

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0325 CAF**

**JOSEPH P. ROLF,  
Complainant**

**v.**

**FCA US LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Joseph P. Rolf (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by FCA US LLC (Respondent). The hearing examiner concludes that the Complainant's vehicle does not have a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 December 15, 2015, in Edna, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. In addition, Steve Heun, Area Parts and Service District Manager, testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

##### a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially 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.<sup>4</sup>

##### b. Substantial Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

**c. Reasonable Number of Repair Attempts**

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.<sup>6</sup> The first applies generally,<sup>7</sup> the second applies to serious safety hazards,<sup>8</sup> and the third applies to vehicles out of service for repair for at least 30 days.<sup>9</sup> The general presumption is the most relevant here. Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts 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.<sup>10</sup>

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>11</sup> Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.<sup>12</sup>

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<sup>6</sup> TEX. OCC. CODE § 2301.605(a).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> 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.

<sup>11</sup> “[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).

<sup>12</sup> “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

**d. Other Requirements**

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.<sup>15</sup>

**2. Warranty Repair Relief**

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."<sup>16</sup>

**3. Burden of Proof**

The law places the burden of proof on the Complainant.<sup>17</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.<sup>18</sup> For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

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<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204.

<sup>17</sup> 43 TEX. ADMIN. CODE § 215.206.66(d).

<sup>18</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

### A. Complainant's Evidence and Arguments

On December 16, 2014, the Complainant, purchased a new 2014 Dodge Ram 1500 from Don Davis Motor Co., Inc. a franchised dealer of the Respondent, FCA US LLC, in El Campo, Texas.<sup>19</sup> The vehicle had 363 miles on the odometer at the time of purchase.<sup>20</sup> The vehicle's basic warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.<sup>21</sup>

The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/23/15	2,614	Vibration at 60-65 mph <sup>22</sup>
03/24/15	5,155	Vibration at 50-70 mph <sup>23</sup>
05/18/15	7,930	Vibration over 30 mph <sup>24</sup>
06/09/15	8,796	Smooth road vibration at highway speeds <sup>25</sup>
08/06/15	11,318	Smooth road vibration driving highway speeds <sup>26</sup>

The Complainant testified that the pulling issue had been corrected and that only the vibration issue remained. He explained that his vehicle vibrated, shaking in the seats and console but not the steering wheel or accelerator. He first experienced the worst vibration probably the day after Christmas 2014. He noted that he never noticed the vibration to be too bad until higher speed, anywhere from 60 to 75 mph. The Complainant stated that after the repair attempts, he could still feel the vibration, but the vibration was not as bad as before the repairs. The Complainant stated that the vibration was worse at higher speeds, 70 to 72 mph, and when pulling a trailer. Though he added that he did not know whether trailer's tires contributed to the vibration. The Complainant testified that the vehicle vibrated basically every time he drove it. He confirmed that the vibration did not affect the vehicle's performance. The Complainant explained that he could notice the vibration more on smooth roads because he could distinguish between the vehicle's vibration and vibration from the road surface.

<sup>19</sup> Complainant's Ex. 1, Buyer's Order.

<sup>20</sup> Complainant's Ex. 2, Odometer Disclosure Statement.

<sup>21</sup> Complainant's Ex. 5, Coverages Report.

<sup>22</sup> Complainant's Ex. 10, Invoice No. 160631.

<sup>23</sup> Complainant's Ex. 9, Invoice No. 161662.

<sup>24</sup> Complainant's Ex. 8, Invoice No. 162864.

<sup>25</sup> Complainant's Ex. 7, Invoice No. 163334.

<sup>26</sup> Complainant's Ex. 6, Invoice No. 164732.

On July 7, 2015, the Complainant mailed a written notice of defect to the Respondent. On July 14, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle vibrates and pulls to the left.

### **B. Respondent's Evidence and Arguments**

After the Complainant test drove his vehicle with Mr. Heun and the dealer's service manager, the Complainant test drove a new, same-model vehicle from the dealership for comparison. The Complainant testified that the new comparison vehicle actually vibrated worse than his vehicle. The Complainant affirmed that the vibration did not impair the use of the vehicle. Mr. Heun testified that the present type of complaint ("smooth road vibration"), typically involves a wheel and/or tire issue. Mr. Heun outlined the measures to address the vibration, including road force balancing and reinstalling the driveshaft after rotating it 180 degrees. Mr. Heun explained that the road force balancing involve mounting the tire to match the variations in the thickness and sidewall stiffness in the tire with the variations/warping in the wheel. Mr. Heun testified that he thought the road force balancing improved the ride quality. With regard to the driveshaft, if bent or unbalanced, the 180 degree rotation should have changed the vibration, but the vibration did not change. Next, Mr. Heun explained that the vehicle's Multi-Displacement System (MDS) will shut down four of the eight cylinders at certain speeds and throttle pressures as a fuel economy measure. If driving in the threshold window between eight and four cylinders, the engine may oscillate between eight and four cylinders, which may be experienced as vibration. Pressing the accelerator hard would activate all eight cylinders (thereby stopping the oscillation); however, MDS was eliminated as a cause since the vibration did not change with the speed. With these possible causes eliminated, the next step was to randomly pick a new (same model) vehicle to compare with the subject vehicle. In the present case, the Complainant's vehicle had less vibration than the new comparison vehicle because his vehicle was specifically tuned to reduce vibration. Mr. Heun confirmed that the Complainant's vehicle's level of vibration was inherent to the vehicle's design.

### **C. Inspection and Test Drive**

Mr. Heun brought a same model vehicle as the Complainant's (except not equipped with four-wheel drive) to the hearing for comparison purposes. Mr. Heun explained that a two-wheel drive vehicle would drive better than a four-wheel drive version because of less weight and fewer

moving parts. The Complainant's vehicle appeared to perform normally during its test drive. After test driving the comparison vehicle, the Complainant answered that the comparison vehicle felt a little smoother than his vehicle. The vibration of the Complainant's vehicle did not appear to differ substantially from the comparison vehicle.

#### D. Analysis

The Complainant's vehicle does not have a warrantable defect subject to repurchase/replacement or warranty repair relief. The Lemon Law does not apply to every issue a person may have with a vehicle, such as characteristics arising from the design of the vehicle. Instead, the Lemon Law's replacement/repurchase relief, as well as warranty repair, only apply to warrantable defects. For the warranty to apply, the complained of issue must result from a defect in materials or workmanship, a manufacturing defect, rather than the vehicle's design. A manufacturing defect occurs when the vehicle varies from the manufacturer's intended design (such as incorrect assembly or the use of a substandard part).<sup>27</sup> In contrast, design characteristics result from the vehicle's intended design and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer's specifications will normally have the same characteristics.

The issue here hinges on whether the complained of vibration constitutes a warrantable defect. In this case, the evidence indicates that the complained of vibration is a normal characteristic of the vehicle's design. During the test drive, the vehicle exhibited vibration. The Complainant found this same level of vibration to be excessive. However, the evidence shows that other like model vehicles vibrate similarly or even more, as shown by the Complainant's test drive with a new comparison vehicle at the dealership and the test of the comparison vehicle at the hearing. Although the vehicle's vibration may be undesirable, the vehicle's vibration appears inherent to the design of that model and not the result of a manufacturing defect. Because the vibration does not arise from a manufacturing defect, the vehicle does not have a warrantable defect subject to repurchase/replacement or warranty repair relief.

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<sup>27</sup> See *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004).

### III. Findings of Fact

1. On December 16, 2014, the Complainant, purchased a new 2014 Dodge Ram 1500 from Don Davis Motor Co., Inc. a franchised dealer of the Respondent, FCA US LLC, in El Campo, Texas. The vehicle had 363 miles on the odometer at the time of purchase.
2. The vehicle's basic warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
02/23/15	2,614	Vibration at 60-65 mph
03/24/15	5,155	Vibration at 50-70 mph
05/18/15	7,930	Vibration over 30 mph
06/09/15	8,796	Smooth road vibration at highway speeds
08/06/15	11,318	Smooth road vibration driving highway speeds

5. A new, like-model vehicle randomly-chosen from the dealer's inventory vibrated worse than the Complainant's vehicle during a test drive at the final repair attempt.
6. On July 7, 2015, the Complainant mailed a written notice of defect to the Respondent.
7. On July 14, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle vibrates, more noticeably at 50 to 70 mph, and pulls to the left.
8. The pulling issue was corrected.
9. On October 6, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, FCA US LLC, 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.
10. The hearing in this case convened and the record closed on December 15, 2015, in Edna, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself.

Jan Kershaw, Early Resolution Case Manager, represented the Respondent. In addition, Steve Heun, Area Parts and Service District Manager, testified for the Respondent.

11. The vehicle's odometer displayed 18,206 miles at the time of the hearing.
12. The vehicle operated normally during the test drive at the hearing and the vibration did not differ substantially from a same model comparison vehicle driven on a test drive at the hearing.

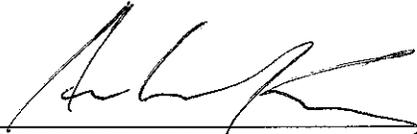
#### IV. Conclusions of Law

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 sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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 § 206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. 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.

**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 February 12, 2016**



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