

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0136 CAF**

**ROBERT RIDDLE,  
Complainant**

v.

**WINNEBAGO INDUSTRIES, INC.,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Robert Riddle (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 his vehicle manufactured by Winnebago Industries, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/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 June 17, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. James "Mick" Kennedy, attorney, represented the Complainant. Christine "Tina" Anderson and the Complainant himself testified for the Complainant. Christopher Lowman, attorney, represented the Respondent. Steve Mary, Product Compliance Manager, and Jeff Stickfort, Service District Manager, testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief

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

##### a. Serious Safety Hazard

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

##### b. Substantial Impairment of 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>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

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

**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**

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.<sup>7</sup> The first applies generally,<sup>8</sup> the second applies to serious safety hazards,<sup>9</sup> and the third applies to vehicles out of service for repair for at least 30 days.<sup>10</sup>

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>11</sup>

Additionally, 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:

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<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).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(1).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>10</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>11</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[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.<sup>12</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>13</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle 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>14</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>15</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>16</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration

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<sup>12</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>13</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

<sup>14</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>15</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>16</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 Duichmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

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>17</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>18</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>19</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>20</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>21</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.

## 4. The Complaint Identifies the Issues in a Case

The Complaint identifies the issues to be addressed in this proceeding.<sup>22</sup> The pleadings should state “sufficient facts to enable the department and the party complained against to know

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<sup>17</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>18</sup> TEX. OCC. CODE § 2301.204.

<sup>19</sup> TEX. OCC. CODE § 2301.603(a).

<sup>20</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>21</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>22</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.”).

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>23</sup>

#### A. Summary of Complainant’s Evidence and Arguments

On February 12, 2015, the Complainant, purchased a new 2015 Winnebago Forza 38R from Crestview RV Center, an authorized dealer of the Respondent, Winnebago Industries, Inc., in Buda, Texas. The vehicle had 1,062 miles on the odometer at the time of purchase.<sup>24</sup> The vehicle’s limited warranty covers the vehicle for 12 months or 15,000 miles, whichever occurs first.<sup>25</sup>

On August 12, 2015, the Complainant mailed a written notice of defect to the Respondent.<sup>26</sup> On January 4, 2016, the Complainant filed a Lemon Law complaint (Complaint), as amended on March 1, 2016, with the Texas Department of Motor Vehicles (Department), alleging that the vehicle’s roof leaked, the slide outs did not operate, and the leveling system never worked reliably. The slide problem does not appear to be a currently existing issue.

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

Date	Miles	Issue
March 31, 2015	1,062	Auto-level unable to finish <sup>27</sup>
April 23, 2015		Water intrusion above driver seat and on floor below <sup>28</sup>
May 5, 2015	3,180	Leveling system working intermittently; leak above driver seat <sup>29</sup>
May 15, 2015	4,203	Roof leaking toward the front; leveling inoperable <sup>30</sup>
May 19, 2015	4,549	Levelers not working properly <sup>31</sup>

<sup>23</sup> 43 TEX. ADMIN. CODE § 215.202(b).

<sup>24</sup> Complainant’s Ex. 2, Purchase Order.

<sup>25</sup> Complainant’s Ex. 4, 2015 New Vehicle Limited Warranty.

<sup>26</sup> Complainant’s Ex. 10, Mailed Notice of Defect.

<sup>27</sup> Complainant’s Ex. 5, Repair Order 97285.

<sup>28</sup> Complainant’s Ex. 6, Repair Order 97684.

<sup>29</sup> Complainant’s Ex. 7, Invoice 4039859.

<sup>30</sup> Complainant’s Ex. 8, Invoice 79064R.

<sup>31</sup> Complainant’s Ex. 9, Invoice 79130R.

The Complainant testified that the vehicle had problems from the first day with water leaks and the leveling system, which continued to the present. Even after repair, the jack warning lights would turn on while driving 60 mph and the leveling system continued to malfunction. The Complainant noted that the leveling system will lift the wheels off the ground trying to level the vehicle though the manual states not to raise the wheels, given that the rear wheels are the only ones that the brakes hold in place. He also explained that the jack warnings continued, though intermittently. With respect to the leak, he elaborated that water leaked above the drive seat, dripped off the cabinets onto the floor and elsewhere. The Complainant cited water dripping from under the air conditioner as showing that the final repair attempt did not successfully cure the leaking. In sum, the Complainant requested repurchase relief. The Complainant noted that he purchased the vehicle from a Texas dealer and that at least two defects continued to exist, though the water test at the inspection did not show a leak, he believed a leak to still exist. Moreover, the leveling system's warning light continues to activate while driving down the road.

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

Mr. Mary testified that the red light on the dash did not necessarily indicate that the jacks were deploying. He explained that the vehicle had a separate alarm for jacks deploying. Instead, the red light indicated that the pressurization of the jacks. He confirmed that Lippert [Components Inc.] (LCI) manufactured the jacks (leveling system) and separately warranted them. He affirmed that LCI redesigned the jack system to prevent confusion. Specifically, LCI modified the system so that the light did not activate every time the pump pressurized the jacks. Mr. Mary stated that inspection of the roof did not show evidence of water intrusion after spraying the roof with a hose from front to rear in different directions. Instead, he suspected condensation as the source of the water. He further stated that at the inspection at the hearing, the jacks extended/retracted as intended and the system displayed a message showing successful leveling and they confirmed the leveling using a level. In closing, the Respondent asserted that the upgraded module fixed the LCI jacks/leveling issue. A nonconformity must continue to exist to qualify for relief but a preponderance of the evidence shows the issues to be fixed.

### **C. Inspection at Hearing**

Upon initial inspection, the front driver side wheel was about one inch above the ground. The ground had a slight downward grade towards the driver side. The vehicle normally retracted the jacks. The jacks subsequently leveled successfully as shown by the leveling system message and manual verification using a level at various points in the vehicle. Inspection of the rear air conditioning unit showed that the metal plate under the air conditioner, specifically under the blower, became cold when operating, conducive to forming condensation. Significantly, that metal plate had some water marks and the metal sheet on the vent cover below the metal plate under the blower clearly showed marks from pooling water. However, the perimeter of the air conditioner did not appear to show evidence of water penetration. The vehicle had 15,100 miles at the time of the hearing.

### **D. Analysis**

#### **1. Water Leak**

A preponderance of the evidence indicates that the vehicle does not currently have an existing leak. Though the vehicle leaked in the past, the repairs appear to have successfully cured this nonconformity. The water testing at the inspection during the hearing did not reveal any water intrusion from the exterior. However, as shown by the repair history and subsequent leaks, water testing using a hose or a rain booth does not necessarily ensure water tightness in real world conditions. However, the Complainant testified that the last instance of water dripping in the interior, from the rear air conditioning vent, occurred after a rainstorm, indicating the possibility that rainwater had leaked into the vehicle. When asked whether the rear air conditioner was running before the water leak from the vent, the Complainant could not recall for certain, but stated that he expected that the air conditioner would have been on. An inspection of the rear air conditioning unit showed that the metal plate under the air conditioner, specifically under the blower, became cold when operating, conducive to forming condensation. Significantly, that metal plate had some water marks and the metal sheet on the vent cover below the metal plate under the blower clearly showed marks from pooling water. The proximity of the pooling water to water marks on the metal plate under the air conditioning unit indicates that condensation dripped onto the metal sheet of the vent cover, as opposed to water intruding from the exterior. Moreover, the perimeter around the air conditioner did not appear to show any evidence of water penetration. Further, the rain

described as coinciding with water from the air conditioner is consistent with the humid conditions necessary for forming condensation. In sum, the balance of the evidence indicates that the water from the air conditioner resulted from normal condensation and not the intrusion of water from the exterior. Nevertheless, because the Complainant notified an authorized dealer of the leak issue during the warranty period, the Respondent has an ongoing obligation to repair any recurrence of this issue, even if it occurs after the expiration of the warranty.<sup>32</sup>

## 2. Leveling System

The leveling issue does not appear to be a warrantable defect. As a component supplied by a third party manufacturer, LCI,<sup>33</sup> the leveling jacks fall outside of the vehicle's warranty coverage. Following the heading "Excluded from Basic Coverage", the warranty states that "a part or component covered under a warranty issued by its manufacturer (for example, the chassis, drivetrain, wheels, tires; electronics and appliances)."<sup>34</sup> In any event, the leveling system appeared to be working normally. In particular, the record reflects that operating the auto-leveling system on uneven ground can result in the conditions identified by the Complainant. Additionally, with regard to the jack warning light, the record reflects that the light will normally activate when the jacks pressurize, even though the jacks are not actually coming down. The vehicle has a separate alarm to indicate when the jacks deploy. The testimony shows that the operation of the warning light is a known design quirk that the manufacturer, LCI, redesigned because of customer confusion.

### III. Findings of Fact

1. On February 12, 2015, the Complainant, purchased a new 2015 Winnebago Forza 38R from Crestview RV Center, an authorized dealer of the Respondent, Winnebago Industries, Inc., in Buda, Texas. The vehicle had 1,062 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for 12 months or 15,000 miles, whichever occurs first.

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<sup>32</sup> TEX. OCC. CODE §§ 2301.204, 2301.603.

<sup>33</sup> See Complainant's Ex. 7, Invoice 4039859.

<sup>34</sup> Complainant's Ex. 7, Invoice 4039859.

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

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
March 31, 2015	1,062	Auto-level unable to finish
April 23, 2015		Water intrusion above driver seat and on floor below
May 5, 2015	3,180	Leveling system working intermittently; leak above driver seat
May 15, 2015	4,203	Roof leaking toward the front; leveling inoperable
May 19, 2015	4,549	Levelers not working properly

4. On August 12, 2015, the Complainant mailed a written notice of defect to the Respondent.
5. On January 4, 2016, the Complainant filed a Lemon Law complaint (Complaint), as amended on March 1, 2016, with the Texas Department of Motor Vehicles (Department), alleging that the vehicle's roof leaked, the slide outs did not operate, and the leveling system never worked reliably.
6. On March 2, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Winnebago Industries, 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.
7. The hearing in this case convened and the record closed on June 17, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. James "Mick" Kennedy, attorney, represented the Complainant. Christine "Tina" Anderson and the Complainant himself testified for the Complainant. Christopher Lowman, attorney, represented the Respondent. Steve Mary, Product Compliance Manager, and Jeff Stickfort, Service District Manager, testified for the Respondent.
8. The vehicle's odometer displayed 15,100 miles at the time of the hearing.
9. The vehicle's warranty had expired on February 12, 2016.
10. The vehicle's warranty does not cover the leveling system.
11. Water penetration from the exterior appears to have been successfully repaired.

12. During the inspection at the hearing, the vehicle showed indications that water condensed and collected below the air conditioner due to the normal operation of the air conditioner.

#### 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 an existing defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED August 16, 2016**



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