

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0335 CAF**

**ROBERT SOLIS, JR.,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Robert Solis, Jr. (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 hearings examiner concludes that a preponderance of the evidence does not show the existence of 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 hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on December 2, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainant represented himself. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. In addition, Stuart Ritchey, Technical Advisor, testified for the Respondent.

¹ 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.”² 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.³ 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.⁴

b. Substantial Impairment

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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *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.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ In this case, the general presumption applies. 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.¹⁰

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.¹¹ 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.¹²

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ 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.

¹¹ “[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).

¹² “[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;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ 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.¹⁵

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."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ 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.¹⁸ 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.

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ 43 TEX. ADMIN. CODE § 215.206.66(d).

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

A. Complainant's Evidence and Arguments

On May 5, 2015, the Complainant, purchased a new 2014 Ram 1500 from North Star Dodge Chrysler Jeep, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 641 miles on the odometer at the time of purchase. The vehicle's basic warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.¹⁹

In relevant part, the Complainant took the vehicle to a dealer on the following dates and miles as shown below:

| Date | Miles | Issue |
|---------|--------|--|
| 5/26/14 | 1,285 | Vehicle shakes at 50 mph, thumping noise from the front left when turning the wheel while stationary ²⁰ |
| 12/2/14 | 7,799 | Vehicle vibrates, vehicle makes a clunking sound when put in gear ²¹ |
| 1/16/15 | 9,165 | Shudder when driving at highway speed ²² |
| 3/24/15 | 10,030 | Vibration felt all over, clunking noise when engaging drive, brake noise when creeping forward ²³ |
| 4/6/15 | 10,336 | Vibration, brake noise, noise when putting into gear ²⁴ |
| 5/4/15 | 11,029 | Engine vibration, brakes feel as if sticking after washing ²⁵ |
| 5/20/15 | 11,052 | Vibration on acceleration ²⁶ |

On July 8, 2015, the Complainant mailed a written notice of defect to the Complainant's lienholder Chrysler Capital (Santander Consumer USA).²⁷ On July 17, 2015, the Complainant filed a Lemon Law complaint (Complaint) alleging that: the vehicle vibrated; the vehicle made a clunking noise when shifting into drive; the brakes would bind and make a loud noise when wet; the engine sometimes vibrated "semi-soft"; and the engine accelerated when making turns.²⁸

¹⁹ Complainant's Ex. 12, VIP Summary Report, Warranty Information.

²⁰ Complainant's Ex. 3, Invoice No. CHCS35485.

²¹ Complainant's Ex. 4, Invoice No. CHCS48120.

²² Complainant's Ex. 5, Invoice No. CHCS50450.

²³ Complainant's Ex. 6, Repair Order No. 26093088/1.

²⁴ Complainant's Ex. 7, Invoice No. CHCS56292.

²⁵ Complainant's Ex. 8, Invoice No. CHCS58204.

²⁶ Complainant's Ex. 9, Invoice No. CHCS59310.

²⁷ Complainant's Ex. 10, written notice to Chrysler Capital; *and see* Complainant's Ex. 1, Retail Installment Sales Contract (identifying Santander Consumer USA as the financing entity).

²⁸ Complainant's Ex. 11, Lemon Law complaint.

The Complainant testified that: his vehicle made a clunking noise turning left or right when leaving certain parking lots and driveways; he would hear noise during the transition from one surface to a second surface when turning; the engine would vibrate; the engine vibration issue in the complaint was not the same as the vibration experienced during the test drive; the engine accelerated (by itself), for two or three seconds while turning when accelerating; the excessive vibration experienced during the test drive is the same as the first vibration issue in the complaint. When asked by the hearings examiner if any of the issues in the Complaint were fixed, resolved or better after the repairs, the Complainant answered no, stating that the brakes still squeaked when wet. The hearings examiner noted that during the test drive, the Complainant stated that the vibration improved after repairs. The Complainant confirmed that the constant vibration was not there but only occurred during acceleration for a few seconds. The Complainant added that he wanted to purchase a vehicle with low miles, maybe 13 to 20 miles, but the dealership could not find the model vehicle in the color that he wanted in town but found one in Nacogdoches, Texas. The Complainant asked if the dealer would bring the vehicle on a trailer but the dealership responded that they would see what they could do. However, the dealership had the vehicle driven all the way to San Antonio and the vehicle had problems, which is what the Complainant wanted to avoid by having a vehicle with lower miles. The Complainant also testified that the noise from rear did not occur as often after repair and that the vibrations occurred occasionally at certain speeds. The Complainant stated that the vehicle did not have performance issues, just occasional vibration and high rpms when turning at intersections. The Complainant noted that a clunking noise occurred when shifting between park, drive, and reverse. He stated that the clunking appeared random but also that the noise happened once in a while in the morning which he thought was due to the engine being cold. Regarding the circumstances of the clunking, the Complainant explained that the engine had a rougher idle, hopefully just because of the cold. In reference to the complaint that the brakes grabbed and squealed when wet, the hearings examiner asked whether the Complainant noticed the brakes grabbing or squealing at other times. The Complainant responded when inching forward, he felt a little bit of that, but the condition gets worse after rain or a car wash (when the wheels/brakes get wet). The Complainant affirmed that no performance changes occurred with any of these issues.

B. Respondent's Evidence and Arguments

On cross examination, the Complainant explained that engine vibration occurred in the beginning when he first got the vehicle and now only occurs occasionally. When asked how he could distinguish between the engine vibration and other vibration, the Complainant explained that he felt more vibration in the mornings in the front of the truck but when driving he felt the vibration in the back half and in the pedals and sometimes the steering wheel (the Complainant characterized the types of vibration as engine vibration and driving vibration). The Complainant stated that after reprogramming the PCM (powertrain control module), the consistent vibration no longer occurred. He stated that he would feel the vibration when accelerating. When asked if the brakes ever failed the Complainant answered not but added only when coming out of the car wash when the vehicle gets wet. The Complainant confirmed that the shifting issue is just the clunking noise and did not affect the vehicle's function. He also stated that the clunk noise when moving over different surfaces was a suspension issue.

Stuart Ritchey, Technical Advisor, testified that he did not experience any abnormal vibration during a prior test drive on May 29, 2015. Likewise, Mr. Ritchey stated that he did not experience any abnormal vibrations during the test drive at the hearing. Mr. Ritchey explained that he had the Complainant press the Tow/Haul button and the Complainant confirmed that the vibration went away. But when pressing the Tow/Haul button again, the vibration came back. Mr. Ritchey explained that the Tow/Haul button deactivates the MDS (multiple displacement system), which turns off four cylinders of the eight cylinder engine (apparently to improve fuel economy), and the MDS (deactivation of the four cylinders) caused the vibration that the Complainant felt. Mr. Ritchey further explained that the MDS is normally on during driving unless the Tow/Haul button is pushed. Mr. Ritchey confirmed that the vibration was due to the greater strain from operating on four cylinders as opposed to eight cylinders. Mr. Ritchey testified that the brake groaning noise, with a foot on the brake and slowly moving, is the noise of the brake pads rubbing on the rotor. When wet, the semi-metallic pads squeal until the rotors are wiped dry. The noise described when switching between park, reverse, and drive resulted from slack in the drivetrain. The loudness may vary based on where the slack is located at in the differential, transmission, and drive shaft, and may also be more noticeable in the beginning of the day with a high engine idle. With regard to the engine acceleration when turning, Mr. Ritchey explained that the engine runs at lower rpm when wheels are straight, but at lower speed when turning, the engine rpm will

increase to assist steering. Mr. Ritchey did not know what the Complainant might have heard with regard to the thumping noise but did testify that he never experienced the noise. Mr. Ritchey concluded that the vehicle was safe to drive and that the vehicle did not exhibit any problems on the day of the hearing.

C. Test Drive

At the test drive at the hearing, the vehicle's odometer displayed 17,165 miles. During the test drive, the Complainant identified a noise as the complained of brake noise. The Complainant stated that he could feel a little vibration at a certain point. He further stated that he could feel the vibration in the steering wheel and through the accelerator. When asked if he felt the vibration anywhere else, he answered only in the cabin area. During the test drive, Mr. Ritchey had the Complainant press the Tow/Haul button to see if it would change anything. The Complainant remarked that he got more acceleration and that he never really used the Tow/Haul mode. The Complainant of vibration appeared to go away when using the Tow/Haul mode. The Complainant identified various points when he experienced vibration during the test drive and explained it occurred when he accelerated just a little bit. The vehicle did not otherwise appear to exhibit any abnormal characteristics. At the conclusion of the test drive the Complainant explained that the noise from the rear when shifting from park to drive occurred because of loose u-joint(s) and the dealer replaced the u-joints. When asked if the noise persisted, the Complainant answered: once in a while, not a lot.

D. Analysis

The law imposes the burden of proof on the Complainant.²⁹ In this case, the Complainant failed to prove by a preponderance, the essential elements of a Lemon Law claim. In particular, the record does not show that the subject vehicle has a currently existing warrantable defect. In other words, the evidence does not show that a warrantable defect more likely than not exists. If the existence of a warrantable defect is just as unlikely as it is likely, then the Complainant cannot prevail. However, with respect to each alleged nonconformity, the evidence shows that vehicle is either operating normally or the nature of the issue is simply indeterminate.

²⁹ TEX. OCC. CODE § 2301.606(d)(2).

III. Findings of Fact

1. On May 5, 2015, the Complainant, Robert Solis, Jr., purchased a new 2014 Ram 1500 from North Star Dodge Chrysler Jeep, a franchised dealer of the Respondent, FCA US LLC, in San Antonio, Texas. The vehicle had 641 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 on the following dates and miles as shown below:

| Date | Miles | Issue |
|---------|--------|--|
| 5/26/14 | 1,285 | Vehicle shakes at 50 mph, thumping noise from the front left when turning the wheel while stationary |
| 12/2/14 | 7,799 | Vehicle vibrates, vehicle makes a clunking sound when put in gear |
| 1/16/15 | 9,165 | Shudder when driving at highway speed |
| 3/24/15 | 10,030 | Vibration felt all over, clunking noise when engaging drive, brake noise when creeping forward |
| 4/6/15 | 10,336 | Vibration, brake noise, noise when putting into gear |
| 5/4/15 | 11,029 | Engine vibration, brakes feel as if sticking after washing |
| 5/20/15 | 11,052 | Vibration on acceleration |

5. On July 8, 2015, the Complainant mailed a written notice of defect to Chrysler Capital (Santander Consumer USA), the vehicle's lienholder, but not to the Respondent, FCA USA LLC.
6. On July 17, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
7. On September 25, 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.~~
8. The hearing in this case convened on December 2, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant represented himself. Jan Kershaw,

Early Resolution Case Manager, represented the Respondent. In addition, Stuart Ritchey, Technical Advisor, testified for the Respondent.

9. The vehicle's odometer showed 17,165 miles at the time of the hearing.
10. The engine vibration resulted from the normal operation of the multiple displacement system.
11. The clunking when shifting resulted from normal slack in the driveline.
12. The groaning braking noise resulted from the normal operation of the brakes, specifically the friction of the brake pads on the rotors moving at slow speeds.
13. The squealing noise resulted from water on the brakes.
14. The nature of the thumping suspension noise was not indeterminate.
15. The vehicle operated normally during the test drive at the hearing.
16. The vehicle does not have a currently existing warrantable defect.

IV. Conclusions of Law

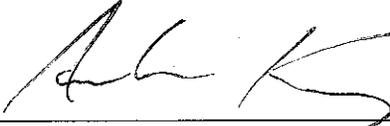
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 § 215.206.66(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 January 26, 2016



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