

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0105 CAF**

**DEBRA & MONTE MOORE,  
Complainants**

**v.**

**FORD MOTOR COMPANY,  
Respondent**

§  
§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Debra & Monte Moore (Complainants) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in their vehicle manufactured by Ford Motor Company (Respondent). The hearings examiner concludes that Complainants did not timely file their complaint and the subject vehicle does not have a warrantable defect. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on April 12, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Maria Diaz, Consumer Legal Analyst, represented the Respondent.

---

<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 Use or Value

##### i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>5</sup>

---

<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).

**ii. Impairment of Value**

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, 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>6</sup>

**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>7</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>8</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle

---

<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

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

to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.<sup>9</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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>10</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>11</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>12</sup>

**2. Warranty Repair Relief**

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle.”<sup>13</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>14</sup>

---

<sup>9</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>10</sup> 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). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

<sup>11</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>12</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>13</sup> TEX. OCC. CODE § 2301.204.

<sup>14</sup> TEX. OCC. CODE § 2301.603(a).

### 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>15</sup> The Complainant must prove all facts 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>16</sup> For example, the Complainant must show the fact 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. If the Complainant fails to prove one (or more) of the required facts, the Complainant cannot prevail.

### 4. Complaint Sets the Issues

The Complaint identifies the issues to be addressed in this proceeding.<sup>17</sup> The pleadings should state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”<sup>18</sup>

#### A. Complainants’ Evidence and Arguments

On November 29, 2013, Monte Moore, purchased a new 2014 Ford Focus from Southwest Ford, a franchised dealer of the Respondent, Ford Motor Company, in Weatherford, Texas. The vehicle had 24 miles on the odometer at the time of purchase. The vehicle’s limited warranty “bumper to bumper” coverage lasts for three years or 36,000 miles, whichever occurs first. The vehicle’s limited warranty powertrain coverage lasts for five years or 60,000 miles, whichever occurs first. The vehicle also has an extended warranty of seven years or 100,000 miles for

---

<sup>15</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>16</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>17</sup> “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted.” TEX. GOV’T CODE § 2001.052. *See also* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.202(b).

transmission clutch shudder and input seals and an extended warranty of 10 years or 150,000 miles for the transmission control module.<sup>19</sup>

Mrs. Moore explained that the vehicle would hesitate and jerk, mostly when taking off from a stop. At times, the vehicle did not feel like it would go at all. Mrs. Moore noticed that the vehicle may roll backwards on an incline without braking. Mrs. Moore testified that they first noticed issues with the vehicle within several weeks of buying the vehicle. Mrs. Moore stated that she last experienced issues with the vehicle on April 3, 2016, and maybe April 4, 2016, before going to the dealership for repair on April 5, 2016.

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

Date	Miles	Issue
April 14, 2015	23,978	Transmission jerk upon take off in low gears, pronounced in stop and go driving, operates properly above 40 mph <sup>20</sup>
August 17, 2015	28,660	Transmission shuddering <sup>21</sup>
October 12, 2015	30,755	Transmission shuddering and shifting harshly <sup>22</sup>
November 17, 2015	32,010	Transmission shudder <sup>23</sup>
April 5, 2016	37,871	Transmission shudders when shifting gears, usually below 40 mph, after engine warms up <sup>24</sup>

The final repair attempt occurred on April 5, 2016. Mr. Moore noted that they first took the vehicle to a dealer for service about two weeks after purchasing the vehicle, but the dealer found the vehicle to be normal and did not document the visit.

On November 11, 2015, the Complainants mailed a written notice of defect to the Respondent. On November 13, 2015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the transmission would jerk, shudder, and rattle upon acceleration.

---

<sup>19</sup> Respondent's Ex. 1, Reference Guide to Understanding DPS6 Automatic Transmission Warranty Coverage.

<sup>20</sup> Complainants' Ex. 3, Invoice 30252.

<sup>21</sup> Complainants' Ex. 4, Invoice 41264.

<sup>22</sup> Complainants' Ex. 7, Invoice 46269.

<sup>23</sup> Complainants' Ex. 5, Invoice 49327.

<sup>24</sup> Complainants' Ex. 6, Invoice 305655.

## B. Respondent's Evidence and Arguments

Ms. Diaz testified that the repair orders indicate that the vehicle operated within specifications up until repair order 49327,<sup>25</sup> when it tested outside of expected limits. Repair order notes indicated that the complainants were satisfied with the repairs. Ms. Diaz noted that updates to the TCM (transmission control module) and PCM (power control module), in which the technician updates the software, are not considered repairs. After reprogramming the TCM and PCM, the technician tests the rpms. Only one invoice showed rpms over 250, which required replacement of both inner input shaft seals and clutches. Ms. Diaz stated that the normal characteristics of the (PowerShift) transmission included: vibration during coasting, noises when downshifting and upshifting. She explained that the transmission essentially consists of two manual transmissions controlled by computer for fuel efficiency and performance. People that expect the characteristics of a traditional transmission are disconcerted by the characteristics of the transmission. If the transmission does not exceed the 250 rpm threshold, no repair is required. At this time, the Respondent considers the vehicle to have been successfully repaired. Ms. Diaz also represented that because the Complainants brought the vehicle in during the warranty period the Respondent would honor any further repair at no cost to the Complainants.

## C. Inspection and Test Drive

The vehicle had 37,953 miles on the odometer at the inspection on the day of the hearing. The vehicle operated normally during the test drive and did not exhibit any of the complained of characteristics.

## D. Analysis

### 1. Statutory Deadline

The Lemon Law requires filing a Lemon Law complaint no later than six months after the earliest of: “(1) the expiration date of the express warranty term; or (2) 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>26</sup> In this case, the earliest of these dates is the date on which 24,000 miles have passed since delivery. The vehicle had 24 miles at the time of delivery (purchase). Accordingly, the

---

<sup>25</sup> Complainants' Ex. 5, Invoice 49327.

<sup>26</sup> TEX. OCC. CODE § 2301.606(d).

complaint must have been filed no later than six months after the date the vehicle's odometer reached 24,024 miles. The repair invoices show that the vehicle had 23,990 miles on April 16, 2015,<sup>27</sup> and 28,673 miles on August 22, 2015.<sup>28</sup> The Complaint specified April 17, 2015, as the date the vehicle reached 24,000 miles.<sup>29</sup> Therefore, the Lemon Law Complaint must have been filed by October 17, 2015. In this case, the Complainants filed their Complaint on November 30, 2015, 44 days after the statutory deadline. Consequently, the law precludes repurchase or replacement relief in this case.

## 2. Warrantable Defect

The Lemon Law does not apply to all problems a consumer may have with a vehicle, such as issues arising from the design of the vehicle. Rather, the Lemon Law only deals with warrantable defects. To qualify for replacement or repurchase or for warranty repair, the law requires the existence of a warrantable defect (a manufacturing defect covered by an applicable warranty).<sup>30</sup> In this case, the evidence shows that the characteristics associated with the vehicle's transmission are not a warrantable defect, but result from the design of the vehicle's PowerShift transmission. Accordingly, neither replacement/repurchase nor warranty repair applies in this case.

A manufacturing defect is an unintended condition that occurs when the vehicle varies from the manufacturer's intended design (such as incorrect assembly or the use of a substandard part).<sup>31</sup> A manufacturing defect occurs during manufacturing and exists when it leaves the manufacturer. That is, a manufacturing defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part. As a result, a defective vehicle differs from a properly manufactured vehicle. Issues that do not arise from manufacturing, such as the design of the vehicle or improper dealer repairs, are not warrantable defects.

---

<sup>27</sup> Complainants' Ex. 3, Invoice 30252.

<sup>28</sup> Complainants' Ex. 4, Invoice 41264.

<sup>29</sup> Complainants' Ex. 1, Complaint.

<sup>30</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>31</sup> See *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004).

In contrast, design characteristics result from the vehicle's design itself and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer's specifications will normally have the same characteristics. Moreover, since design characteristics are inherent to the design, such characteristics cannot be repaired, but would require redesigning the vehicle to address the issue. The evidence in this case indicates that the vehicle's transmission issues arise from the vehicle's intended design, specifically the design of the PowerShift transmission.

The complained of characteristics appear inherent to the design of the vehicle and not the result of a manufacturing defect. The evidence shows that Ford's PowerShift transmission exhibits such characteristics due to its design incorporating aspects of both manual transmissions and automatic transmissions. Furthermore, the "Focus Quick Reference Guide" actually contemplates that the vehicle will behave as described by the Complainants. The guide states that:

This transmission is designed for fun-to-drive performance and exceptional fuel efficiency, by using the advantages of a manual transmission with the convenience of an automatic transmission. You may notice the following characteristics of this technology:

- Mechanical noises after the engine is turned off, after the driver door is opened and during some transmission shifting events. These are normal and do not cause damage.
- Firm gearshifts when moving the accelerator pedal back and forth quickly.

Your transmission continuously makes electronic adjustments to optimize shift quality and acceleration performance. Most adjustments will be made during the first 1,000 miles (1610 kilometers) of operation. During this break-in period, slight vibrations may be felt when accelerating the vehicle from low speeds.<sup>32</sup>

Although the vehicle's complained of characteristics may be undesirable, these characteristics result from the vehicle's intended design (specifically, the PowerShift transmission) and not from any manufacturing defect. Moreover, the Respondent had the vehicle repaired the week before the hearing and any nonconformity that may have existed appears to have been successfully repaired. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief under TEX. OCC. CODE § 2301.604(a) and § 2301.204.

---

<sup>32</sup> Respondent's Ex. 1, Focus Quick Reference Guide Two Thousand Fourteen (emphasis added).

### III. Findings of Fact

1. On November 29, 2013, Monte Moore, purchased a new 2014 Ford Focus from Southwest Ford, a franchised dealer of the Respondent, Ford Motor Company, in Weatherford, Texas. The vehicle had 24 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty "bumper to bumper" coverage lasts for three years or 36,000 miles, whichever occurs first. The vehicle's limited warranty powertrain coverage lasts for five years or 60,000 miles, whichever occurs first. The vehicle also has an extended warranty of seven years or 100,000 miles for transmission clutch shudder and input seals and an extended warranty of 10 years or 150,000 miles for the transmission control module.
3. The vehicle's bumper to bumper and powertrain warranty coverages were in effect at the time of the hearing.
4. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
April 14, 2015	23,978	Transmission jerk upon take off in low gears, pronounced in stop and go driving, operates properly above 40 mph
August 17, 2015	28,660	Transmission shuddering
October 12, 2015	30,755	Transmission shuddering and shifting harshly
November 17, 2015	32,010	Transmission shudder
April 5, 2016	37,871	Transmission shudders when shifting gears, usually below 40 mph, after engine warms up

5. On November 11, 2015, the Complainants mailed a written notice of defect to the Respondent.
6. On November 13, 2015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the transmission would jerk, shudder, and rattle upon acceleration.
7. The vehicle had 24,000 miles on April 17, 2015.
8. On January 12, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Ford Motor Company, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority

and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

9. The hearing in this case convened and the record closed on April 12, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Maria Diaz, Consumer Legal Analyst represented the Respondent.
10. The vehicle's odometer showed 37,953 miles at the time of the hearing.
11. The vehicle operated normally during the test drive at the hearing.
12. The vehicle does not have a currently existing warrantable defect.

#### **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 parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
4. The Complainants bear the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
5. The Complainants did not prove that the vehicle has an existing defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
6. The Complainants did not timely file the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
7. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.606(d).

8. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expires. TEX. OCC. CODE §§ 2301.204, 2301.603.

**V. Order**

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED June 8, 2016**



---

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