

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0370 CAF**

**ZACHARY FORD AND MEGAN BOND,**  
**Complainants**

v.

**FORD MOTOR COMPANY,**  
**Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Zachary Ford and Megan Bond (Complainants) 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 their vehicle manufactured by Ford Motor Company (Respondent). The hearings examiner concludes that the transmission issues do not constitute warrantable defects and that neither the complaint nor the mailed written notice of defect included the electrical issues. Consequently, the Complainants' 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 on January 12, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainants represented themselves. Maria Diaz, Consumer Legal Analyst, represented 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

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> 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 Complainants.<sup>17</sup> The Complainants must prove each fact required for relief by a preponderance, that is, the Complainants must present enough evidence to show that all of the required facts are more likely than not true.<sup>18</sup> For example, the Complainants 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 Complainants and the Respondent equally, the Respondent will prevail. The Complainants 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. Complainants' Evidence and Arguments

On April 19, 2014, the Complainants, purchased a new 2014 Ford Focus from Five Star Ford, a franchised dealer of the Respondent, in North Richland Hills, Texas. The vehicle had nine miles on the odometer at the time of purchase. The vehicle's limited warranty bumper to bumper coverage lasts for three years or 36,000 miles, whichever occurs first, and the powertrain coverage lasts for five years or 60,000 miles, whichever occurs first.<sup>19</sup>

The Complainants took the vehicle to a dealer on the following dates and miles as shown below:

Date	Miles	Issue
May 14, 2015	7,967	Transmission shudder at takeoff, slow acceleration <sup>20</sup>
October 30, 2015	12,240	Vehicle stalled, transmission shudders at takeoff, feels like not shifting into 2nd gear <sup>21</sup>
	14,067	Hazard lights came on, car locked and unlocked, wipers would not shut off, check engine light came on <sup>22</sup>

The Respondent's final opportunity to repair the vehicle occurred on October 30, 2015.

On June 27, 2015, the Complainants mailed a written notice of defect to the Respondent.<sup>23</sup> On August 27, 2015, the Complainants filed a Lemon Law complaint (Complaint) alleging that the vehicle shudders when stopping or accelerating from a stop or slow speed, makes grinding noises, shudders when downshifting at highway speeds, and hesitates in city driving and lurches in stop and go traffic.

Ms. Bond testified that that she first noticed the shaking/shuddering and lagging right before the service visit in May 2015. She added that she would experience such transmission issues every time she drove the vehicle. Ms. Bond also testified that in one incident, everything electrical turned off and back on. Ms. Bond stated that she first noticed an electrical issue in October 2015, when a buzzing noise came from behind the instrument panel.

<sup>19</sup> Complainants' Ex. 15, 2014 Model Year Ford Warranty Guide at 8.

<sup>20</sup> Complainants' Ex. 3, Invoice No. 648644.

<sup>21</sup> Complainants' Ex. 4, Invoice No. 669317.

<sup>22</sup> Complainants' Ex. 3, Repair Order Detail No. 675812.

<sup>23</sup> Complainants' Ex. 2, written notice of defect mailed to Respondent.

In addition to the visits shown on the repair orders, Mr. Ford testified that he took the vehicle to a dealership for repair on June 20, 2015, but the dealership told him to take the vehicle back home. Mr. Ford noted that Repair Order No. 675812 did not list the issue of the shifter locking in park. On Christmas of 2015, the check engine light came on and Mr. Ford took the vehicle to O'Reilly Auto Parts at which the Complainants obtained the trouble code (P2610 relating to ECM/PCM engine off timer performance).<sup>24</sup> The Complainants provided video evidence showed various electrical malfunctions, including: the windshield wipers wiping with the vehicle turned off and the keys out of the ignition;<sup>25</sup> the low fuel warning illuminating and the fuel gauge reading empty although refueled the night before, hazard lights not turning off, the locks locking and unlocking repeatedly by themselves,<sup>26</sup> and the gearshift locking in park.<sup>27</sup> Additionally, the Complainants provided video of a buzzing sound from behind the dash.<sup>28</sup>

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

Ms. Bond confirmed that she received the quick reference guide and owner's manual. Ms. Diaz testified that the owner's manual explains that if the gearshift lever does not move out of park, a fuse may have blown or the brake lamps are not operating properly. The owner's manual also provides instructions on how to address such condition. However, the dealer could not find the issue underlying the gearshift lever locked in park. With regard to the quick reference guide, Ms. Diaz stated that the guide describes the characteristics of the vehicle's transmission. The guide states that the PowerShift six-speed automatic transmission is designed for both performance and efficiency by using aspects of both a manual transmission and automatic transmission. The guide explained that the following characteristics of this technology may be noticeable: mechanical noises during some transmission shifting and firm gearshifts. The guide states that the noises are normal and do not cause damage. The guide also explains that vibrations may be felt when accelerating from low speeds. The vehicle inspection report from October 30, 2015, concluded that the Complainants' vehicle performed similarly to like vehicles and that the excessive shudder

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<sup>24</sup> Complainants' Ex. 8, diagnostic trouble code.

<sup>25</sup> Complainants' Ex. 11, 20151225\_201549.mp4.

<sup>26</sup> Complainants' Ex. 12, 20151228\_154701.mp4.

<sup>27</sup> Complainants' Ex. 13, 20151228\_160858.mp4.

<sup>28</sup> Complainants' Ex. 1400.2021,212. 20160111\_235000\_001.mp4.

was addressed by performing TSB 15-0120. Ms. Diaz added that the electrical issue was not included in the complaint or the notice of defect.

### C. Test Drive at Hearing

During the test drive at the hearing, the vehicle shuddered in several instances when accelerating from a stop and low speeds, the vehicle also exhibited grinding noises as well as some hesitation.

### D. Analysis

#### 1. Transmission Issues

The Lemon Law does not apply to all problems that may occur with a vehicle, such as issues arising from the design of the vehicle. To qualify for replacement or repurchase or for warranty repair, the law requires the existence of a warrantable defect (a defect covered by an applicable warranty).<sup>29</sup> In this case, the evidence shows that the characteristics associated with the vehicle's transmission are not a warrantable defect, but result from the design of the vehicle's PowerShift transmission. Accordingly, replacement/repurchase relief does not apply in this case.

Ford's warranty states that it applies to malfunctions or failures due to a "manufacturing defect in factory-supplied materials or factory workmanship."<sup>30</sup> Accordingly, for the warranty to apply, the complained of issue must result from a manufacturing defect rather than the vehicle's design. A manufacturing defect is an unintended condition that occurs when the vehicle varies from the manufacturer's intended design (such as incorrect assembly or the use of a substandard part).<sup>31</sup> That is, a manufacturing defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part. As a result, a defective vehicle differs from a properly manufactured vehicle. In contrast, design characteristics result from the vehicle's design itself and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer's

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<sup>29</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>30</sup> Complainants' Exhibit 15, 2014 Model Year Ford Warranty Guide at 9 (emphasis added).

<sup>31</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).

specifications will normally have the same characteristics. Moreover, since design characteristics are inherent to the design, such characteristics cannot be repaired, but would require redesigning to address the issue. The evidence in this case indicates that the vehicle's transmission issues arise from the vehicle's intended design, specifically the design of the PowerShift transmission.

During the test drive, the vehicle exhibited some of the qualities described by the Complainants. However, these characteristics appear inherent to the design of the vehicle and not the result of a manufacturing defect. The evidence shows that Ford's PowerShift transmission exhibits such characteristics due to its design incorporating aspects of both manual and automatic transmissions. Furthermore, the vehicle's quick start guide actually contemplates that the vehicle will behave as described by the Complainants, including mechanical noises, firm gearshifts, and vibrations.

Although the vehicle's complained of characteristics may be undesirable, these characteristics result from the vehicle's intended design (specifically, the PowerShift transmission) and not from any manufacturing defect. Because the vehicle's characteristics are not due to a manufacturing defect, Ford's warranty does not apply and the vehicle does not qualify for repurchase/replacement or warranty repair relief under TEX. OCC. CODE § 2301.604(a) and § 2301.204.

## **2. Electrical Issues**

The evidence appears to show that the vehicle has substantial electrical issues, including: the windshield wipers wiping with the vehicle turned off and the keys out of the ignition; the low fuel warning illuminating and the fuel gauge reading empty although refueled the night before; hazard lights not turning off; the locks locking and unlocking by themselves; and the gearshift locking in park. Additionally, the dealer could not find the underlying cause of the gearshift locking in park. However, the electrical issues, which began in December 2015, appear unrelated to the transmission issues, which are actually normal characteristics of the PowerShift transmission. More importantly, neither the complaint nor the written notice of defect in this case include the electrical issues. The complaint limits the scope of this proceeding.<sup>32</sup> Section 2301.204(b) of the Occupations Code provides that "[t]he complaint must be made in

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<sup>32</sup> The complaint identifies the issues to be addressed in this proceeding. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”<sup>33</sup> Further, Section 215.202(a)(2) of the Department’s rules states that “[c]omplaints should state sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”<sup>34</sup> However, the complaint never addressed any electrical issues nor does the record show any amendments to the complaint. Moreover, the Complainants cannot qualify for a refund or replacement unless a mailed written notice identifies the alleged defect or nonconformity. The Lemon Law specifies that:

An order issued under this subchapter may not require a manufacturer . . . to make a refund or to replace a motor vehicle unless: (1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor; and (2) the manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity.<sup>35</sup>

In this case, the Complainants’ June 27, 2015, mailed written notice cited a rattling noise behind the dash and transmission issues but never identified any electrical issues. Although the vehicle appears to have substantial electrical issues, the complaint and the written notice of defect do not comply with the requirements for warranty repair and replacement/repurchase.

### III. Findings of Fact

1. On April 19, 2014, the Complainants, purchased a new 2014 Ford Focus from Five Star Ford, a franchised dealer of the Respondent, in North Richland Hills, Texas. The vehicle had nine miles on the odometer at the time of purchase.
2. The vehicle’s limited warranty bumper to bumper coverage lasts for three years or 36,000 miles, whichever occurs first, and the powertrain coverage lasts for five years or 60,000 miles, whichever occurs first.
3. The vehicle’s warranty was in effect at the time of the hearing.

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<sup>33</sup> TEX. OCC. CODE § 2301.204.

<sup>34</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

<sup>35</sup> TEX. OCC. CODE § 2301.606(c) (emphasis added).

4. The Complainants took the vehicle to a dealer to address the complained of issues as follows:

Date	Miles	Issue
May 14, 2015	7,967	Transmission shudder at takeoff, slow acceleration
October 30, 2015	12,240	Vehicle stalled, transmission shudders at takeoff, feels like not shifting into 2nd gear
	14,067	Hazard lights came on, car locked and unlocked, wipers would not shut off, check engine light came on

In addition to the visits shown on the repair orders, the Complainants took the vehicle to a dealership for repair on June 20, 2015, but the dealership declined to attempt any repairs. The Respondent's final opportunity to repair the vehicle occurred on October 30, 2015.

5. On June 27, 2015, the Complainants mailed a written notice of defect to the Respondent. The notice of defect did not address any electrical issues.
6. On August 27, 2015, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department). The complaint did not include any electrical issues.
7. On October 29, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Ford Motor Company, 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 January 12, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainants represented themselves. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
9. The vehicle's odometer showed 14,783 miles at the time of the hearing.
10. The vehicle's transmission exhibited shuddering/hesitation, and grinding during the test drive at the hearing.
11. The vehicle may normally exhibit shuddering/hesitation, and grinding because of the design of the vehicle's transmission.

12. The vehicle has substantial electrical issues, including: the windshield wipers wiping with the vehicle turned off and the keys out of the ignition; the low fuel warning illuminating and the fuel gauge reading empty although refueled the night before; hazard lights not turning off; the locks locking and unlocking by themselves; and the gearshift locking in park.

#### 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 Complainants timely filed a 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainants' vehicle did not meet the statutory presumption for a reasonable number of repair attempts with respect to the electrical issues. TEX. OCC. CODE § 2301.605(a).
7. The Complainants did not comply with the statutory requirement to specify each defect in the vehicle with regard to the electrical issues. TEX. OCC. CODE § 2301.204(b).
8. The Complainants did not comply with the statutory requirement to mail written notice with regard to the electrical issues. TEX. OCC. CODE § 2301.606(c)(1).
9. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.604(a), 2301.606(c)(1).

10. 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.
11. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expires. 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED January 20, 2016**



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