

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0067 CAF**

MICHELLE D. BETTINGER,
Complainant

v.

FORD MOTOR COMPANY,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Michelle D. Bettinger (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Ford Focus. Complainant asserts that the vehicle jerks, has transmission issues, doesn't shift gears correctly when driving at slower speeds, and sometimes feels that it's accelerating from a stop in second gear. Ford Motor Company (Respondent) argued that Complainant has not met the repurchase requirements set forth in the Occupations Code and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect; however, Complainant is not eligible for replacement relief since she did not authorize repairs suggested by Respondent's field service engineer during their final repair attempt.

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 on March 29, 2016, in Fort Worth, Texas before Hearings Examiner Edward Sandoval and closed that same day. 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

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

In addition to these 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

B. Complainant's Evidence and Arguments

Complainant purchased a 2013 Ford Focus from Texas Motors, Inc., in Fort Worth, Texas on April 24, 2013, with mileage of 3 at the time of delivery.^{6,7} The basic "bumper to bumper" warranty provided coverage for three years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides for coverage for the powertrain for five years or 60,000 miles.⁸ On the date of hearing the vehicle's mileage was 32,255. At this time, Respondent's basic warranty coverage for the vehicle remains in effect.

Complainant testified that a few weeks after purchasing the vehicle, she felt a very bad jerk from the vehicle when she was accelerating from a stop light. It almost felt as if someone had rear ended her vehicle. After the vehicle repeated the behavior a few times, Complainant took it to Texas Motors sometime in May or June of 2013 because of her concerns with the vehicle jerking. Complainant was informed by the dealer representative that the vehicle was just getting used to the way she drove and that the drive would get better. No repairs were performed at the time.

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods 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, 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.

⁶ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract and Motor Vehicle Buyer's Order dated April 24, 2013.

⁷ Complainant Ex. 2, Odometer Disclosure Statement dated April 24, 2013.

⁸ Complainant Ex. 12, Notice of Customer Satisfaction Program 14M02 dated September 2015, p. 2.

Complainant stated that she was driving the vehicle in early November of 2013, when the transmission put itself into neutral. She was concerned about the transmission's behavior; so, on November 8, 2013, Complainant took it to Texas Motors for repair. Complainant was informed by the dealer's representative that they could not look at the vehicle that day and she should make a repair appointment. In order to immediately resolve the concern, the representative told Complainant to turn the vehicle off and then turn it back on. The vehicle operated normally after Complainant followed the dealer representative's instructions.

Complainant took the vehicle back to Texas Motors on November 11, 2013, in order for the transmission to be repaired. The service technician determined that fluid was leaking from the vehicle's inner input shaft seal and causing the vehicle to shudder and jerk.⁹ The technician installed new transmission seals in the vehicle, cleaned the housing and clutch, and flashed (updated) the vehicle's power control module (PCM) and transmission control module (TCM).¹⁰ The vehicle's mileage when it was taken to the dealership on this occasion was 5,799.¹¹ The vehicle was in the dealer's possession for two (2) days during this repair visit. Complainant was not provided with a rental or loaner vehicle while her vehicle was being repaired.

The vehicle drove fine for a while. However, after about three or four weeks the shuddering returned. The shuddering was mild at first, but then got worse. Complainant decided to take the vehicle to Texas Motors on September 8, 2014, in order to have her concerns addressed. The service technician verified the concern and reprogrammed the vehicle's PCM and TCM.¹² The vehicle's mileage when it was delivered to the dealer on this occasion was 15,258.¹³ The vehicle was in the dealer's possession for one day. Complainant was not provided with a rental or loaner vehicle while her vehicle was in the dealer's possession.

Complainant felt that the vehicle was behaving worse and shuddering more after the repair was performed on September 8, 2014. So, she took the vehicle back to Texas Motors on September 24, 2014. Complainant told the dealer's service technician that the vehicle felt like it was starting in third gear and that it was shuddering.¹⁴ The technician verified the concern and replaced the vehicle's clutch assembly and reprogrammed the PCM and TCM.¹⁵ The vehicle's mileage when it was delivered to the dealer on this occasion was 15,742.¹⁶ The vehicle was in the dealer's

⁹ Complainant Ex. 3, Repair Order dated November 11, 2013.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 4, Repair Order dated September 8, 2014.

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated September 24, 2014.

¹⁵ *Id.*

¹⁶ *Id.*

possession for eight days. Complainant was provided with a rental vehicle while her vehicle was being repaired

The vehicle drove fine for about two to three weeks. Then, it began to shudder again. The shudder increased in both frequency and severity as time passed. Complainant took the vehicle to McDavid Ford (McDavid) in Fort Worth on October 6, 2015, in order to have the shuddering issue addressed. The dealer's service technician determined that the vehicle's clutch assembly needed replacement.¹⁷ However, the clutch had to be special ordered. The vehicle's mileage when it was delivered to the dealer on this occasion was 27,129.¹⁸ Complainant was provided with a loaner or rental vehicle for about seven days. Complainant did not like the rental vehicle, so she asked if she could drive her own vehicle until the clutch arrived.

The clutch arrived at the dealership about four to six weeks after it was ordered. Complainant took the vehicle to McDavid on November 9, 2015, to complete the repair. The clutch assembly was installed during this repair. The vehicle's mileage on this occasion was 27,971.¹⁹

On October 14, 2015, Complainant wrote a letter to Respondent advising them of the problems she was experiencing with the vehicle.²⁰ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) effective October 21, 2015.²¹

After receiving notice of Complainant's Lemon Law complaint regarding the vehicle, Respondent contacted Complainant to schedule an inspection and final repair attempt. Respondent had a field service engineer inspect the vehicle on December 10, 2015. The inspection was performed at McDavid. The engineer determined that the vehicle's transmission needed to be replaced. However, Complainant did not approve the repair work to be performed. She felt that Respondent had been given plenty of opportunities to repair the vehicle and it was still shuddering. She was not convinced that replacing the transmission would fix the vehicle completely.

Complainant testified that the vehicle still shudders, although less frequently than before the November 2015 clutch replacement. She noticed on January 6, 2016, while driving to work that

¹⁷ Complainant Ex. 6, Repair Order dated October 6, 2015.

¹⁸ *Id.*

¹⁹ Complainant Ex. 7, Repair Order dated November 9, 2015.

²⁰ Complainant Ex. 9, Letter to Ford Motor Company dated October 14, 2015.

²¹ Complainant Ex. 8, Lemon Law complaint dated October 21, 2015. The complaint was signed by Complainant on October 14, 2015. However, it was not received by TxDMV until October 21, 2015, which is the effective date of the complaint.

the vehicle's RPM's increased from 2000 to 5000 for about a second and the engine revved up for no reason.

During cross examination, Complainant testified that when she purchased the vehicle she took a test drive in a similar vehicle, but not the exact vehicle she purchased. She was never informed by the sales person that the vehicle's transmission was not a regular automatic transmission. It has been inconvenient for her to take the vehicle to the dealer for repairs as often as required.

C. Respondent's Evidence and Arguments

Maria Diaz, Consumer Affairs Legal Analyst, testified for Respondent. Ms. Diaz first became involved with Complainant's complaint on October 22, 2015, after Respondent received notice from TxDMV that Complainant had filed a Lemon Law complaint. Ms. Diaz spoke to Complainant on October 29, 2015, and discussed an ongoing repair for Complainant's vehicle. Complainant indicated to Ms. Diaz that the dealer representative had ordered a clutch for the vehicle, but it had not arrived at the dealership by the time of the conversation which was approximately a week after the clutch being ordered. During the discussion, they agreed that Respondent would be allowed an opportunity for inspection of the vehicle, but that the inspection would not occur until after the new clutch for the vehicle was installed.

Complainant asked that Respondent's field service engineer conduct the inspection on December 10, 2015. The inspection was performed at McDavid Ford on the date scheduled. The vehicle was inspected by Zachary LaTour, Field Service Engineer. Mr. LaTour determined that the vehicle's clutch slip was outside the manufacturer's specifications.²² He felt that the correct repair for the issue was to replace the vehicle's transmission.²³ However, Complainant decided not to allow the repairs to be performed.

Ms. Diaz testified that information about the vehicle's transmission should have been relayed to Complainant. The vehicle has a DPS6 automatic transmission. The transmission is a dual clutch, six speed automatic transmission. Essentially, the transmission is a manual transmission which shifts automatically. The transmission was designed in an attempt to obtain better fuel mileage. Respondent is aware that the transmission does cause some vibration in the vehicle during acceleration. In addition, the vehicle can have some roll back when stopped on a hill.

Ms. Diaz also stated that Respondent has provided a three (3) year or 36,000 mile bumper-to-bumper warranty for the vehicle. In addition, there is a five (5) year or 60,000 mile powertrain

²² Respondent Ex. 1, FSE Vehicle Inspection Report dated December 10, 2015.

²³ *Id.*

warranty, a seven (7) year or 100,000 mile warranty for the vehicle's transmission input shaft seals, and a ten (10) year or 150,000 mile warranty for the vehicle's transmission control module.

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 a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the 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, Complainant is entitled to have the vehicle repurchased or replaced.

The evidence reveals that there is a problem with the vehicle's transmission. The vehicle shudders, shakes, and jerks when being driven at lower speeds. During the final repair attempt, Respondent's field service engineer determined that the transmission should be replaced. The defective condition of Complainant's vehicle substantially impairs its use and market value. The vehicle's shuddering and jerking makes it less desirable to drive than comparable vehicles. In addition, it can cause the driver to decide that the vehicle is not roadworthy for extended trips which can affect its marketability due to the reduced capacity for use. As such, the hearings examiner must hold that Complainant has established the existence of a defect or condition that substantially impairs the use or market value of the vehicle.

Complainant purchased the vehicle on April 24, 2013, and presented the vehicle to Respondent's, authorized dealer for repair due to her concerns with the vehicle's transmission on the following dates: November 8, 2013; November 11, 2013; September 8, 2014; September 24, 2014; October 6, 2015; and November 9, 2015. 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." Section 2301.605(a)(1) specifies 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." The evidence presented at the hearing establishes that Complainant has met the requirements of this test since Complainant presented the vehicle for repair twice within the first 12,000 miles of ownership. The fact that no repair was performed on November 8, 2013, was the fault of the dealer and not Complainant. In addition, the next two repairs were performed within

12,000 miles from the second repair on November 11, 2013. As such, Complainant has met the presumption that Ford has been provided with a reasonable number of attempts to repair the vehicle.

However, Complainant did not allow Respondent a final opportunity to repair the vehicle. Section 2301.606(c)(2) provides that an order requiring a manufacturer, converter, or distributor to repurchase or replace a vehicle cannot be issued unless the manufacturer, converter, or distributor has been given an opportunity to repair the alleged defect or nonconformity. Although Complainant allowed Respondent an opportunity for a final inspection and repair, she did not approve the repairs which may have been able to cure the defect in the vehicle. As such, it cannot be found that she gave Respondent the opportunity to repair the vehicle. Therefore, repurchase or replacement relief cannot be granted to Complainant, although repair relief will be awarded to her.

Ford's express warranty applicable to Complainants' vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's warranty was still in effect. As such, Ford is under an obligation to repair the vehicle under the terms of the express warranty whenever any issue covered by the warranty is raised.

Complainants' request for repurchase or replacement relief is denied. Respondent will be required to repair the vehicle so that it conforms to their warranty.

III. FINDINGS OF FACT

1. Michelle D. Bettinger (Complainant) purchased a new 2013 Ford Focus on April 24, 2013 from Texas Motors, Inc., in Fort Worth, Texas, with mileage of 3 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. The vehicle's mileage on the date of hearing was 32,255.
4. At the time of hearing the vehicle's basic warranty was still in effect.

5. After purchasing the vehicle, Complainant noticed that the vehicle's transmission was not operating correctly and would cause the vehicle to shudder, shake, and jerk when she was driving it.
6. Complainant took her vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle's transmission, on the following dates:
 - a. November 8, 2013, at unknown miles;
 - b. November 11, 2013, at 5,799 miles;
 - c. September 8, 2014, at 15,258 miles;
 - d. September 24, 2014, at 15,742 miles;
 - e. October 6, 2015, at 27,129 miles; and
 - f. November 9, 2015, at 27,971 miles.
7. On November 8, 2013, the dealer representative advised Complainant to make an appointment to perform repairs on the vehicle for another date. The vehicle was not accepted for repair at the time.
8. On November 11, 2013, the dealer's service technician installed new inner input shaft seals on the vehicle, cleaned the vehicle's housing and clutch, and flashed the vehicle's power control module (PCM) and transmission control module (TCM).
9. On September 8, 2014, the dealer's service technician reprogrammed the vehicle's PCM and TCM.
10. On September 24, 2014, the dealer's service technician replaced the vehicle's clutch and reprogrammed the PCM and TCM.
11. On October 6, 2015, the dealer's service technician determined that the clutch needed to be replaced and special ordered the clutch.
12. A new clutch was installed in the vehicle by the dealer's technician on November 9, 2015.
13. Complainant provided written notice of the defect to Respondent on October 14, 2015.
14. Respondent performed a final repair attempt on the vehicle on December 10, 2015. However, Complainant did not approve the suggested repair.

15. On October 21, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
16. On January 4, 2016, 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.
17. The hearing in this case convened on March 29, 2016, in Fort Worth, Texas before Hearings Examiner Edward Sandoval and closed that same day. 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-.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's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. Complainant did not allow Respondent a final opportunity to cure the defect discovered by Respondent's field service engineer. Tex. Occ. Code § 2301.606(c)(2).

8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
9. 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-.613 is hereby **DISMISSED**. However, Respondent is hereby **ORDERED** to **PERFORM ALL NECESSARY REPAIRS** in order to conform the vehicle to Respondent's express warranty.

SIGNED April 12, 2016.



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