

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0294 CAF**

ASHLY N. DOLLAR	§	BEFORE THE OFFICE
and DAN A. BAKER, JR.,	§	
Complainants	§	
v.	§	OF
	§	
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ashly N. Dollar and Dan A. Baker, Jr. (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2014 Ford Focus. Complainants assert that the vehicle is defective because it shudders during acceleration and deceleration. Ford Motor Company (Respondent) argues that the vehicle has been repaired and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired and does not have an existing warrantable defect. Therefore, Complainants are 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 closed on October 1, 2015, in Ft. Worth, Texas, before Hearings Examiner Edward Sandoval. Complainants, Ashly N. Dollar and Dan A. Baker, Jr., appeared and testified at the hearing. Respondent was represented by Maria T. Diaz, Legal Analyst for Consumer Affairs.

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: (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, then Complainants have 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. The third test provides that Complainants 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.⁶ 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.⁷

B. Complainants' Evidence and Arguments

Complainants purchased a new 2014 Ford Focus from Respondent's authorized dealer, AutoNation Ford (AutoNation), located in Burleson, Texas, on April 26, 2014.⁸ The vehicle's mileage at the time of delivery was 102.⁹ Respondent provided a limited bumper-to-bumper warranty for the vehicle for the first three (3) years or 36,000 miles after purchase of the vehicle. In addition, Respondent provided a five (5) year or 75,000 mile powertrain warranty for the vehicle. The vehicle's mileage on the date of hearing was 27,638.

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)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainants Ex. 1, Retail Purchase Agreement dated April 26, 2014.

⁹ Complainants Ex. 2, Odometer Disclosure Statement dated April 26, 2014.

Dan Baker testified that he first noticed a problem with the vehicle sometime in late May or early June of 2014. He felt that the vehicle would shudder excessively when he accelerated from a stop. He stated that it felt like the vehicle's transmission was slippery. After a while, Mr. Baker scheduled an appointment with AutoNation to take the vehicle in for repair for the shudder issue.

Mr. Baker first took the vehicle to AutoNation for repair on September 23, 2014. The dealer's service technician verified Mr. Baker's concern. The technician updated and reprogrammed the vehicle's power control module (PCM) and the transmission control module (TCM).¹⁰ In addition, the technician performed a transmission adaptive relearn for the vehicle.¹¹ Mr. Baker was informed by the dealer's representative that the vehicle's throttle positioning sensor was out of calibration with the transmission. The vehicle's mileage on this repair visit was 10,414.¹² The vehicle was in the dealer's possession for one to two days. Mr. Baker was provided with a rental vehicle while his vehicle was being repaired.

The vehicle drove fine for a few days after the September 23, 2014, repair. However, the vehicle again began to shudder during acceleration. Mr. Baker decided to take the vehicle back to AutoNation on November 12, 2014, in order to repair the shudder issue. During this repair visit, the dealer's service technician verified "a slight shudder on take off."¹³ The technician updated and reprogrammed the vehicle's PCM and TCM and performed a transmission adaptive relearn.¹⁴ The vehicle's mileage when it was taken for repair on this occasion was 12,745.¹⁵ The vehicle was in the dealer's possession for two days. Mr. Baker was provided with a rental vehicle while his vehicle was being repaired.

The vehicle drove fine for a while after the reprogramming of the PCM and TCM, but then began to shudder again. Mr. Baker took the vehicle back to AutoNation on May 11, 2015, in order to have the shudder issue addressed. The dealer's service technician verified that the vehicle shuddered when accelerating or shifting gears.¹⁶ The technician updated the vehicle's PCM and TCM and performed a transmission adaptive relearn.¹⁷ He determined that the clutch was beyond Respondent's specifications and indicated that new clutches were on back order.¹⁸ Mr. Baker was not informed that the clutch was on back order at the time. He was not informed that he needed to return the vehicle to the dealer in order to complete the repairs. The vehicle's mileage on this occasion was 22,507.¹⁹ Mr. Baker was not provided with a rental vehicle during this repair visit.

¹⁰ Complainants Ex. 3, Repair Order dated September 23, 2014.

¹¹ *Id.*

¹² *Id.*

¹³ Complainants Ex. 4, Repair Order dated November 12, 2014.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainants Ex. 5, Repair Order dated May 11, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Mr. Baker took the vehicle to AutoNation on May 26, 2015, because it was again shuddering whenever he accelerated when driving it. During this visit, the dealer's service technician informed Mr. Baker that a replacement clutch had to be special ordered. He was told that since the clutch was on back order, it would take about three months in order to obtain a replacement clutch for the vehicle. The vehicle's mileage at the time of this repair visit was 22,747.²⁰

On May 27, 2015, Complainants mailed a letter to Respondent informing them of Complainants' dissatisfaction with the vehicle.²¹ Complainants filed a Lemon Law complaint with an effective date of June 22, 2015.²²

After filing the Lemon Law complaint, Mr. Baker was contacted by Maria Diaz, Legal Analyst for Consumer Affairs for Respondent. Ms. Diaz asked whether Respondent would be allowed to perform a final repair attempt on the vehicle. The final repair attempt was eventually scheduled for August 10, 2015, at AutoNation. The final repair attempt was delayed until Respondent could ensure that the necessary parts were available to address the clutch issue. Mr. Baker testified that the vehicle's clutch was replaced during the final repair attempt. Respondent's field engineer road tested the vehicle and did not find any leaks in the clutch. The engineer had Mr. Baker pick up the vehicle after determining that the repairs were complete and that there were no issues with the vehicle. Mr. Baker was provided with a loaner vehicle while his vehicle was being repaired.

Mr. Baker testified that he has not experienced any shudder in the vehicle while driving it after the August 10, 2015, final repair attempt. Mr. Baker also stated that he had purchased an extended warranty for the vehicle, in addition to the basic three (3) year, 36,000 mile warranty.

During cross examination, Mr. Baker testified that the vehicle would shudder during acceleration and deceleration. However, the vehicle has not shuddered since the final repair.

Ashly Dollar testified that she and Mr. Baker drive the vehicle equally. She stated that since the vehicle was fixed, she has not experienced any shuddering. Prior to the final repair, however, each time they took the vehicle for repair, then the shuddering would get worse. She said that it felt like a major shudder when she was at a stop sign or stop light and the vehicle was accelerating.

²⁰ Complainants Ex. 9, Repair Order dated May 26, 2015.

²¹ Complainants Ex. 7, Letter to Respondent dated May 27, 2015.

²² Complainants Ex. 6, Lemon Law Complaint Form dated June 8, 2015. Although the complaint was signed and dated by Complainants on June 8, 2015, the effective date of the complaint is the date it was received by the Texas Department of Motor Vehicles (TxDMV), June 22, 2015.

C. Respondent's Evidence and Arguments

Maria T. Diaz, Legal Analyst for Consumer Affairs, testified that the vehicle was repaired on August 10, 2015, during Respondent's final repair attempt. She stated that Respondent assigned Brent Hochgraber, Field Service Engineer, to oversee the final repair attempt which was performed at AutoNation, Respondent's authorized dealer. A replacement clutch for the vehicle had been ordered by AutoNation's service technician on May 26, 2015. The vehicle's clutch assembly was replaced on August 10, 2015.²³

Ms. Diaz testified that Respondent provided a basic warranty of three (3) years or 36,000 miles for Complainants' vehicle. In addition, Respondent provided a five (5) year or 75,000 mile warranty for the vehicle's powertrain. Also, Respondent had offered additional coverage for the vehicle's transmission under a loyalty program, thereby providing an additional warranty for the transmission for 72 months or 100,000 miles.

Ms. Diaz testified that every time that the vehicle's PCM and TCM were updated and reprogrammed, the dealer's technicians had to perform an adaptive relearn for the vehicle. This enables the vehicle's transmission to relearn the driver's driving habits which is a feature of the transmission.

D. Analysis

Under the Lemon Law, Complainants bear 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, Complainants 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, Complainants are 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, Complainants are entitled to have the vehicle repurchased or replaced.

Occupations Code § 2301.603 provides that "a manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer's converter's or distributor's express warranty." In the present case, the evidence indicates that Complainants' concerns with the vehicle have been addressed and that the vehicle has been repaired. Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer's warranty. If a vehicle has been repaired then no relief can be possible. The Lemon Law requires that in order for a vehicle to be determined to be a

²³ Complainants Ex. 8, Repair Order dated August 10, 2015.

“lemon” the “nonconformity continues to exist” after the manufacturer has made repeated repair attempts.²⁴ In the present case, the evidence reveals that the vehicle has been fully repaired and that it currently conforms to the manufacturer’s warranty. Therefore, the hearings examiner finds that there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainants is not warranted.

Respondent’s express warranty applicable to Complainants’ vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 75,000 miles. On the date of hearing, the vehicle’s mileage was 27,638 and it remains under this warranty. As such, the 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. Ashly N. Dollar and Dan A. Baker, Jr. (Complainants) purchased a new 2014 Ford Focus on April 26, 2014, from AutoNation Ford (AutoNation) located in Burleson, Texas, with mileage of 102 at the time of delivery.
2. Respondent issued a three (3) year or 36,000 mile bumper-to-bumper warranty for the vehicle. In addition, Respondent provided a five (5) year or 75,000 mile powertrain warranty for the vehicle.
3. The vehicle’s mileage on the date of hearing was 27,638.
4. At the time of hearing the vehicle’s warranty was still in effect.
5. Complainants took the vehicle to AutoNation on the following dates in order to address the issue of the vehicle shuddering during acceleration:
 - a. September 23, 2014, at 10,414 miles;
 - b. November 12, 2014, at 12,745 miles;
 - c. May 11, 2015, at 22,507 miles; and
 - d. May 26, 2015, at 22,747 miles.

²⁴ Tex. Occ. Code § 2301.605.

6. On September 23, 2014, the dealer's service technician verified that the vehicle's clutch shuddered. He updated and reprogrammed the vehicle's power control module (PCM) and transmission control module (TCM). As well as performed a transmission adaptive relearn on the vehicle.
7. On November 12, 2014, the dealer's service technician verified that the vehicle shuddered during acceleration. He updated and reprogrammed the vehicle's PCM and TCM. As well as performed a transmission adaptive relearn on the vehicle.
8. On May 11, 2015, the dealer's service technician verified that the vehicle shuddered during acceleration. He updated and reprogrammed the vehicle's PCM and TCM. As well as performed a transmission adaptive relearn on the vehicle. The technician indicated on the repair order that a replacement clutch was on back order.
9. On May 26, 2015, the dealer's service technician verified that the vehicle shuddered on acceleration. The technician indicated on the repair order that a replacement clutch was special ordered.
10. On June 22, 2015, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On August 10, 2015, Respondent performed a final repair attempt on the vehicle. Brent Hochgraber, Field Service Engineer, oversaw the replacement of the vehicle's clutch assembly during this repair.
12. On July 24, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
13. 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 October 1, 2015, in Ft. Worth, Texas, before Hearings Examiner Edward Sandoval. Complainants, Ashly N. Dollar and Dan A. Baker, Jr., appeared and testified at the hearing. Respondent was represented by Maria T. Diaz, Legal Analyst for Consumer Affairs.


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. Complainants 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. Complainants bear the burden of proof in this matter.
6. Complainants 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. Complainants' 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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED October 7, 2015



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