

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0038 CAF**

**KARI M. KOVACEVICH,  
Complainant**

v.

**FCA US LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Kari M. Kovacevich (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 her vehicle manufactured by FCA US LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase or replacement relief.

**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 February 26, 2016 in Galveston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself and her spouse, Kurt Kovacevich, testified for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, 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**

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>6</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>7</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>8</sup>

**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>9</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>10</sup> and (3) the owner filed the Lemon Law

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<sup>6</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>7</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>8</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).

<sup>9</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>10</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).

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>11</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>12</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>13</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present evidence showing that all of the required facts are more likely than not true.<sup>14</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 equally supports the Complainant and the Respondent, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

### A. Complainant's Evidence and Arguments

On November 8, 2014, the Complainant, purchased a new 2015 Jeep Wrangler from Ron Carter Chrysler Jeep Dodge of League City, a franchised dealer of the Respondent, FCA US LLC, in Dickinson, Texas.<sup>15</sup> The vehicle had 272 miles on the odometer at the time of purchase.<sup>16</sup> The vehicle's basic limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.<sup>17</sup>

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<sup>11</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>12</sup> TEX. OCC. CODE § 2301.204.

<sup>13</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>14</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>15</sup> Complainant's Ex. 1, Retail Installment Sales Contract; Complainant's Ex. 2, Vehicle Purchase Order.

<sup>16</sup> Complainant's Ex. 2, Vehicle Purchase Order.

<sup>17</sup> Complainant's Ex. 4, Jeep 2015 All Vehicles Warranty Information.

The Complainant testified that she first noticed water leaking about two weeks after purchasing the vehicle. She explained that the vehicle did not leak at every rain, but the leaking may depend on the amount and direction of the rain. She noted that the (initial) repairs did not improve the leaking but the leaking actually worsened towards the end. In the beginning, water leaked onto the driver's side floorboard, but after repairs, the water began leaking onto the passenger side and on all floorboards. After the last repair, water also leaked down the seat front. The Complainant testified that the leaking seemed worse in prolonged rains, noting that in one instance, the vehicle leaked after misting all day. Also, the Complainant explained that the vehicle can leak even when washing it with a water hose. The Complainant noted that she had not removed the roof panels or the roof screws since purchasing the vehicle. Ellen Vanier, an estimator at McRee Ford, testified that she found the driver side trough filled with water more than once after bad weather while at McRee for repair of damage from being stolen and crashed.

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

Date	Miles	Issue
December 2, 2014	590	Rain water leaks onto driver side floorboard <sup>18</sup>
April 21, 2015	3,941	Rainwater leaking onto driver side front floorboard and passenger side front floorboard <sup>19</sup>
July 3, 2015	4,891	Driver front side floor gets wet when it rains <sup>20</sup>
November 17, 2015	6,324	Water leaking into vehicle driver front floorboard <sup>21</sup>
December 2, 2015	6,455	Water leaks into vehicle driver side front floorboard <sup>22</sup>

On October 1, 2015, the Complainant mailed a written notice of defect to the Respondent.<sup>23</sup> On October 6, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that water leaked onto the floorboards when raining.

<sup>18</sup> Complainant's Ex. 5, Invoice 114769.

<sup>19</sup> Complainant's Ex. 6, Invoice 120176; Complainant's Ex. 7, Invoice 120176.

<sup>20</sup> Complainant's Ex. 8, Invoice DOCS166151.

<sup>21</sup> Complainant's Ex. 9, Invoice 130033.

<sup>22</sup> Complainant's Ex. 10, Invoice 130696.

<sup>23</sup> Complainant's Ex. 11, Letter to FCA US LLC, 10/01/15.

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

On cross examination, the Complainant affirmed that they installed a piece of plastic tubing to hold down the top but the tubing did not help and Mr. Kovacevich explained that the dealer removed the tubing. Mr. Kovacevich also confirmed that the vehicle had been in a collision caused by vehicle thieves. Ms. Kershaw noted that the repair in Complainant's exhibit 6 (invoice 120176) was not a warranty repair and either the dealer or the Complainant paid for the repair. Mr. Stewart testified that the roof tops weather stripping can only withstand about 3 psi, so not installing the roof panels straight can cause leaking. Mr. Stewart added that the top was very sensitive to tightening and over tightening can cause a water leak. Mr. Stewart also testified that corner pieces at the "A" pillars were sensitive and could pinch off the normal flow of water. Mr. Stewart noted that the owner's manual specified that the vehicle can leak in certain situations. Mr. Stewart testified that any Jeep/convertible can be made to leak with a water hose. Mr. Stewart further explained that water over the whole vehicle disperses, but the vehicle is not designed to have water constantly in one area.

### **C. Inspection**

The vehicle had 8,135 miles on the odometer at the inspection on the day of the hearing. The inspection revealed a bulge in the rubber molding (weather stripping) between roof panels.

### **D. Analysis**

The evidence does not show that a currently existing warrantable defect more likely than not caused the water leak; consequently, the vehicle is not eligible for repurchase or replacement. Whether water leaked into the vehicle is not disputed. Rather, this case hinges on whether the leak resulted from a manufacturing defect. A manufacturing defect occurs when the vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a substandard part. A manufacturing defect occurs during the manufacturing process and exists when it leaves the manufacturer. Accordingly, problems arising outside of the manufacturing process, such as improper dealer repairs, are not warrantable manufacturing defects. In contrast to manufacturing defects, characteristics of the vehicle's design do not arise from any error in the manufacturing process, but may normally occur in same-model vehicles produced according to the manufacturer's specifications. The Lemon Law only applies to manufacturing defects and not to characteristics of the vehicle's design. 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>24</sup> The evidence does not show that the leaking water more likely than not resulted from a warrantable defect. Therefore, replacement/repurchase relief does not apply.

The record shows that water leaked into the cabin. However, the difficulty is determining whether such leak resulted from a manufacturing defect. The evidence shows that a Jeep Wrangler's seals are sensitive to even slight misalignment and that the seals will not keep out water under every circumstance. The owner's manual even states that the vehicle may leak under certain circumstances. These are characteristics/limitations of the vehicle's design and not manufacturing defects. At least one roof panel appears to have been misaligned (apparently by the dealer), as evidenced by the bulge in the molding. Testimony showed that water concentrated in a single area may overwhelm the vehicle's ability to channel away the water. Likewise, any bulging in the molding/seals may impede the vehicle's ability to channel away water. Moreover, the direction of the water also affects the ability of the vehicle to effectively channel away the water. Even a minor misalignment of the roof panels can apparently lead to water intrusion and inspection did reveal bulging in the roof top panel molding. Moreover, the dealer appears to have at least aggravated the leaking as shown by the leaking worsening after repair. The Complainant and Mr. Kovacevich confirmed that the vehicle did not leak every time when raining. In sum, the record indicates that various non-manufacturing defects (normal design characteristics as well as dealer repairs) could have caused the leaking. As a whole, the evidence reflects that non-defects appear just as likely to have been the cause of the leaking as a manufacturing defect. Because the evidence does not show that a manufacturing defect more likely than not caused the leaking, repurchase or replacement relief does not apply.

### III. Findings of Fact

1. On November 8, 2014, the Complainant, purchased a new 2015 Jeep Wrangler from Ron Carter Chrysler Jeep Dodge of League City, a franchised dealer of the Respondent, FCA US LLC, in Dickinson, Texas. The vehicle had 272 miles on the odometer at the time of purchase.

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<sup>24</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

2. The vehicle's basic limited warranty covers the vehicle for three years 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
December 2, 2014	590	Rain water leaks onto driver side floorboard <sup>25</sup>
April 21, 2015	3,941	Rainwater leaking onto driver side front floorboard and passenger side front floorboard <sup>26</sup>
July 3, 2015	4,891	Driver front side floor gets wet when it rains <sup>27</sup>
November 17, 2015	6,324	Water leaking into vehicle driver front floorboard <sup>28</sup>
December 2, 2015	6,455	Water leaks into vehicle driver side front floorboard <sup>29</sup>

5. On October 1, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On October 6, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that water leaked onto the floorboards when raining.
7. On December 21, 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 and the record closed on February 26, 2016 in Galveston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself and her spouse, Kurt Kovacevich, testified for the Complainant. Jan

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<sup>25</sup> Complainant's Ex. 5, Invoice 114769.

<sup>26</sup> Complainant's Ex. 6, Invoice 120176; Complainant's Ex. 7, Invoice 120176.

<sup>27</sup> Complainant's Ex. 8, Invoice DOCS166151.

<sup>28</sup> Complainant's Ex. 9, Invoice 130033.

<sup>29</sup> Complainant's Ex. 10, Invoice 130696.



Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for the Respondent.

9. The vehicle's odometer displayed 8,135 miles at the time of the hearing.
10. An inspection of the vehicle at the hearing appeared to show that one or more of the roof panels had been misaligned causing the molding to bulge.

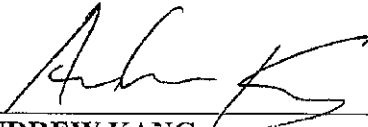
#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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 by a preponderance of the evidence 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 April 26, 2016**

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