

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0132 CAF**

**KRESSY E. CARLILE,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Kressy E. Carlile (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). The hearings examiner concludes that the subject vehicle does not have a currently existing warrantable defect that creates a serious safety hazard or substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

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 May 24, 2016, in Odessa, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Bob Weir, Technical Advisor, testified for 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 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.”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).

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.”⁶

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.⁷

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.⁸ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle

⁶ *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.”).

⁷ 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.

⁸ “[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.⁹

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;¹⁰ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹¹ 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.¹²

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 . . . warranty agreement applicable to the vehicle."¹³ The manufacturer has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁴

⁹ "[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).

¹⁰ 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.

¹¹ 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).

¹² TEX. OCC. CODE § 2301.606(d)(2).

¹³ TEX. OCC. CODE § 2301.204.

¹⁴ TEX. OCC. CODE § 2301.603(a).

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁵ 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.¹⁶ 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 Sets the Issues

The Complaint identifies the issues to be addressed in this proceeding.¹⁷ 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.”¹⁸

A. Complainant’s Evidence and Arguments

On August 9, 2014, the Complainant, purchased a new 2014 Ram 1500 from Pioneer Dodge, a franchised dealer of the Respondent, FCA US LLC, in Lubbock, Texas.¹⁹ The vehicle had 9 miles on the odometer at the time of purchase.²⁰ The vehicle had 141 miles at the time of actual delivery. The vehicle’s Basic Limited Warranty Coverage lasts for 3 years or 36,000 miles, whichever occurs first.²¹

¹⁵ 43 TEX. ADMIN. CODE § 215.66(d).

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

¹⁷ “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.”).

¹⁸ 43 TEX. ADMIN. CODE § 215.202(b).

¹⁹ Complainant’s Ex. 1, buyers order, odometer disclosure statement and other sales documents.

²⁰ Complainant’s Ex. 1, buyers order, odometer disclosure statement and other sales documents.

²¹ Complainant’s Ex. 2, 2014 Ram Truck Warranty Information.

On October 20, 2015, the Complainant mailed a written notice of defect to the Respondent.²² On January 8, 2016, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging that oil leaked from the turbocharger line; diesel exhaust entered the cab; the vehicle had an issue with: the particulate filter, five recalls, the DEF (diesel exhaust fluid) system, a broken bolt, and exhaust.

The Complainant provided invoices showing the following service visits:

Open Date	Miles	Issue
12/15/14	6,353	Exhaust fumes coming into cab when heater on, reprogram engine control module ²³
04/21/15	10,446	Customer requested inspection ²⁴
09/30/15	26,438	Check engine lamp on, customer requested inspection, customer requested check for power control module update, emissions recall – exhaust high frequency decoupler, safety recall; reprogram occupant restraint control, safety recall - steering wheel wiring, safety recall – radio security vulnerability, safety recall –side air bag curtain, NOx catalyst efficiency ²⁵

In addition the “VIP Summary Report”²⁶ showed, in relevant part, the following service history not shown in the invoices above:

Repair Date	Miles	Issue
09/04/14	2,115	Lines, turbocharger oil
11/04/14	5,465	Exhaust trouble
03/08/16	37,717	Engine control module

The Complainant noted that not all concerns were documented in the repair invoices. She estimated that the vehicle had six service visits for the exhaust issue. The Complainant testified that the exhaust issue occurred on the day the vehicle was delivered. She also noticed diesel exhaust entering the cab right after picking the vehicle up from the dealer (Tate Branch) in September (of 2014). The Complainant confirmed that the exhaust issue was successfully repaired.

²² Complainant’s Ex. 4, correspondence from Complainant to Respondent.

²³ Complainant’s Ex. 7, Invoice 70246.

²⁴ Complainant’s Ex. 8, Invoice 90692.

²⁵ Complainant’s Ex. 9, Invoice 95214.

²⁶ Complainant’s Ex. 10, VIP Summary Report.

The Complainant stated she included an electrical concern in an amended complaint.²⁷ She explained that the dash would flash, the cruise control would turn on and off, and the Bluetooth would stop working. She added that when opening and closing the console, the radio will come on or go off. However, the Complainant stated that she did not keep track of service dates for the electrical issue. The Complainant identified the September 30, 2015, visit as addressing the electrical issue but she could not remember if the vehicle had more than one visit for the issue. She did recall that the radio came on loudly and she believed she brought the vehicle in for a visit in March or April of 2016 for the electrical issue. The Complainant stated that the electrical issue continued to be a problem, noting that a minor electrical problem occurred the day before the hearing – the cruise control would go on and off, the display would show information from her phone and switch back to the radio.

The Complainant stated she added a coolant leak issue in a second amended complaint. The second amended complaint only lists one repair attempt, 03/06/2016 at 37,717 miles²⁸ and the Complainant confirmed that she believed the vehicle had just one repair attempt for the coolant issue (a check engine light for coolant valve stuck). She expressed a belief that the coolant issue was not resolved and that she could smell coolant during a cold spell about a week before the hearing.

B. Respondent's Evidence and Arguments

On cross-examination, the Complainant affirmed that she only sent one notice to the Respondent by certified mail (sent October of 2015) and that she could not confirm the receipt of the other letters to the Respondent. Ms. Kershaw explained that the Respondent's customer care opens a "CAIR" whenever receiving any contact. The CAIR Details for the Complainant appears to show five contacts. The CAIR Details show that the Respondent received a letter from the Complainant on October 28, 2015, which was the last time the Respondent receive any correspondence from the Complainant. After receiving the letter, the district manager contacted the Complainant and explained she could take the vehicle in for service. This letter did not address any electrical issues and the Respondent did not otherwise receive any notice of electrical issues.

²⁷ Complainant's Ex. 5, Amended Complaint.

²⁸ Complainant's Ex. 6, Second Amended Complaint.

Ms. Kershaw testified that the repair order the Complainant cited for the electrical issue did not actually address her complained of electrical issues but concerned recalls (the radio recall addressed security issues involving hacking into the vehicle), so there were no actual electrical repairs. Also, the Respondent contended that the electrical issues were out of warranty and that they were never actually addressed. With regard to the coolant issue, this was a new issue for which the Respondent also did not receive notice. The Complainant noted that the coolant has not been low since an incident at Lowe's Home Improvement. The Respondent pointed out that the Complainant testified that the exhaust issue in the original complaint had been successfully repaired. Ms. Kershaw noted that the vehicle's basic warranty had expired but the power train warranty still remained in effect.

C. Inspection and Test Drive

At the inspection during the hearing, the vehicle had 43,626 miles on the odometer. The Complainant explained that she smelled coolant on two occasions. In one instance, the coolant was low, maybe one-third empty. Mr. Weir scanned the vehicle for diagnostic trouble codes and found a code stored for a one-time malfunction of a mirror but no other codes. Mr. Weir explained that the mirror malfunction was probably not related to the complained of issues. Mr. Weir added that not every malfunction sets the check engine light. The Complainant described the electrical issues as occurring maybe once a week at highway speeds and not going slowly. The vehicle operated normally during the test drive which included driving on the highway. The odometer showed 43,651 miles at the end of the test drive.

D. Analysis

1. Exhaust Issue

To qualify for any relief, the vehicle must have an existing warrantable defect. Although the vehicle previously had an issue with exhaust entering the cabin, the Complainant testified that the exhaust issue has since been successfully repaired. Consequently, the exhaust issue is not a basis for relief.

2. Electrical and Coolant Issues.

The evidence reflects that the Respondent never received notice of the electrical or coolant issues in the amended and second amended complaints. In addition, record is unclear whether the

Complainant actually pleaded the electrical or coolant issues. The Department's notice of hearing itself only included the original complaint. Moreover, the Complainant acknowledged that she had no confirmation that the Respondent received notice of the electrical or coolant issues. Accordingly, the electrical and coolant issues will not be considered as a basis for relief in this case.

III. Findings of Fact

1. On August 9, 2014, the Complainant, purchased a new 2014 Ram 1500 from Pioneer Dodge, a franchised dealer of the Respondent, FCA US LLC, in Lubbock, Texas. The vehicle had 9 miles on the odometer at the time of purchase.
2. The vehicle's Basic Limited Warranty Coverage lasts for 3 years or 36,000 miles, whichever occurs first.
3. The vehicle's odometer displayed 43,626 miles at the time of the hearing.
4. The vehicle's Basic Limited Warranty expired at 36,009 miles, prior to the hearing.
5. The Complainant took the vehicle to a dealer for repair as shown below:

Open Date	Miles	Issue
12/15/14	6,353	Exhaust fumes coming into cab when heater on, reprogram engine control module
04/21/15	10,446	Customer requested inspection
09/30/15	26,438	Check engine lamp on, customer requested inspection, customer requested check for power control module update, emissions recall – exhaust high frequency decoupler, safety recall; reprogram occupant restraint control, safety recall - steering wheel wiring, safety recall -- radio security vulnerability, safety recall –side air bag curtain, NOx catalyst efficiency

Repair Date	Miles	Issue
09/04/14	2,115	Lines, turbocharger oil
11/04/14	5,465	Exhaust trouble
03/08/16	37,717	Engine control module

6. On October 20, 2015, the Complainant mailed a written notice of defect to the Respondent. The Respondent did not receive any other notices of defect from the Complainant.

7. On January 8, 2016, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that oil leaked from the turbocharger line; diesel exhaust entered the cab; the vehicle had an issue with: the particulate filter, five recalls, the DEF (diesel exhaust fluid) system, a broken bolt, and exhaust.
8. On March 14, 2016, 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. The notice of hearing included a copy of the original Complaint but not any amended complaints. The Respondent did not otherwise receive a copy of any amended complaints.
9. The hearing in this case convened and the record closed on May 24, 2016, in Odessa, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Bob Weir, Technical Advisor, testified for the Respondent.
10. The vehicle operated normally during the test drive at the hearing.

IV. Conclusions of Law

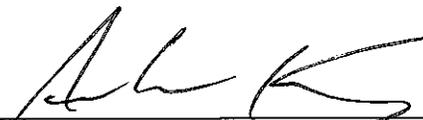
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 that the vehicle has a currently existing defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant timely filed the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
8. Neither the Complainant nor a person on behalf of the Complainant provided sufficient notice of the electrical or coolant issues to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
9. The Respondent did not have an opportunity to cure the alleged electrical or coolant related defects. TEX. OCC. CODE § 2301.606(c)(2).
10. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
11. 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 expiration of the warranty. 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 June 23, 2016



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