

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0274 CAF**

**STEVEN W. VINKLAREK,  
Complainant**

v.

**FORD MOTOR COMPANY,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Steven W. Vinklarek (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 vehicle manufactured by Ford Motor Company (Respondent). The record shows that the Lemon Law does not apply to the complained of issues. 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 August 30, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Kim Lartigue testified for the Complainant. Maria Diaz, Consumer Legal Analyst, represented 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>

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>

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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> “[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

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<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 every required fact is 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. If the Complainant fails to prove one (or more) of the required facts, the Complainant will not prevail.

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

On October 17, 2014, the Complainant, purchased a new 2014 Ford Focus from Mac Haik Ford, a franchised/authorized dealer of the Respondent, Ford Motor Company, in Houston, Texas. The vehicle had 150 miles on the odometer at the time of purchase.<sup>17</sup> The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and provides powertrain coverage for five years or 60,000 miles, whichever occurs first.<sup>18</sup>

On or about May 14, 2016, the Complainant mailed a written notice of defect to the Respondent. On May 18, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle exhibited transmission shudder and hesitation.

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

Date	Miles	Issue
06/13/15	9,630	Shudder on takeoff <sup>19</sup>
09/08/15	12,761	Shudder and hesitation on acceleration; clutch chatter <sup>20</sup>
11/21/15	15,654	Shudder on acceleration <sup>21</sup>
04/22/16	21,197	Transmission shudder on acceleration <sup>22</sup>
06/29/16	24,003	Transmission shudder <sup>23</sup>

The Respondent's final opportunity to repair the vehicle occurred on June 29, 2016.

<sup>16</sup> E.g., *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>17</sup> Complainant's Ex. 1, Vehicle Purchase Order.

<sup>18</sup> Complainant's Ex. 9, 2014 Model Year Ford Warranty Guide.

<sup>19</sup> Complainant's Ex. 4, Invoice FOCS392107.

<sup>20</sup> Complainant's Ex. 5, Invoice FOCS400705.

<sup>21</sup> Complainant's Ex. 6, Invoice FOCS408191.

<sup>22</sup> Complainant's Ex. 7, Invoice FOCS422361.

<sup>23</sup> Complainant's Ex. 8, Invoice FOCS429244.

The Complainant testified that the vehicle shuddered and reacted strangely (jerky) when shifting in and out of gears. The greatest concern was the lack of acceleration. Ms. Lartigue, the primary driver of the vehicle, described the transmission as jerky mainly at low speeds but at faster speeds, the vehicle takes more time to accelerate. Ms. Lartigue first noticed this issue within six months of the vehicle's purchase. She stated that the jerkiness would occur daily at lower speeds. She last noticed this the day before the hearing driving home in the afternoon traffic.

The Complainant questioned Ms. Diaz regarding the representation of the vehicle's PowerShift transmission as an automatic as opposed a hybrid, citing that the transmission incorporates two clutches instead of a torque converter. Ms. Diaz explained that the Respondent does not hide the transmission information, the dealers' salespersons were trained and their failure to provide information was not a manufacturer issues but a dealer issue. The Complainant alleged that the Respondent's window sticker clearly misrepresents the transmission as a six speed automatic transmission.

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

Ms. Diaz asserted that the vehicle did not qualify for relief under the Lemon Law, noting that the vehicle had five service visits but only two actual repairs. At the final repair attempt, the vehicle did not present any diagnostic trouble codes and all systems passed – performing as designed. She explained that the vehicle's DPS6 PowerShift transmission operates like a manual transmission that shifts automatically. Because the transmission uses clutches to enable shifting, the shifting is not as smooth as a conventional automatic transmission, and will have some jerkiness and hesitation when shifting. These characteristics are delineated in the owner's manual and quick start guide. Drivers accustomed to a conventional automatic or manual transmission may find the PowerShift transmission (characteristics) to be unusual. So when a customer brings a vehicle with a PowerShift transmission to the dealer, the technician searches for applicable technical service bulletins (TSBs). In part, the TSBs provide that if the clutch shuddering (slipping) exceeds 250 rpms, the clutches should be replaced. However, the clutch slipping remained within specifications at the final repair attempt and the vehicle has not since been taken in for repair.

### C. Inspection and Test Drive

The subject vehicle had 26,502 miles on the odometer prior to the test drive at the hearing. The test drive consisted primarily of stop and go driving through residential areas and some driving on a freeway. The vehicle exhibited two instances of transmission shudder during the test drive while accelerating from low speeds.

### D. Analysis

The Complainant did not raise any issues subject to Lemon Law relief. 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 or representations about 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 vehicle to have a defect covered by an applicable warranty.<sup>24</sup> In this case, the vehicle's warranty provides that:

Under your New Vehicle Limited Warranty if:

- your Ford vehicle is properly operated and maintained, and
- was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.<sup>25</sup>

The courts have explained that “[a] manufacturing defect is one created by a manufacturer’s failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer’s design specifications.”<sup>26</sup> In other words, 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 (which occurs before manufacturing) or improper dealer representations

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<sup>24</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>25</sup> Complainant’s Ex. 9, 2014 Model Year Ford Warranty Guide (emphasis added).

<sup>26</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

in selling the vehicle (which occur after manufacturing), are not warrantable defects. In contrast to manufacturing defects, “[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves.”<sup>27</sup> Design characteristics result from the vehicle’s design and not from any error in the manufacturing process, so that the same-model vehicles made according to the manufacturer’s specifications should ordinarily have the same characteristics, which would require redesigning the vehicle to change the characteristics.

In the present case, the Complaint identified transmission shudder and hesitation issues. The Complainant’s testimony reflects his concerns with the design of the transmission and its resulting characteristics as well as with representations (or lack thereof) made by the Respondent and the selling dealer, none of which constitute a manufacturing defect. For instance, the complainant testified that manufacturer’s window sticker described the transmission as an automatic. The shudder described in testimony and experienced during the test drive is a design characteristic that may normally occur with the PowerShift transmission. The record indicates the vehicle may normally exhibit shuddering and hesitation. Further, clutch slippage under 250 rpms falls within manufacturer specifications for normal operation. The evidence shows that the PowerShift transmission exhibits such characteristics due to its unique design (which uses manual transmission components), 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 the complained of characteristics. Although the vehicle’s characteristics may be undesirable, the record shows that these characteristics arise from the intended design of the vehicle’s transmission (such as the use of clutches) and not from a manufacturing defect. Additionally, any representations or non-disclosure about the transmission are not manufacturing defects since a manufacturing defect is a failure in the factory materials or workmanship to conform to the manufacturer’s specifications. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief.

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<sup>27</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

### III. Findings of Fact

1. On October 17, 2014, the Complainant, purchased a new 2014 Ford Focus from Mac Haik Ford, a franchised/authorized dealer of the Respondent, Ford Motor Company, in Houston, Texas. The vehicle had 150 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
06/13/15	9,630	Shudder on takeoff
09/08/15	12,761	Shudder and hesitation on acceleration; clutch chatter
11/21/15	15,654	Shudder on acceleration
04/22/16	21,197	Transmission shudder on acceleration
06/29/16	24,003	Transmission shudder

4. On or about May 14, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On May 18, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle exhibited transmission shudder and hesitation.
6. On June 29, 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.
7. The hearing in this case convened and the record closed on August 30, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Kim Lartigue testified for the Complainant. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
8. The vehicle's odometer displayed 26,502 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.

10. The vehicle exhibited two instances of transmission shudder during the test drive at the hearing.
11. The vehicle's PowerShift transmission incorporates manual transmission components, including clutches, but shifts automatically.
12. The vehicle's PowerShift transmission may normally exhibit mechanical noises, firm gearshifts, and vibrations.
13. The vehicle's PowerShift transmission, as designed, performs differently than a conventional automatic transmission.

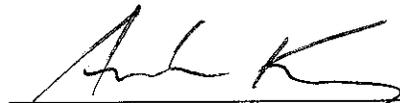
#### IV. Conclusions of Law

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
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.603 and 2301.204.

**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 September 15, 2016**

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