

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0218 CAF**

**ERIC ERNST,**  
Complainant

v.

**DRV, LLC,**  
Respondent

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Eric Ernst (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 DRV, LLC (Respondent). The hearings examiner concludes that the subject vehicle has a warrantable defect that substantially impairs the vehicle's market value. Consequently, the Complainant's vehicle qualifies for repurchase/replacement relief.

**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 13, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Loris Ernst testified for the Complainant. Chad Olinger, represented and 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**

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>

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:

[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>8</sup>

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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)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(3).

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>9</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>10</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>11</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>12</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>13</sup>

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<sup>9</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>10</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>11</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>12</sup> TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>13</sup> TEX. OCC. CODE § 2301.606(d)(2).

## 2. Burden of Proof

The law places the burden of proof on the Complainant.<sup>14</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>15</sup> For example, the Complainant must show the fact that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence equally supports the Complainant and the Respondent, the Respondent will prevail. If the Complainant fails to prove one (or more) of the required facts, the Complainant cannot prevail.

## 3. The Complaint Identifies the Issues in this Case

The Complaint identifies the issues to be addressed in this proceeding.<sup>16</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>17</sup>

### A. Complainant’s Evidence and Arguments

On July 31, 2015, the Complainant, purchased a new 2015 DRV Tradition 384RSS from Explore USA RV Supercenter, an authorized dealer of the Respondent, DRV, LLC, in Seguin, Texas.<sup>18</sup> The vehicle’s limited warranty covers the vehicle for one year from the date of purchase or the date placed in service, whichever occurs first. The warranty covers the vehicle’s structure for three years from the date of purchase or the date placed in service, whichever occurs first.<sup>19</sup>

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<sup>14</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>15</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>16</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>17</sup> 43 TEX. ADMIN. CODE § 215.202(b).

<sup>18</sup> Complainant’s Ex. 2, Buyer’s Order.

<sup>19</sup> Complainant’s Ex. 3, 2015 Model Year Three Year Limited Warranty.

On February 22, 2016, the Complainant mailed a written notice of defect to the Respondent.<sup>20</sup> On March 29, 2016, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the kitchen and dinette slides leaked when raining, and water pooled on the left gutter rail and flowed over the side instead of at the ends.

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

Date	Issue
November 28, 2015 December 23, 2015	Kitchen slide leaking at dinette; driver side gutter rail pools instead of running out ends and leaks at joints <sup>21</sup>
December 28, 2015 February 6, 2016	Slides leaking; gutter rail leaking/overflowing onto side <sup>22</sup>
March 3, 2016 April 15, 2016	Living room and kitchen slides leaking <sup>23</sup>

The Respondent's final opportunity to repair the vehicle occurred on March 3, 2016.

The Complainant testified that the slide seals were falling off. One slide was out of square, leaving a gap. Above the slide, standing water would run off the gutter rail to the top of the slide. However, the Complainant confirmed that the water did not actually enter at that point. Mrs. Ernst added that a slide out seal came off. The Complainant stated that he first noticed the vehicle leaking in November of 2015. He explained that the vehicle would leak every time with the slides out when raining. Initially, the vehicle leaked so badly that in a light rain, the water leaking in would take multiple towels to soak up. The Complainant could not see the actual leak but would find the carpet soaked. The Complainant state that he probably first noticed water pooling at the gutter rail after the second repair visit. Water would pool whenever the sitting level with the slides out. Mrs. Ernst noted that a big leak occurred at the dining room table, the same time a leak occurred on the other side. The Complainant testified that the morning of the hearing, he noticed that the carpet was wet, although the last rain occurred about a week ago, apparently when the slides were closed. He last noticed water pooling on the top of the slide on May 23, 2016. The Complainant stated that the repairs improved the leaking issue but the vehicle still leaked. After the last service visit, the

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<sup>20</sup> Complainant's Ex. 9, Written Notice Mailed to Respondent.

<sup>21</sup> Complainant's Ex. 4, WO G7187.

<sup>22</sup> Complainant's Ex. 5, WO G7392.

<sup>23</sup> Complainant's Ex. 8, WO G8039.

Complainant left the slides out but did not notice any leaks. However on a trip after the last repair visit, slide seals came out on the driver side and the slide on the other side appeared to leak. The Complainant expressed concern that mold would grow in the vehicle after being wet for days. The Complainant stated a preference for repurchase relief.

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

On cross-examination, the Complainant clarified that the first two slide repairs addressed both slides but the last slide repair only involved the kitchen side. Mr. Olinger testified that he did not believe that the vehicle qualified as a "lemon" and that any issues can be fixed at the manufacturer. He noted that he did not know if any slide out opening would be perfectly square, explaining that the frames are not built perfectly flat and that installing the walls flattens the frames (but not completely).

#### **C. Inspection**

During the inspection at the hearing, the carpet by the dinette, near the door, was damp to the touch. Approximately three feet of the molding on the non-door side slide had come off and hung from the slide.

#### **D. Analysis**

As explained below, the vehicle qualifies for repurchase/replacement relief. The facts are not disputed. This case turns on whether the facts satisfy the requirements for relief under the Lemon Law. A preponderance of the evidence shows that the vehicle continues to have a defect that substantially impairs the vehicle's market value after a reasonable number of repair attempts. The repair orders show that the vehicle has been out of service for over 30 days to address the leaking. However, as evidenced by the damp carpet on the day of the hearing, the leak continued to exist even after the final repair attempt on March 3, 2016. Under the reasonable prospective purchaser standard, the water leak substantially impairs the vehicle's value, particularly given the prospect of water damage. In other words, the water leak may deter a reasonable purchaser from buying the vehicle or substantially negatively affect how much s/he would be willing to pay. Although the Respondent itself did not undertake any repairs of the vehicle, the Respondent's

authorization of repairs by the dealer<sup>24</sup> after receiving the written notice of defect qualifies as a final opportunity to repair by the Respondent.<sup>25</sup> In conclusion, the vehicle satisfies the requirements for repurchase/replacement relief.

### III. Findings of Fact

1. On July 31, 2015, the Complainant, purchased a new 2015 DRV Tradition 384RSS from Explore USA RV Supercenter, an authorized dealer of the Respondent, DRV, LLC, in Seguin, Texas.
2. The vehicle's limited warranty covers the vehicle for one year from the date of purchase or the date placed in service, whichever occurs first. The warranty covers the vehicle's structure for three years from the date of purchase or the date placed in service, whichever occurs first.
3. In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Issue
November 28, 2015 December 23, 2015	Kitchen slide leaking at dinette; driver side gutter rail pools instead of running out ends and leaks at joints
December 28, 2015 February 6, 2016	Slides leaking; gutter rail leaking/overflowing onto side
March 3, 2016 April 15, 2016	Living room and kitchen slides leaking

4. On February 22, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On March 29, 2016, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the kitchen and dinette slides leaked when raining, and water pooled on the left gutter rail and flowed over the side instead of at the ends.
6. On May 16, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, DRV, LLC, giving all parties not

<sup>24</sup> Complainant's Ex. 8, WO G8039.

<sup>25</sup> See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

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 13, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Loris Ernst testified for the Complainant. Chad Olinger, represented and testified for the Respondent.
8. The vehicle's warranty was in effect at the time of the hearing.
9. During the inspection at the hearing, the carpet by the dinette exhibited dampness and the non-door side slide had approximately three feet of molding displaced.
10. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$78,280.95
Date of delivery	07/31/15
Date of first report of defective condition	11/28/15
Date of hearing	06/13/16
Days out of service	108
Useful life determination	3,650

Purchase price, including tax, title, license and registration				\$78,280.95
<i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery	11/28/15	-	07/31/15	= 120
<i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair	06/13/16	-	11/28/15	= 198 -108 <u>90</u>
<i>Reasonable Allowance for Use Calculations:</i> Unimpaired days	120	÷	3,650	× \$78,280.95 = \$2,573.62
Impaired days	90	÷	3,650	× \$78,280.95 × 50% = \$965.11
<b>Total reasonable allowance for use deduction</b>				<u>\$3,538.73</u>
Purchase price, including tax, title, license and registration				\$78,280.95
Less reasonable allowance for use deduction				-\$3,538.73
Plus filing fee refund				\$35.00
<b>TOTAL REPURCHASE AMOUNT</b>				<u><b>\$74,777.22</b></u>

#### 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 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 \$74,777.22. 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,<sup>26</sup> 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;

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<sup>26</sup> (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.

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 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 August 12, 2016**

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