

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0158 CAF**

**LAURA M. PENA,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Laura M. Pena (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 Forest River, Inc. (Respondent). The hearings examiner concludes that the subject vehicle has a warrantable defect that substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle qualifies 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 20, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. In addition, Susana Sliva testified for the Complainant. Warren Murphy, represented and 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

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.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 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

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)(3).

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).

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).

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

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

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).

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).

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 Complaint identifies the issues to be addressed in this proceeding.¹⁷ In other words, this proceeding will only address the issues specified in the Complaint. The Complaint 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 February 5, 2015, the Complainant, executed a purchase agreement for a new 2015 Forest River Rockwood RLT233S from Topper’s Camping Center, an authorized dealer of the Respondent, Forest River, Inc., in Waller, Texas. The vehicle was delivered on February 17, 2015.¹⁹ The vehicle’s limited warranty covers the vehicle for one year after purchase.²⁰ The Respondent extended the warranty for an additional seven months.²¹

On December 30, 2015, the Complainant mailed a written notice of defect to the Respondent.²² On January 4, 2016, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the bed doors leaked and the door latch hardware would break.

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, Purchase Agreement.

²⁰ Complainant’s Ex. 2, Limited Warranty Towable Products.

²¹ Complainant’s Ex. 6, Letter from Respondent Extending Warranty.

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

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

Date	Issue
April 2, 2015 June 5, 2015	Water leak at bed door
August 20, 2015 December 17, 2015	Front bed/bunk frame, rear bed/bunk frame, right side bed/bunk frame ²³
December 22, 2015 April 27, 2016	Side bunk canvas and mattress stain, front bunk bed latch, side bunk mattress stain ²⁴

In relevant part, the Complainant testified that the doors to the beds leaked, the latch to the side bed broke, the latch for the front bed broke, the mattress was in standing water, the canvas had mold from a leak, the mattresses got moldy, the vehicle smelled moldy, and water would pour out when opening the bed doors. She explained that water would leak onto the canvas then onto the mattresses because the mattresses leaned on the canvas with the bed doors closed. The Complainant stated that the repairs did not alleviate the problems. After first noticing the problem with the beds, the dealer did not repair anything. At the second repair visit, the dealer kept the vehicle for four months and a second bunk broke. Ms. Sliva added that the latch to the bunk broke while in South Carolina and they used a clamp to hold the latch closed on the return trip. She explained that there was no reason for the latch to break because the mattress was not in place (and therefore did not press on the bed door). The latch now appeared crooked. The Complainant stated that the water last leaked on the beds on December 19th, the last time they went camping in 2015. A latch last broke on December 22, 2015, when preparing to leave from camping. She elaborated that she had a hard time closing the beds because none of the locks aligned. After picking up the vehicle from the dealer on April 22, 2016, the latch appeared mostly repaired but still did not align properly. The Complainant stated that she did not get a repair order for the very first service visit, at which the dealer could not find a leak, but water poured out when opening the awning. The Complainant concluded that she preferred repurchase relief.

B. Respondent's Evidence and Arguments

Mr. Murphy stated that some miscommunication occurred in February. The Respondent understood that the latches were the problem and the vehicle did not need to be transported to the

²³ Complainant's Ex. 8, Work Order 17939.

²⁴ Complainant's Ex. 7, Work Order 18793.

manufacturer in Indiana, at considerable expense. On March 24, 2016, the Respondent was told the doors were separating. The Respondent corresponded with John DuFour, the Department's case advisor, once the Respondent determined the dealer could not correct the problem. Once the problem became clear to the Respondent, it no longer had an opportunity to fix the problem. The doors appeared to be an issue in August (2015), but appeared to be fixed to the Respondent and the Respondent did not learn otherwise until March (of 2016). Initially, the Respondent believed the latches, not the doors, were the problem. However, the problem actually appeared to be the doors and not the latches holding them closed. The Respondent contended that it did not have an effective opportunity to repair.

C. Inspection

Inspection of the vehicle at the hearing showed clear signs of water penetrating past the bed doors. Water poured out when opening one of the bed doors. In the closed (up) position, the door stands flush with the wall of the vehicle. When opened, the door, which has hinges on the bottom, drops down from the vehicle to a horizontal position so that the door panel acts as a bed platform. In this way, the door, together with the surrounding canvas, forms a bunk. The Complainant stated that the water would seep past the door into the interior. A mattress and adjacent wood exhibited mold and the surrounding canvas had water stains. The Complainant explained that the bed doors would close easily without the mattresses on them but would not close properly with the mattresses on them.

D. Analysis

As explained below, the vehicle qualifies for repurchase/replacement relief. The parties do not dispute the existence of a warrantable defect. Rather, dispute centers on whether the Respondent actually had an effective opportunity to repair the vehicle. In particular, this case hinges on whether the Respondent had adequate notice and an opportunity to repair the warrantable defects. In the present case, the Complaint provided sufficient information to identify the actual problem and the Respondent had an opportunity to repair within the meaning of the Lemon Law.

1. Sufficiency of Complaint

The Department's rules state that a complaint should state "sufficient facts . . . 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.”²⁵ Through no fault of the Complainant or the Respondent, reading the Complaint’s description of the leaking door issue together with the breaking latch issue could suggest that defective latches allowed the doors to leak (in actuality, the reverse occurred: misaligned doors caused the latches to break). As a result, the Respondent passed on the opportunity to repair the vehicle and instead authorized a dealer to repair the latches, believing the dealer could resolve this apparently straight-forward problem. Had the Respondent known the true nature of the problem, the Respondent itself would have attempted the repair. Nevertheless, the Complaint sufficiently raised the issue regarding the fit of the door itself. The complaint stated that “All doors to beds leaked.” Though the malfunctioning latches could lead to the assumption that the door’s latches allowed the doors to leak, the Complaint clearly identified the problem as leaking doors. Nothing in the Complaint precludes other possible causes of the door leaks. Therefore, the Respondent had adequate notice of the issues.

2. Opportunity to Repair

By the time the Respondent realized the true nature of the door problem, the Respondent, as a practical matter, could not repair the door defect in the limited time before the hearing. As a result, the Respondent contends that it did not effectively have an opportunity to repair. The fact that the Respondent in good faith did not realize that the doors themselves caused the problems does not mean that it did not have an opportunity to repair. The Lemon Law requires that “the manufacturer . . . has been given an opportunity to cure the alleged defect or nonconformity.” The law does not require an actual repair attempt but only an opportunity to repair. Under the Department’s application of the Lemon Law, if a manufacturer authorized repairs by a dealer in response to a notice of defect, the manufacturer may be deemed to have had an opportunity to cure.²⁶ Although the Respondent may have acted differently with a better understanding of the issues, the Respondent nevertheless had an opportunity to cure.

²⁵ 43 TEX. ADMIN. CODE § 215.202(b).

²⁶ See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

III. Findings of Fact

1. On February 5, 2015, the Complainant, executed a purchase agreement for a new 2015 Forest River Rockwood RLT233S from Topper's Camping Center, an authorized dealer of the Respondent, Forest River, Inc., in Waller, Texas. The vehicle was delivered on February 17, 2015.
2. The vehicle's limited warranty covers the vehicle for one year after purchase. The Respondent extended the warranty for an additional seven months.
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
April 2, 2015	
June 5, 2015	Water leak at bed door
August 20, 2015	Front bed/bunk frame, rear bed/bunk frame, right side bed/bunk
December 17, 2015	frame ²⁷
December 22, 2015	Side bunk canvas and mattress stain, front bunk bed latch, side
April 27, 2016	bunk mattress stain ²⁸

5. On December 30, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On January 4, 2016, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the bed doors leaked and the door latch hardware would break.
7. On April 4, 2016, 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.

²⁷ Complainant's Ex. 8, Work Order 17939.

²⁸ Complainant's Ex. 7, Work Order 18793.

8. The hearing in this case convened and the record closed on May 20, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. In addition, Susana Sliva testified for the Complainant. Warren Murphy, represented and testified for the Respondent.
9. At the inspection during the hearing, showed signs of water penetration. A mattress and adjacent wood exhibited mold and the surrounding canvas had water stains. Additionally, water poured out when opening one of the bed doors.
10. The vehicle has an existing defect: the bed doors leak water.
11. The leaking has caused mold growth and staining of various components, including the mattresses, wood trim, and canvas.
12. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$25,571.89
Date of delivery	02/17/15
Date of first report of defective condition	04/02/15
Date of hearing	05/20/16
Days out of service	310
Useful life determination	3,650

Purchase price, including tax, title, license and registration				\$25,571.89
<i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery	04/02/15	-	02/17/15	= 44
<i>Impaired Days:</i> Date of hearing less date of first report of defective condition	05/20/16	-	04/02/15	= 414
Less days out of service for repair				-310
				104
<i>Reasonable Allowance for Use Calculations:</i> Unimpaired days	44	÷	3,650	× \$25,571.89 = \$308.26
Impaired days	104	÷	3,650	× \$25,571.89 × 50% = \$364.31
Total reasonable allowance for use deduction				\$672.58
Purchase price, including tax, title, license and registration				\$25,571.89
Less reasonable allowance for use deduction				-\$672.58
Plus filing fee refund				\$35.00
TOTAL REPURCHASE AMOUNT				\$24,934.31

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 or market value 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(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the

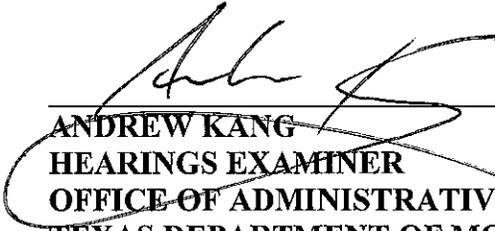
- vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$24,934.31**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
 3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁹ the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, starting on the 31st day after the date this Order becomes final, the Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
 4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
 5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail

²⁹ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

SIGNED July 14, 2016



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