear. After a couple of attempts the vehicle shifted into gear and she was able to drive the vehicle to Helfman for repair. The dealer's service technician found a fault code stored in the vehicle's computer.¹² (The technician replaced the vehicle's valve body [v-body] and internal harness.)¹³ Complainant indicated that she was told by Helfman's representative that the technician had replaced the vehicle's "heart and brain." The vehicle was in Helfman's possession for two to

⁸ Complainant Ex. 1, Motor Vehicle Motor Vehicle Retail Installment Sales Contract dated August 11, 2014.

⁹ Complainant Ex. 2, Odometer Disclosure Statement dated August 11, 2014.

¹⁰ Complainant Ex. 3, Summary History Printout dated May 7, 2015, p. 3.

¹¹ *Id.*

¹² *Id.*, pp. 2-3.

¹³ *Id.*

three days while it was being repaired. Complainant was provided with a rental vehicle while her vehicle was being repaired. The mileage on the vehicle at the time of this repair was 9,165.¹⁴

After picking up the vehicle from Helfman, Complainant felt that the vehicle was still driving the same and that the transmission was not acting properly. So, Complainant took the vehicle to Helfman on April 29, 2015, for the service technician to have another look at the vehicle's transmission. The dealer's service technician could not duplicate Complainant's concerns, so no repairs were performed on this visit. The mileage on the vehicle at the time of the repair was 9,455.¹⁵ The vehicle was in the dealer's possession for two to three days. Complainant was provided with a rental vehicle while her vehicle was being repaired.

Complainant continued to drive the vehicle and felt that there was still an issue with the vehicle's transmission. She took the vehicle to Helfman on May 7, 2015, for repair to the transmission. The dealer's service technician test drove the vehicle and could not duplicate Complainant's concern. In addition, he did not discover any trouble codes on the vehicle's computer system. No repairs were done to the vehicle during this visit. The mileage on the vehicle when taken to Helfman on this occasion was 9,790.¹⁶

On May 26, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).¹⁷ Complainant also mailed a notice letter to Respondent on May 7, 2015, advising them of Complainant's dissatisfaction with the vehicle.¹⁸

Complainant testified that Respondent was provided with a final repair attempt on the vehicle on August 4, 2015.

Complainant testified that she doesn't feel safe driving the vehicle. She's afraid that the vehicle will fail on her when she's driving on the freeway. She stated that the vehicle's transmission intermittently refuses to shift. Complainant testified that sometimes there's as much as a four second gap between the time she steps on the gas pedal and the time that the transmission shifts gears.

¹⁴ *Id.*

¹⁵ *Id.*, p. 2.

¹⁶ *Id.*

¹⁷ Complainant Ex. 8, Lemon Law Complaint dated May 20, 2015. Although the complaint was signed by Complainant on May 20, 2015, it was not received by the Department until May 26, 2015, which is the effective date of the complaint.

¹⁸ Complainant Ex. 4, Letter to Chrysler Group LLC dated May 7, 2015.

C. Respondent's Evidence and Arguments

Stuart Ritchey, Technical Advisor, testified for Respondent. He has worked as a technical advisor for Respondent since 1994. Prior to his employment in that capacity, Mr. Ritchey worked as a district parts and service manager from 1986 through 1994 for Respondent. He has a four year degree in automotive technology.

Mr. Ritchey testified that he performed a final repair attempt on the vehicle on August 4, 2015, at Helfman. Mr. Ritchey testified that he initially walked the vehicle to see if there was any physical damage to it. He then attached a scan tool to the vehicle to see if the computer had any fault codes. Mr. Ritchey testified that there were no codes. In addition, the vehicle's check engine light was not illuminated. He then test drove the vehicle and attempted to duplicate Complainant's concerns. He testified that he attempted to drive the vehicle through all the gear ranges and tried to get it to act up. Mr. Ritchey checked the vehicle's clutch volumes to see if there was any slippage or if the transmission was skipping gears. After the test drive, Mr. Ritchey updated ("flashed") the vehicle's transmission software pursuant to the instructions from a technical service bulletin issued by Respondent. No other repairs were performed on the vehicle at the time. Mr. Ritchey determined that the vehicle's transmission was operating correctly.

Mr. Ritchey testified that he did not see or feel anything abnormal during the test drive of the vehicle taken by the parties on the hearing date. He stated that the vehicle feels normal and is safe to drive. The vehicle was shifting fine. Mr. Ritchey stated that since the vehicle has a nine (9) speed transmission, the lower gear ranges will be "busy." If you're driving in fifth or sixth gear and you slow down, it will drop to a lower gear and you will feel a bump. As time goes on, it's not severe.

During cross examination, Mr. Ritchey testified that the vehicle has an adaptive learning transmission. This means that the transmission will adapt to the driver's driving habits. The transmission will fine tune to whoever drives the vehicle. He testified that there was nothing wrong with the vehicle and that it was functioning properly.

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.

Respondent argues that the vehicle has been repaired, is operating as designed, and has no defect. However, the first-hand testimony reveals that Complainant is experiencing a hard shift in the vehicle's transmission and a hesitation in the transmission shifting gears. Complainant's testimony was that sometimes there is as much as a four (4) second gap between the time that she steps on the vehicle's accelerator and the vehicle actually shifts gears. This creates a safety hazard, since Complainant cannot rely on the vehicle to respond promptly in an emergency situation. The intermittent nature of the condition increases the safety risk and substantially impedes Complainant's ability to control or operate the vehicle for ordinary use or intended purposes. Complainant has met her burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Moreover, the defect in Complainant's vehicle substantially impairs its use and market value. An unimpaired vehicle with similar mileage should not behave in such a manner.

Complainant purchased the vehicle on August 11, 2014, and presented the vehicle to an authorized dealer of Respondent due to her concerns with the vehicle's transmission on April 21, 2015; April 29, 2015; and May 7, 2015. (Complainant also was required to submit the vehicle to the dealer to perform a recall on March 30, 2015, but this repair visit to the dealer did not appear to be because of any concerns with the vehicle that she may have had at the time.) 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)(2) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair a vehicle that has a nonconformity that creates a safety hazard have been made if at least one repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt. Complainant has met the requirements of this test and Respondent has been provided a reasonable number of attempts to conform Complainant's vehicle to the applicable express warranty.

Finally, Complainant did serve written notice of her dissatisfaction with the vehicle to Respondent when she mailed them a notice letter on May 7, 2015. Respondent was provided with a final opportunity to repair the vehicle on August 4, 2015.

When a Complainant establishes that relief under the Lemon Law is appropriate, the manufacturer may be required to repurchase the motor vehicle, or replace the motor vehicle with a comparable motor vehicle. Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case.

Based on the above analysis, the hearings examiner orders Respondent to repurchase Complainant's vehicle as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Ginger Gray (Complainant) purchased a new 2014 Jeep Cherokee from Helfman Chrysler-Jeep-Dodge-Ram (Helfman) in Houston, Texas, on August 11, 2014. The vehicle's mileage was 24 at the time of delivery.
2. The manufacturer of the vehicle, FCA US LLC (Respondent), issued a limited warranty for the vehicle for the first three (3) years or 36,000 miles, whichever comes first.
3. The vehicle's mileage on the date of hearing was 15,007.
4. At the time of hearing the vehicle's basic express warranty was still in effect.
5. Complainant feels that the vehicle's transmission hesitates and fails to shift or shifts late when she's driving the vehicle.
6. On March 30, 2015, Complainant took the vehicle to Helfman in order to have a recall performed. Helfman's service technician performed two recalls, one of which required reprogramming the vehicle's transmission, as well as updating the vehicle's air bag module.
7. Complainant took the vehicle to Helfman on the following dates in order to address Complainant's concerns with the vehicle's transmission:
 - a. April 21, 2015, at 9,165 miles;
 - b. April 29, 2015, at 9,455 miles; and
 - c. May 7, 2015, at 9,790 miles.
8. On April 21, 2015, Helfman's service technician replaced the vehicle's valve body and internal harness in order to address the vehicle's transmission issues, after the vehicle's transmission had locked up and refused to operate correctly.

9. On April 29, 2015, Helfman's technician was unable to duplicate the concern raised by Complainant, so no repairs were performed.
10. On May 7, 2015, Helfman's technician was unable to duplicate the concern raised by Complainant, so no repairs were performed.
11. On May 7, 2015, Complainant mailed a letter to Respondent advising them of her dissatisfaction with the vehicle.
12. On May 26, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On August 4, 2015, Stuart Ritchey, Technical Advisor, performed a final repair attempt and inspection on the vehicle.
14. During Respondent's final repair attempt, Mr. Ritchey performed a programming update on the vehicle's transmission. He determined that the vehicle was operating as designed and that no other repairs were required.
15. On August 13, 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.
16. The hearing in this case convened and the record closed on September 10, 2015, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Ginger M. Gray, appeared and represented herself. Respondent was represented by Jan Kershaw, Early Resolution Case Manager. 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's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2014 Jeep Cherokee. Tex. Occ. Code § 2301.604(a)(1).
11. Complainant is not entitled to reimbursement of incidental expenses. Tex. Occ. Code § 2301.604(a); 43 Tex. Admin. Code § 215.209.

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in this final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$23,527.87**. The total refund of **\$23,527.87** shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$26,118.18
Delivery mileage	24
Mileage at first report of defective condition	9,165
Mileage on hearing date	15,007
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$26,118.18
Mileage at first report of defective condition		9,165			
Less mileage at delivery		<u>-24</u>			
Unimpaired miles		9,141			
Mileage on hearing date		15,007			
Less mileage at first report of defective condition		<u>-9,165</u>			
Impaired miles		5,842			
Reasonable Allowance for Use Calculations:					
Unimpaired miles		<u>9,141</u>			
	120,000		X	\$26,118.18	= \$1,989.55
Impaired miles		<u>5,842</u>			
	120,000		X	\$26,118.18 X .5	= <u>\$635.76</u>
Total reasonable allowance for use deduction:					\$2,625.31
Purchase price, including tax, title, license and registration					\$26,118.18
Less reasonable allowance for use deduction					-\$2,625.31
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$23,527.87

3. Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);.
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;¹⁹
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

¹⁹ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.

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 **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED October 16, 2015



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