

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0024 CAF**

BRENDA MILLY,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Brenda Milly (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Ford Focus. Complainant asserts that the vehicle is defective due to suspension issues and a bad transmission. She desires to have the vehicle repurchased. Ford Motor Company (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect, and Complainant is not eligible for repurchase 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 was closed on March 2, 2016, in San Antonio, Texas, before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Respondent was represented telephonically by Maria Diaz, Consumer Affairs Legal Analyst.

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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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.⁵

An alternative test provides that a rebuttable presumption that the manufacturer has undertaken a reasonable number of attempts to conform a motor vehicle to an applicable express warranty can be established if the same nonconformity continues to exist 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 the owner.⁶ However, the 30 days described above do not include any period of time during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by the franchise dealer.⁷

B. Complainant's Evidence and Arguments

Complainant purchased a 2014 Ford Focus from Jordan Ford in San Antonio, Texas on May 29, 2014, with mileage of 60 at the time of delivery.^{8,9} Respondent provided a warranty for the vehicle with bumper-to-bumper coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides coverage for the vehicle's powertrain for five (5) years or 60,000 miles. Respondent provided two additional warranties for the vehicle: the transmission and clutch are covered for seven (7) years or 100,000 miles and the transmission control module (TCM) is covered for ten (10) years or 150,000 miles. On the date of hearing the vehicle's mileage was 19,188. At this time, Respondent's warranty coverage for the vehicle remains in effect.

Complainant testified that prior to purchasing the vehicle; she took a test drive in it and was satisfied with the ride. The vehicle drove fine for the first month that Complainant owned the vehicle. Soon after, however, the vehicle started shuddering when she was driving it.

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) provides an alternative method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard.

⁶ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainant Ex. 1, Texas Motor Vehicle Retail Installment Sales Contract dated May 29, 2014.

⁹ Respondent Ex. 1, Odometer Disclosure Statement dated May 29, 2014.

Complainant took the vehicle to Jordan for repair for the shuddering issue on August 22, 2014. She informed Jordan's service advisor that the vehicle had a rough idle and that the vehicle seemed to jerk or hesitate when accelerating.¹⁰ Jordan's service technician determined that the vehicle was functioning properly and that no repairs were required.¹¹ Complainant took a test drive in the vehicle with one of Jordan's representatives who informed her that the vehicle's transmission was a result of new technology. She was further informed that she needed to drive the vehicle as if it had a manual transmission. She was surprised by this information, because she had not been informed of this when she purchased the vehicle. The vehicle's mileage on this occasion was 3,068.¹²

Complainant stated that the shuddering seemed to ease up for a while. However, she still felt it on occasion. Complainant then began hearing a knocking from the front of the vehicle. She took the vehicle to Jordan for repair on June 29, 2015. Complainant testified that she complained to the service advisor about the transmission shudder, as well as about the knocking sound. Jordan's service technician did not look at the transmission. However, he determined that the knocking noise was coming from the left front upper strut bearing.¹³ The strut and bushings were replaced by the technician.¹⁴ The vehicle was in the dealer's possession for six (6) days. Complainant was provided with a rental or loaner vehicle while her vehicle was being repaired. The vehicle's mileage on this occasion was 13,288.¹⁵

Complainant testified that she got the vehicle back from Jordan and she continued to hear a loud sound from the front of the vehicle. So, she took the vehicle back to Jordan on July 14, 2015. Jordan's service technician verified hearing the noise described by Complainant.¹⁶ The technician replaced the vehicle's right front strut and the rear shocks.¹⁷ Complainant also informed the service advisor that she felt that the transmission was slipping when taking off from slow speeds.¹⁸ To address the issue, the technician reprogrammed the vehicle's power control module (PCM) and transmission control module (TCM).¹⁹ The vehicle was in the dealer's possession for approximately three (3) weeks. During the time that the vehicle was being repaired Complainant did not receive a loaner or rental vehicle since she did not ask for one because she was out of the country. The mileage on the vehicle on this occasion was 13,902.²⁰

¹⁰ Complainant Ex. 3, Repair Order dated August 22, 2014.

¹¹ *Id.*

¹² *Id.*

¹³ Complainant Ex. 4, Repair Order dated June 29, 2015.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 5, Repair Order dated July 14, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Complainant testified that she picked up the vehicle from Jordan on August 5, 2015, when she returned to the United States. She stated that she was disappointed because the vehicle's transmission felt worse. She felt that the vehicle's ride was bumpy and there was a clunking noise from the front of the vehicle. In addition, there was a small ding on one of the doors. She took the vehicle back to Jordan for repair for the door ding. She also talked to Jordan's service manager who apologized to her and said that nothing could be done about the vehicle's transmission.

Complainant stated that at this point, she started looking into filing a Lemon Law complaint. She began getting the necessary paperwork together. However, she decided to try one more time to have the transmission repaired. She took the vehicle to Jordan on September 14, 2015. She asked the service technician to look at the vehicle's transmission. Complainant informed the service advisor that the vehicle was jerking on acceleration and when taking off.²¹ Complainant was informed that the vehicle was operating within the manufacturer's specifications and nothing was wrong with it. The mileage on the vehicle on this occasion was 15,431.²² The vehicle was in the dealer's possession for two (2) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired. In addition, Complainant was provided with a printout from the dealer which provided information regarding the operating characteristics of the vehicle's transmission which includes noises from the transmission, shuddering during take-off, and a harsh-shift feel.²³

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) regarding the vehicle with an effective date of September 16, 2015.²⁴ In addition, Complainant faxed a letter to Respondent informing Respondent that she was dissatisfied with the vehicle.²⁵

Complainant testified that she was contacted by Maria Diaz, Respondent's Consumer Affairs Legal Analyst, who scheduled a final repair attempt for the vehicle for October 29, 2015, at Jordan. Complainant took her vehicle to the dealer on the scheduled date and spoke to Respondent's field service engineer. In addition, she took a test drive in the vehicle with the engineer and described her concerns. The engineer had the vehicle's clutch assembly and seals replaced to address the shuddering issue. However, no work was performed on the suspension issue, as it was determined there was no problem with it. The vehicle's mileage at the time of the

²¹ Complainant Ex. 6, Repair Order dated September 14, 2015.

²² *Id.*

²³ Complainant Ex. 7, PowerShift 6-speed Transmission Operating Characteristics.

²⁴ Complainant Ex. 8, Lemon Law complaint dated September 16, 2015. Although the complaint was signed by Complainant on September 8, 2015, it was not received by Texas Department of Motor Vehicles until September 16, 2015, which is the effective date of the complaint.

²⁵ Complainant Ex. 9, Letter to Ford Motor Company dated September 11, 2015.

final repair attempt was 16,413.²⁶ The vehicle was in the dealer's possession for two (2) days. She was provided with a loaner vehicle while her vehicle was being repaired.

Complainant further testified that the vehicle's transmission is feeling better. There is a slight hesitation, but it's not anything to worry about. However, she is hesitant about the vehicle because she's been told in the past that it was fine, when it wasn't. She doesn't know how long the vehicle will be good. She also thinks that the vehicle's suspension is bad. Complainant feels that the vehicle drives clunky and that it's very noticeable on bumps. She thinks that the vehicle is beginning to develop rattles in the dash and that things are shaking loose in the vehicle. She hasn't taken the vehicle back to the dealer for this issue, because she was told it was okay and there was no sense in taking it back for repair after being told that it was operating properly.

Complainant also addressed Respondent's evidence which indicated that her vehicle has been out of service for 34 days. Complainant testified that according to her computations, the vehicle has been out of service for 42 days. In addition, she feels that the vehicle's value has been affected by the repairs performed on it.

During cross examination, Complainant stated that the front end noise in the vehicle was addressed mostly by replacing the struts and bushings. However, the banging is not gone completely. The vehicle is not making any noise while turning. The noise seems to occur only when going over bumps. The salesperson from whom Complainant purchased the vehicle did not explain anything about the vehicle's transmission. Complainant is aware that Respondent has extended the warranty on the vehicle's transmission.

C. Respondent's Evidence and Arguments

Maria Diaz, Consumer Affairs Legal Analyst, testified for Respondent. She stated that she first became involved in the case when Respondent received the Lemon Law complaint from the Texas Department of Motor Vehicles (TxDMV). Ms. Diaz attempted to contact Complainant and had to leave a message for her initially. Ms. Diaz did eventually speak to Complainant on either October 14 or October 15 of 2015. At that time, they agreed that Respondent would perform a final repair attempt on the vehicle on October 29, 2015 at Jordan. Brett Castleberry, Field Service Engineer, performed the final repair attempt on the scheduled date. Mr. Castleberry determined that the vehicle's clutch was slipping which was causing the transmission shudder that Complainant was experiencing.²⁷ As a result, the vehicle's clutch assembly was replaced pursuant to Mr. Castleberry's instructions. Complainant had raised two (2) other issues: suspension noise and a rough ride. Mr. Castleberry determined that the vehicle did not "exhibit

²⁶ Complainant Ex. 10, Repair Order dated October 29, 2015.

²⁷ Respondent Ex. 1, Vehicle Inspection Report dated October 29, 2015.

any characteristics indicative of an impending concern.”²⁸ No repairs were ordered for the other issues raised by Complainant.

Ms. Diaz also testified that Respondent has provided additional warranty coverage for the Focus model for the TCM and for the transmission and clutch in order to provide customer satisfaction. The transmission is a DP 6 transmission which has two (2) separate clutches working together in an attempt to provide better gas mileage for customers. Some characteristics of the transmission are mechanical noises after the vehicle’s engine is turned off and “during some transmission shifting events” and “firm gearshifts when moving the accelerator pedal back and forth quickly.”²⁹

D. Analysis

Under the 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 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, Complainant is 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, Complainant is entitled to have the vehicle repurchased or replaced.

1. Transmission Issue

Complainant purchased the vehicle on May 29, 2014, and presented the vehicle to an authorized dealer of Respondent due to her concerns with the vehicle’s transmission on the following dates: August 22, 2014; June 29, 2015; July 14, 2015; and September 14, 2015. The vehicle’s transmission was repaired during the final repair attempt on October 29, 2015. Complainant agreed that the vehicle’s transmission was repaired, although she is concerned about possible problems in the future.

Texas Occupations Code § 2301.603(a) 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.” 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 “lemon” the “nonconformity continues to

²⁸ *Id.*

²⁹ Respondent Ex. 3, Essential Information 2014 Ford Focus.

exist” after the manufacturer has made repeated repair attempts.³⁰ In the present case, the evidence indicates that the vehicle’s transmission has been repaired and that it currently conforms to the manufacturer’s warranty. Therefore, the hearings examiner finds that there is no defect with the vehicle’s transmission and, as such, repurchase or replacement relief for Complainant is not warranted for this issue.

2. Suspension issue

In addition, Complainant took the vehicle for repair to the vehicle’s struts and shock absorbers on June 29, 2015 (at 13,288 miles) and July 14, 2015 (at 13,902 miles). The only other time she raised an issue regarding the vehicle’s suspension was during the final repair attempt on October 29, 2015. However, Complainant testified that she hears noise from the front end intermittently and it seems to occur only when she’s driving over bumps.

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.” Occupations Code § 2301.605(a)(1) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if “two or more 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 two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.” Complainant has not met the requirements of this test. Complainant has only allowed Respondent two (2) repair attempts for the suspension issue. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent.

Occupations Code § 2301.605(a)(3) provides another test to establish whether Respondent performed a reasonable number of attempts to repair the vehicle. This section provides that the rebuttable presumption that a reasonable number of attempts to repair have been made if the “nonconformity continues to exist and 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 occurs first, following the date of original delivery to the owner; and at least two repair attempts were made in the 12 months or 12,000 miles from the date of original delivery to the owner.” However, Occupations Code § 2301.605(c) provides that the 30 days do not include any period during which the Complainant received a comparable loaner or rental vehicle during the repair period. Complainant was provided with a loaner vehicle during most of the repairs. The only time she did not receive a loaner vehicle while her vehicle was being repaired for the suspension issue was when she was out of the country for the period from late July of 2015 through August 5, 2015, approximately 21 days. In addition, the two repair attempts dealing with the vehicle’s suspension occurred after the vehicle had been driven in excess of 12,000 miles from the date the

³⁰ Tex. Occ. Code § 2301.605.

vehicle was delivered to Complainant. So, Complainant did not meet the standards of the "Thirty Day" test to establish that Respondent was provided with a reasonable number of attempts to repair the vehicle. As a result, repurchase relief is not warranted for the suspension issue. However, it is apparent that Complainant sometimes hears what might be noise from the front end of the vehicle which may be caused by the suspension. Respondent will be ordered to investigate and repair the issue.

Respondent's express warranty applicable to Complainant's 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 60,000 miles. The vehicle's transmission and clutch are covered for seven (7) years or 100,000 miles and the TCM is covered for ten (10) years or 150,000 miles. On the date of hearing, the vehicle's mileage was 19,188 and it remains under this warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Brenda Milly (Complainant) purchased a new 2014 Ford Focus on May 29, 2014, from Jordan Ford (Jordan) in San Antonio, Texas, with mileage of sixty (60) at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent), issued a bumper-to-bumper warranty for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 60,000 miles.
3. Respondent also issued additional warranties for the vehicle's transmission and clutch for seven (7) years or 100,000 miles and for the vehicle's transmission control module (TCM) for ten (10) years or 150,000 miles.
4. The vehicle's mileage on the date of hearing was 19,188.
5. At the time of hearing the vehicle was still under warranty.
6. Complainant's vehicle was serviced by Jordan on the following dates because of her concerns with the vehicle's transmission and suspension:
 - a. August 22, 2014, at 3,068 miles;
 - b. June 29, 2015, at 13,288 miles;

- c. July 14, 2015, at 13,902 miles; and
 - d. September 14, 2015, at 15,431 miles.
7. On August 22, 2014, Jordan's service technician did not perform any repairs to the vehicle's transmission since he felt that the vehicle was functioning properly.
 8. On June 29, 2015, Jordan's service technician verified a noise from the vehicle's front end and replaced the left front strut bearing. No work was performed on the vehicle's transmission, although Complainant raised the issue to the dealer's representative.
 9. On July 14, 2015, Jordan's service technician verified a noise from the vehicle's front end and replaced the right front strut bearing and rear shock absorbers. In addition, he reprogrammed the vehicle's transmission control module and power control module to address the transmission issue.
 10. On September 14, 2015, Jordan's service technician determined that the vehicle's transmission did not need a repair at the time and was working within specifications.
 11. On September 16, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 12. On October 29, 2015, Respondent performed a final repair attempt on the vehicle.
 13. The vehicle's clutch assembly was replaced during the final repair attempt in order to address the transmission issue. No repairs were performed for the suspension issue or the rough ride issues also raised by Complainant at the final repair attempt.
 14. On November 25, 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.
 15. The hearing in this case convened and the record was closed on March 2, 2016, in San Antonio, Texas, before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Respondent was represented telephonically by Maria Diaz, Consumer Affairs Legal Analyst.

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 failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle's transmission 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. Complainant proved by a preponderance of the evidence that the vehicle has a verifiable defect or condition in the vehicle's suspension that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
8. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent for the suspension issue prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a).
9. 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.
10. Complainant's 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 Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**. Respondent is hereby **ORDERED** to repair Complainant's vehicle so that it conforms to Respondent's express warranty. Texas Occupations Code § 2301.204.

SIGNED March 7, 2016



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