

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0238 CAF**

**JEREMY S. SUYDAM,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Jeremy S. Suydam (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 his recreational vehicle manufactured by Forest River, Inc. (Respondent). The record shows that the warranty does not apply to the defects in this case. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on August 18, 2016, in Beaumont, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and Andrea Suydam, the Complainant's spouse, testified for the Complainant. Mel Williams, Owner Relations Manager, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

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

a. Serious Safety Hazard

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

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁷

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.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ 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.⁹ 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.¹⁰

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;¹¹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹² 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.¹³

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

⁹ "[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).

¹⁰ "[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).

¹¹ 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.

¹² 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).

¹³ TEX. OCC. CODE § 2301.606(d)(2).

distributor's . . . warranty agreement applicable to the vehicle."¹⁴ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁵

3. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.¹⁶ 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."¹⁷

A. Summary of Complainant's Evidence and Arguments

On April 29, 2015, the Complainant, purchased a new 2016 Work and Play 26FBW from Sherrod RV Center, an authorized dealer of the Respondent, Forest River, Inc., in Silsbee, Texas. The vehicle's limited warranty covers the vehicle for one year from the date of purchase. On April, 5, 2016, the Complainant mailed a written notice of defect to the Respondent. On April 14, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the generator breaker would trip; the air conditioning (AC) had problems; the awning would not roll up uniformly; the information center was repaired with the wrong fuse; and the front cover (enclosing the generator compartment) was not repaired correctly.

¹⁴ TEX. OCC. CODE § 2301.204.

¹⁵ TEX. OCC. CODE § 2301.603(a).

¹⁶ "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* 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.").

¹⁷ 43 TEX. ADMIN. CODE § 215.202(b).

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

Date	Issue
05/26/15	Information center not working; generator will not power trailer, tripped breaker, ¹⁸
08/10/15	Awning looks out of line; fabric on awning rolls up with wrinkles; cover on front of trailer comes off; generator seems to surge ¹⁹
12/29/15	Breaker on generator trips when transfer switch engaged; generator front panel comes off causing latches to come undone; AC shuts off by itself ²⁰

The Complainant testified that all of the complained of issues continued to exist. The issues with the generator first occurred about May 25, 2015. The generator would turn on but not power anything (because the breaker would trip). He stated that this occurred numerous times, approximately once every three or four days of use, with the last occurrence about a week before the hearing. The Complainant explained that the AC worked inconsistently almost the entire time he owned the vehicle. At times the AC would come on and run for a majority of the time and shut off in the early morning. Other times, the AC will trip the breaker and not stay on. The Complainant testified that he first noticed the AC malfunction in July 2015 and that the AC did not currently function and has not functioned for the past nine months. The Complainant stated that the awning material seemed stressed and he could hear a grinding noise when it rolled up. He first noticed the awning issue after having the awning replaced in May 2015 and last noticed the problem the day before the hearing. The Complainant testified that he brought the vehicle in for service when the information center would not turn on. He discovered that the dealer installed a 20 amp fuse although the fuse box label indicated a 10 amp fuse should be used. The same fuse remained installed as of the day of the hearing and had not blown. The Complainant first experienced problems with the front cover in June 2015. While stopped at a gas station, he noticed that latches holding the front cover had become unfastened. He refastened the latches, but the cover later came off. He explained that he would have to stop and refasten the latches or remove the cover (to avoid losing it in transit). He noted that the dealer performed a non-factory authorized repair, installing hood pins that secured the cover but also made the cover more difficult to remove. Although this repair secured the cover, the latches themselves would still not work properly. The Complainant stated that the vehicle has been out of service for repairs for approximately three months. With

¹⁸ Complainant's Ex. 4, Repair Order 31705.

¹⁹ Complainant's Ex. 7, Repair Order 32722.

²⁰ Complainant's Ex. 8, Repair Order 34234.

respect to the final repairs, the Complainant clarified that he had asked a representative of the Respondent to hold off the final repairs until after filing the Complaint.

B. Summary of Respondent's Evidence and Arguments

On cross-examination, the Complainant identified the breaker on the generator as the breaker that would trip when operating the AC. He clarified that between December 2015 and February 2016, the vehicle was out of service for repair about two months. Mrs. Suydam added the vehicle was out for a week for one of the repairs. Mr. Williams testified that the Respondent did not manufacture the breaker, the AC, or the awning. Mr. Williams explained that the warranty did not provide for replacement of the vehicle but reserved the Respondent's right to repair. He added that the warranty did not provide for service calls. Mr. Williams represented that, regardless of the outcome of this case, the Respondent would be willing to repair the vehicle, restart the warranty, and reimburse the Complainant for three months (of payments). Upon clarifying questions by the hearings examiner, Mr. Williams confirmed that Respondent itself did not have an attempt to repair the vehicle at the factory but he could not confirm whether the Respondent authorized repairs by the dealer after receiving notice of the defects.

C. Inspection

The inspection at the hearing showed that a latch on the front cover was unlatched; the awning fabric was rolled unevenly (towards the right); the lower breaker on the generator had tripped; the AC would initially turn on but would only run momentarily; the fuse box panel's label showed that the information center should have a 10 amp fuse but a 20 amp fuse was installed instead.

D. Analysis

The vehicle's warranty does not apply to any of the defects alleged in this case. Consequently, the vehicle does not qualify for repurchase/replacement or warranty repair. As a threshold matter, the Lemon Law only applies to items covered by the manufacturer's warranty.²¹ The Respondent's warranty only applies to defects in the materials and workmanship of the

²¹ TEX. OCC. CODE § 2301.604(a).

vehicle's body structure, i.e., manufacturing defects in the body structure.²² Under the warranty, the Respondent warrants that "the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor."²³ The warranty further states that "Warrantor will remedy substantial defects in materials and workmanship caused by the Warrantor."²⁴ Additionally, under "EXCLUSIONS FROM THIS WARRANTY" the warranty explains that "Warrantor makes no warranty with regard to, but not limited to, the chassis, including, without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, routine maintenance, equipment and appliances, or audio and/or video equipment."²⁵ Accordingly, problems arising outside of the Respondent's manufacture of the body structure, such as improper dealer repairs or defects in non-body components, are not warrantable defects. Specifically in this case, the warranty does not cover the generator/breaker, air conditioner, awning, or information center (which are non-body components manufactured by third parties) nor does the warranty cover the dealer's improper replacement of the information center fuse (which occurred outside of the vehicle's manufacture by the Respondent). Although the warranty originally applied to the front cover, the dealer altered the front cover (by installing two hood pins to secure the cover) without the Respondent's authorization,²⁶ thereby voiding warranty coverage. Following the heading "EVENTS DISCHARGING WARRANTOR FROM OBLIGATION UNDER THIS WARRANTY", the warranty states: "Misuse or neglect, including failure to provide reasonable and necessary maintenance, unauthorized alteration, accident, and improper loading, use as a permanent residence, commercial use or leasing of the recreational vehicle, shall discharge Warrantor from any obligation under this Warranty."²⁷ In the present case, the Complainant expressly approved the dealer's alteration of the front cover even though the dealer warned that "Modifications to your RV, without written authorization from Forest River, Inc.

²² A manufacturing defect occurs when the vehicle has a flaw because of some error in making it, such as incorrect assembly (defective workmanship) or the use of a substandard part (defective material). *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). A manufacturing defect happens during the manufacturing process and exists when it leaves the manufacturer.

²³ Complainant's Ex. 1, Warranty (emphasis added).

²⁴ Complainant's Ex. 1, Warranty.

²⁵ Complainant's Ex. 1, Warranty (emphasis added).

²⁶ Complainant's Ex. 9, Approval of Alteration.

²⁷ Complainant's Ex. 1, Warranty (emphasis added).

could result in reduction or loss of warranty coverage.”²⁸ The warranty makes clear that unauthorized alteration will relieve the Respondent of any warranty obligation. Consequently, the warranty no longer provides any coverage and the vehicle does qualify for repurchase/replacement or repair relief.

III. Findings of Fact

1. On April 29, 2015, the Complainant, purchased a new 2016 Work and Play 26FBW from Sherrod RV Center, an authorized dealer of the Respondent, Forest River, Inc., in Silsbee, Texas.
2. The vehicle’s limited warranty covers the vehicle for one year from the date of purchase.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Issue
05/26/15	Information center not working; generator will not power trailer, tripped breaker;
08/10/15	Awning looks out of line; fabric on awning rolls up with wrinkles; cover on front of trailer comes off; generator seems to surge
12/29/15	Breaker on generator trips when transfer switch engaged; generator front panel comes off causing latches to come undone; AC shuts off by itself

4. On April, 5, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On April 14, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the generator breaker would trip; the air conditioning had problems; the awning would not roll up uniformly; the information center was repaired with the wrong fuse; and the front cover was not repaired correctly.
6. On May 23, 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.

²⁸ Complainant’s Ex. 9, Approval of Alteration.

7. The hearing in this case convened and the record closed on August 18, 2016, in Beaumont, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and Andrea Suydam testified for the Complainant. Mel Williams, Owner Relations Manager, represented the Respondent.
8. The vehicle's warranty applies to defects in materials and workmanship of the body structure attributable to the Respondent.
9. The vehicle's warranty expressly excludes the chassis, including, without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, routine maintenance, equipment and appliances, or audio and/or video equipment.
10. The generator/breaker, air conditioner, awning, and information center are non-body structure components manufactured by third parties.
11. The vehicle's warranty specifies that unauthorized alteration will discharge the Respondent from any warranty obligation.
12. The dealer altered the vehicle's front cover without the Respondent's authorization.

IV. Conclusions of Law

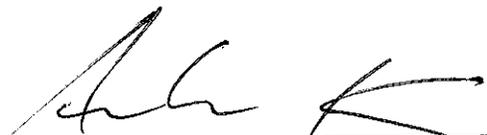
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation 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.

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 25, 2016



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