

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0072 CAF**

**LAURIE E. BALDWIN,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Laurie E. Baldwin (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 recreational vehicle manufactured by Forest River, Inc. (Respondent). The hearings examiner concludes that the subject vehicle has a warrantable defect that substantially impairs the vehicle's use. Consequently, the Complainant's vehicle qualifies for repurchase/replacement.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on February 25, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Tom Kitchen, the Complainant's husband testified for the Complainant. Warren Murphy, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment 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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

For vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) 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 (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁶

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.⁷ 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.⁸

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;⁹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁰ and (3) the owner or someone on behalf of the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's

⁶ TEX. OCC. CODE § 2301.605(a)(3).

⁷ “[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).

⁸ “[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).

⁹ TEX. OCC. CODE § 2301.606(c)(1). Note: the Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016).

¹⁰ 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).

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.¹¹

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.”¹²

3. **Burden of Proof**

The law places the burden of proof on the Complainant.¹³ 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.¹⁴ 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.

4. **The Complaint Limits the Issues in this Case**

The law limits the scope of this case to the issues identified in the complaint and any amendments.¹⁵

A. **Complainant’s Evidence and Arguments**

On May 13, 2015, the Complainant, purchased a new 2015 Cherokee Wolf Pup 16BHS from I-10 Inc. d/b/a Cliff Jones RV, an authorized dealer of the Respondent, Forest River, Inc., in Sealy, Texas. The vehicle’s limited warranty covers the vehicle for one year from the date of purchase.¹⁶

¹¹ TEX. OCC. CODE § 2301.606(d)(2).

¹² TEX. OCC. CODE § 2301.204.

¹³ 43 TEX. ADMIN. CODE § 215.66(d).

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

¹⁵ 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.

¹⁶ Complainant’s Ex. 2, Limited Warranty Towable Products.

The Complainant testified that the bed broke during a trip to Kansas City. Mr. Kitchen testified that, the battery would die within a day or day and half when using battery power and three days when not using battery power. Mr. Kitchen stated that they dropped off the vehicle at the dealer on August 27, 2015, and picked it up on November 20, 2015, roughly three months later. Mr. Kitchen noted that after the September 18, 2015, repair attempt, the dealer pried the bed frame and moved the brackets, but left the bed frame cracked. At the November 13, 2015, repair attempt, the dealer installed a supporting wall under the bed and a battery shut off switch. However, Mr. Kitchen testified that the bed already sagged, and had a loose handle and loose trim and the battery shut off would also shut power off to the propane detector. Mr. Kitchen confirmed that the battery drain and bed frame issues remained as of the date of the hearing. The Complainant provided photographic exhibits showing wood frame components not flush with each other and a bracket that had been realigned¹⁷ as well as nails or staples pulling out of the frame.¹⁸ The Complainant expressed a preference for replacement relief.

In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Issue
08/27/2015	Battery dies every few days with everything turned off, master bed supports have fallen ¹⁹
09/18/2015	Dead battery, cracked bed frame ²⁰
11/13/2015	Install battery disconnect switch, rebuild bed ²¹

On October 10, 2015, the Complainant mailed a written notice of defect to the Respondent. On October 26, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the main bed frame collapsed and the battery died.²²

¹⁷ Complainant's Ex. 8, photo of angle bracket.

¹⁸ Complainant's Ex. 9, photo of nails pulling out.

¹⁹ Complainant's Ex. 3, Invoice 29908.

²⁰ Complainant's Ex. 4, Repair Order 29908.

²¹ Complainant's Ex. 5, Invoice 30257.

²² Complainant's Ex. 6, Lemon Law Complaint.

B. Respondent's Evidence and Arguments

On cross examination, Mr. Kitchen confirmed that the vehicle had a slow drain marine battery and although the battery checked out fine, the dealer replaced the battery anyway. Mr. Murphy explained that the propane detector drew the correct amperage but added that the battery may be insufficient. Mr. Murphy noted that, based on the photographs of the bed frame, he could not tell whether the bed frame was up to standards.

C. Inspection

The inspection revealed that the bed had a loose handle and trim and repositioned angle brackets. Additionally, staples used to fasten 2x4's to the frame were coming loose. Mr. Kitchen pointed out that the wall the dealer installed to support the bed frame reduced the usable storage space under the bed. Mr. Kitchen explained that they used the trailer instead of paying to stay at hotels when traveling. The Complainant added that using the trailer allowed them to bring their dog while traveling. The inspection showed the vehicle had a conventional deep cycle battery. The battery was down to one third of capacity with the battery turned on the day before.

D. Analysis

The Complaint identified two issues for resolution: the battery drain and the collapsed bed frame. The battery drain is not a warrantable defect. On the other hand, the collapsed bed frame constitutes a warrantable defect that qualifies the vehicle for replacement or repurchase. A warrantable defect occurs when the vehicle has a flaw because of some error in making it, such as incorrect assembly (defective workmanship) or the use of a substandard part (defective material). A warrantable defect occurs during the manufacturing process and exists when it leaves the manufacturer. Therefore, problems arising outside of the manufacturing process, such as improper dealer repairs, are not warrantable defects.

1. Battery Drain

The battery drain issue does not appear to be a warrantable defect. Forest River only warrants that "the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor." Further, Forest River "makes no warranty with regard to, but not limited to, the chassis, including, without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, routine maintenance, equipment

and appliances, or audio and/or video equipment.”²³ Accordingly, the warranty does not appear to apply to the battery itself and whatever equipment may be causing the battery drain. Therefore, the battery drain issue does not support repurchase of replacement relief.

2. Bed Frame

The bed frame is a structural component in the vehicle that falls within the warranty’s coverage. The testimony shows that the Complainant used the vehicle for overnight trips, essentially as an alternative to staying at a hotel. Considering the Complainant’s use of the vehicle, the defective bed frame poses a substantial impairment of use. The repair orders reflect three repair attempts in the first 12 months, with the vehicle out of service for repair from August 27, 2015, to November 18, 2015, a total of 83 days. However, the bed frame continued to have problems. The record shows that the bed sagged and had fasteners pulling out of the wood frame. Accordingly, the vehicle qualifies for replacement of repurchase relief.

III. Findings of Fact

1. On May 13, 2015, the Complainant, purchased a new 2015 Cherokee Wolf Pup 16BHS from I-10 Inc. d/b/a Cliff Jones RV, an authorized dealer of the Respondent, Forest River, Inc., in Sealy, Texas.
2. The vehicle’s limited warranty covers the vehicle for one year from the date of purchase.
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	Issue
08/27/2015	Battery dies every few days with everything turned off, master bed supports have fallen ²⁴
09/18/2015	Dead battery, cracked bed frame ²⁵
11/13/2015	Install battery disconnect switch, rebuild bed ²⁶

5. On October 10, 2015, the Complainant mailed a written notice of defect to the Respondent.

²³ Complainant’s Ex. 2, Limited Warranty Towable Products.

²⁴ Complainant’s Ex. 3, Invoice 29908.

²⁵ Complainant’s Ex. 4, Repair Order 29908.

²⁶ Complainant’s Ex. 5, Invoice 30257.

6. On October 26, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the main bed frame collapsed and the battery died.
7. On November 25, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Forest River, Inc., 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 25, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Tom Kitchen, the Complainant's husband testified for the Complainant. Warren Murphy, represented the Respondent.
9. The vehicle remained out of service for repair from August 27, 2015, to November 18, 2015, a total of 83 days.
10. The bed frame continues to exhibit various defects, including sagging and fasteners pulling out of the frame.
11. The Complainant used the vehicle for overnight trips and as an alternative to staying at hotels.

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 provided sufficient notice of the defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604.

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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall, in accordance with Texas Administrative Code § 215.208(d)(1)(A), promptly authorize the exchange of the Complainant's vehicle (the reacquired vehicle) with the Complainant's choice of any comparable motor vehicle.
2. The Respondent shall instruct the dealer to contract the sale of the selected comparable vehicle with the Complainant under the following terms:
 - a. The sales price of the comparable vehicle shall be the vehicle's Manufacturer's Suggested Retail Price (MSRP);
 - b. The trade-in value of the Complainant's vehicle shall be the MSRP at the time of the original transaction, less a reasonable allowance for the Complainant's use of the vehicle;
 - c. The use allowance for replacement relief shall be calculated in accordance with the formula outlined in Texas Administrative Code § 215.208(b)(2) (the use allowance is \$642.60);

- d. The use allowance paid by the Complainant to the Respondent shall be reduced by \$35.00 (the refund for the filing fee) (after deducting the filing fee, the use allowance is reduced to **\$607.60**, which is the amount that the Complainant must be responsible for at the time of the vehicle exchange).
3. The Respondent's communications with the Complainant finalizing replacement of the reacquired vehicle shall be reduced to writing, and a copy thereof shall be provided to the Department within twenty (20) days of completion of the replacement.
4. The Respondent shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department.²⁷
5. The Respondent shall affix the disclosure label to the reacquired vehicle in a conspicuous location (e.g., hanging from the rear view mirror). Upon the Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, the Respondent shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.
7. The Respondent shall repair the defect or condition that was the basis of the vehicle's reacquisition and issue a new 12 month/12,000 mile warranty on the reacquired vehicle.
8. Upon replacement of the Complainant's vehicle, the Complainant shall be responsible for payment or financing of the usage allowance of the reacquired vehicle, any outstanding liens on the reacquired vehicle, and applicable taxes and fees associated with the new sale, excluding documentary fees. Further, in accordance with 43 Tex. Administrative Code § 215.208(d)(2):
 - a. If the comparable vehicle has a higher MSRP than the reacquired vehicle, the Complainant shall be responsible at the time of sale to pay or finance the difference in the two vehicles' MSRPs to the manufacturer, converter or distributor; and
 - b. If the comparable vehicle has a lower MSRP than the reacquired vehicle, the Complainant will be credited the difference in the MSRP between the two vehicles. The difference credited shall not exceed the amount of the calculated usage allowance for the reacquired vehicle.

²⁷ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, Phone (512) 465-4076.

9. The Complainant shall be responsible for obtaining financing, if necessary, to complete the transaction.
10. The replacement transaction described in this Order shall be completed within 20 days after the date this Order becomes final under Texas Government Code § 2001.144. If the transaction cannot be accomplished within the ordered time period, the Respondent shall repurchase the Complainant's vehicle pursuant to the repurchase provisions set forth in 43 Tex. Administrative Code § 215.208(b)(1) and (2). The repurchase price shall be **\$13,689.32**. The refund shall be paid to the Complainant and the lien holder, if any, as their interests appear. If clear title is delivered, the full refund shall be paid to the Complainant.
- The calculations for the repurchase price are as follows:

Purchase price, including tax, title, license and registration	\$14,261.92
Date of delivery	05/13/15
Date of first report of defective condition	08/27/15
Date of hearing	02/25/16
Days out of service	83
Useful life determination	3,650

Purchase price, including tax, title, license and registration	\$14,261.92		
<i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery	08/27/15	-	05/13/15 = 106
<i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair	02/25/16	-	08/27/15 = 182 -83 99
<i>Reasonable Allowance for Use Calculations:</i> Unimpaired days	106 ÷	3,650 ×	\$14,261.92 = \$414.18
Impaired days	99 ÷	3,650 ×	\$14,261.92 × 50% = \$193.42
Total reasonable allowance for use deduction	\$607.60		
Purchase price, including tax, title, license and registration	\$14,261.92		
Less reasonable allowance for use deduction	-\$607.60		
Plus filing fee refund	\$35.00		
TOTAL REPURCHASE AMOUNT	\$13,689.32		

11. If the Complainant's vehicle is substantially damaged or there is an adverse change in its condition, beyond ordinary wear and tear, from the date of the hearing to the date of the Respondent's reacquisition of the vehicle, and the parties are unable to agree on an amount allowed for such damage or condition, either party may request reconsideration by the final order authority of the trade-in value of the Complainant's vehicle.

SIGNED April 22, 2016



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