

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0204 CAF**

**ELVA I. CASAS,  
Complainant**

**v.**

**FORD MOTOR COMPANY,  
Respondent**

§  
§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Elva I. Casas (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her vehicle manufactured by Ford Motor Company (Respondent). The hearings examiner concludes that the subject vehicle does not currently have 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 July 12, 2016, in Del Rio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Maria Diaz, Consumer Legal Analyst, represented and testified for 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 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>

---

<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).

<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).

<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).

**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>

**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

---

<sup>10</sup> TEX. OCC. CODE § 2301.606(c)(1). 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). 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).

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

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.

#### **4. The Complaint Identifies the Issues in this Proceeding**

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. Complainant’s Evidence and Arguments**

On May 5, 2014, the Complainant, purchased a new 2014 Ford Focus from Ken Stoepel Ford-Lincoln, a franchised dealer of the Respondent, Ford Motor Company, in Kerrville, Texas.<sup>19</sup> The vehicle had 26 miles on the odometer at the time of purchase.<sup>20</sup> The vehicle’s limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.<sup>21</sup>

On January 20, 2016, the Complainant mailed a written notice of defect to the Respondent.<sup>22</sup> On March 2, 2016, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the vehicle exhibited noise, the transmission jerked, and the vehicle did not respond at times.

---

<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).

<sup>19</sup> Complainant’s Ex. 5, Buyers Order.

<sup>20</sup> Complainant’s Ex. 2, Odometer Disclosure Statement.

<sup>21</sup> Complainant’s Ex. 3, Your Warranty.

<sup>22</sup> Complainant’s Ex. 1, Written Notice from Complainant to Respondent.

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

Date	Miles	Issue
05/27/2014	1,726	Vehicle jerks when leaving stops. <sup>23</sup>
04/13/2015	9,209	Vehicle vibrates and hesitates at any speed. <sup>24</sup>
05/07/2015	9,819	Vehicle has a vibration and hesitates at any speed. <sup>25</sup>
09/11/2015	13,429	Recall on transmission control module reprogramming. <sup>26</sup>

The Respondent's final opportunity to repair the vehicle occurred on April 27, 2016.<sup>27</sup>

The Complainant testified that the vehicle would exhibit transmission noise, jerking, and unresponsiveness when starting to move. However, she noted that the vehicle did not exhibit these conditions as much since the last repair. She explained that when stopping, the car would vibrate and when accelerating, the vehicle would sometimes respond quickly and sometimes would not respond until a second or two later. The Complainant stated she first noticed the issues the week she purchased the vehicle. She last noticed the issues the day before the hearing. She added that after one repair that included a gasket change, she found oil on the engine.

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

The Respondent argued that the vehicle did not qualify for repurchase or replacement, citing that the vehicle did not have four repair attempts and the vehicle was not out of service for repairs for 30 days. Ms. Diaz stated that in 2014, after reprogramming the transmission control module and power control module, the transmission performed within the specification of 250 rpm or less. At the April 13, 2015, visit, the inner shaft seals were found to be leaking and were replaced. The vehicle was working within specifications after repair. The September 11, 2015, visit only updated the transmission control module to the latest specifications and did not constitute a repair. At the final opportunity for repair on April 27, 2016, Kurt Kindler, the Respondent's field service engineer, test drove the vehicle and recommended clutch replacement because at the time, it exceeded specifications. The Respondent contended that the vehicle did not have a nonconformity. Rather, a lack of information (about the vehicle's DPS6 PowerShift transmission),

---

<sup>23</sup> Complainant's Ex. 6, Invoice W86756.

<sup>24</sup> Complainant's Ex. 10, Invoice 174247.

<sup>25</sup> Complainant's Ex. 9, Invoice 174921.

<sup>26</sup> Complainant's Ex. 8, Repair Order 178344.

<sup>27</sup> Respondent's Ex. 1, Vehicle Inspection Report.

not a manufacturing defect, was the issue. The transmission's design differed from a traditional transmission. The transmission did not have a torque converter and would not shift as smoothly. Instead the transmission had two independent manual transmission clutches so there will be some vibration, hesitation and delay innate to the transmission. Information from Ford's website, the Owner's Manual, Quick Reference Guide, and dealerships describe other normal characteristics, including: vibrations, firm gear shifts, mechanical sounds. The transmission has a normal operating threshold of 250 rpms. If rpms exceed 250, then the transmission will require work. The only times the Complainant's transmission required repair was April 13, 2015, and at the final repair attempt on April 27, 2016; the Respondent contended that these service visits constituted the only repair attempts.

### **C. Inspection and Test Drive**

The vehicle had 19,625 miles before the test drive at the hearing. The vehicle was driven on local streets in predominantly stop-and-go and slow-and-go conditions to duplicate the conditions most likely to produce the complained of issue. The vehicle exhibited one instance of slight clutch shudder noticed by the hearings examiner; however, this did not appear to have any substantive effect on the vehicle's performance. The Complainant stated that she heard a couple of instances of a mechanical noise that she could not describe. The hearings examiner did not hear the noises heard by the Complainant, but road noise may have obscured the mechanical noise given the condition of some of the roads during the test drive. The Complainant commented that the vehicle did not seem to exhibit the issues as noticeably as compared to the past. She noted that the vehicle did perform better after the last repair. The vehicle had 19,637 miles at the end of the test drive.

### **D. Analysis**

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>28</sup> In this case, the evidence shows that the conditions associated with the vehicle's transmission are not

---

<sup>28</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

warrantable manufacturing defects, but are design characteristics of the vehicle's PowerShift transmission. Accordingly, this condition cannot support replacement/repurchase or warranty repair relief.

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>29</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 service, are not warrantable defects. In contrast to manufacturing defects, 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 may ordinarily 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.

Although the vehicle's transmission previously exceeded the manufacturer's specifications and required repair, the vehicle does not appear to currently have any existing nonconformities. The Complainant acknowledged that the vehicle did improve after the final repair. The slight shudder occurring during the test drive appears to be the type of condition that may normally occur with the vehicle's PowerShift transmission. The record reflects that at least to some extent, the vehicle will normally exhibit mechanical noises, firm gearshifts, and vibrations. The evidence shows that the PowerShift transmission exhibits such characteristics due to its unique design, which differs from conventional automatic transmissions and therefore will behave differently than conventional automatic transmissions. Furthermore, various reference sources from the manufacturer specify that the vehicle will exhibit characteristics such as mechanical noises, firm gearshifts, and vibrations. Although the vehicle's characteristics may be undesirable, the record shows that these characteristics arise from the vehicle's intended design (specifically, the

---

<sup>29</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).

PowerShift transmission) and not from a manufacturing defect. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief under TEX. OCC. CODE § 2301.604(a) and § 2301.204.

### III. Findings of Fact

1. On May 5, 2014, the Complainant, purchased a new 2014 Ford Focus from Ken Stoepel Ford-Lincoln, a franchised dealer of the Respondent, Ford Motor Company, in Kerrville, Texas. The vehicle had 26 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
05/27/2014	1,726	Vehicle jerks when leaving stops. <sup>30</sup>
04/13/2015	9,209	Vehicle vibrates and hesitates at any speed. <sup>31</sup>
05/07/2015	9,819	Vehicle has a vibration and hesitates at any speed. <sup>32</sup>
09/11/2015	13,429	Recall on transmission control module reprogramming. <sup>33</sup>

4. On January 20, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On March 2, 2016, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles alleging that the vehicle exhibited noise, the transmission jerked, and the vehicle did not respond at times.
6. On April 18, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant 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.

---

<sup>30</sup> Complainant's Ex. 6, Invoice W86756.

<sup>31</sup> Complainant's Ex. 10, Invoice 174247.

<sup>32</sup> Complainant's Ex. 9, Invoice 174921.

<sup>33</sup> Complainant's Ex. 8, Repair Order 178344.

7. The hearing in this case convened and the record closed on July 12, 2016, in Del Rio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Maria Diaz, Consumer Legal Analyst, represented and testified for the Respondent.
8. The vehicle's odometer displayed 19,625 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle is equipped with a DPS6 PowerShift transmission.
11. The transmission's design and characteristics differ from that of a conventional automatic transmission.
12. The transmission may normally exhibit characteristics such as mechanical noises, firm gearshifts, and vibrations.
13. The transmission normally operates within 250 rpms.
14. The transmission requires repair when the rpms exceed 250.
15. The vehicle's transmission required repair on April 13, 2015, and April 27, 2016.
16. The transmission's performance improved after repair.
17. The vehicle operated normally during the test drive at the hearing, exhibiting some characteristic clutch shudder (vibration).

#### **IV. Conclusions of Law**

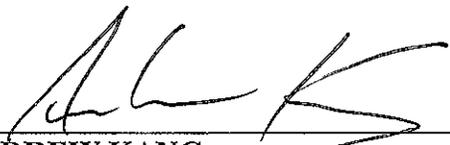
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 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 remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. 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 July 26, 2016**

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