

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0321 CAF**

**EDWARD MALDONADO,  
Complainant**

**v.**

**FORD MOTOR COMPANY,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Edward Maldonado (Complainant) filed a 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/distributed/converted by Ford Motor Company (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect but this defect does not create a serious safety hazard or substantially impair the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but does qualify for 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 29, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maria Diaz, Consumer Legal Analyst, represented the Respondent. Brent Hochberg, Field Service Engineer, 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>

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>

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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).

### 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 showing that every required fact is more likely than not true.<sup>16</sup>

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

The Complaint identifies the issues to be addressed in this proceeding.<sup>17</sup> 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.”<sup>18</sup>

#### A. Complainant’s Evidence and Arguments

On July 31, 2015, the Complainant, purchased a new 2015 Ford Edge from Maxwell Ford, a franchised dealer of the Respondent, Ford Motor Company, in Austin, Texas.<sup>19</sup> The vehicle had 17 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 June 17, 2016, the Complainant mailed a written notice of defect to the Respondent.<sup>22</sup> On June 22, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the subject vehicle had serious brake noise issues since its purchase. In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

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

<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* 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. 2, Retail Installment Sales Contract.

<sup>20</sup> Complainant’s Ex. 3, Odometer Disclosure Statement.

<sup>21</sup> Complainant’s Ex. 1, 2015 Model Year Ford Warranty Guide.

<sup>22</sup> Complainant’s Ex. 4, Written Notice of Defect.

Date	Miles	Issue
September 12, 2015	3,880	Brakes squeak loudly when stopping <sup>23</sup>
October 17, 2015	5,609	Brakes are squeaking <sup>24</sup>
October 26, 2015	6,096	Front and rear brakes squeal <sup>25</sup>
November 18, 2015	7,421	Brakes squeal loudly on most slowdowns to a stop <sup>26</sup>
June 29, 2016	24,160	Squeaking noise when braking at slow speeds <sup>27</sup>

The Respondent's final opportunity to repair the vehicle occurred on June 29, 2016.<sup>28</sup>

The Complainant testified that the vehicle would intermittently make a loud, obnoxious noise at low speeds, such as when driving around subdivisions or going through a drive through. He confirmed that the noise was a squealing noise. He noted that a dealer technician heard the noise but the noise did not occur during the manufacturer's final inspection. The Complainant acknowledged that the noise appeared to occur more when starting cold than after driving around a while. He explained that some days the noise will continue for 15 minutes. He added that he never had this issue with previously purchased Ford vehicles. The Complainant described the noise as usually happening at least once a day, sometimes in the morning, sometimes at night. He confirmed that the invoices in evidence reflect all repairs for the complained of issue, except one service visit early on in which met with the service manager who test drove the vehicle but did not log the visit. The Complainant answered that the first repair attempt at Covert Ford-Lincoln (in November) appeared to resolve the noise for a day or two, but the noise returned shortly thereafter. He affirmed that he did not notice any effect on the vehicle's performance, rather the noise was the concern.

### B. Respondent's Evidence and Arguments

On cross-examination, the Complainant confirmed that the vehicles did not display any messages indicating a problem and did not fail at any time. The Respondent asserted that the vehicle did not comply with the requirements for repurchase or replacement, did not have a safety

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<sup>23</sup> Complainant's Ex. 5, Invoice 578646.

<sup>24</sup> Complainant's Ex. 6, Invoice 581725.

<sup>25</sup> Complainant's Ex. 7, Invoice 582351.

<sup>26</sup> Complainant's Ex. 8, Invoice FOCS407876.

<sup>27</sup> Complainant's Ex. 8, Invoice FOCS429239.

<sup>28</sup> Respondent's Ex. 2, FSE Vehicle Inspection Report.

hazard, and did not have the requisite repair attempts. The Respondent pointed out that a repair order noted that minor brake noise was not a problem.<sup>29</sup> Nothing wrong could be found in any of the five service visits. The shop manual showed that the described brake noise was normal<sup>30</sup> and the owner's manual noted that occasional brake noise was normal.<sup>31</sup> Because the vehicle had not failed to stop or exhibited any warning messages, the Respondent contended that the vehicle did not have a defect. Mr. Hochgraber testified that he inspected the brake fluid level, calipers, and rotors and found nothing unusual. He test drove the vehicle on the highway and through a subdivision, probably stopping over 100 to 200 times, but experienced no pulling, and no noise.

### C. Inspection and Test Drive

The vehicle had 29,025 miles on the odometer before the test drive. During the test drive, the Complainant drove the vehicle predominantly through residential areas controlled by stop signs. The vehicle exhibited squealing noises multiple times while slowing to a stop. In some instances the noise appeared to originate from the front brakes and at other times the noise appeared to come from the rear brakes. The test drive ended with 29,026 miles on the odometer.

### D. Analysis

During the test drive at the hearing, the vehicle appeared to exhibit brake noise more frequently and more loudly than normal. However, this nonconformity does not rise to the level of substantially impairing the use or value of the vehicle. Accordingly, the vehicle does not qualify for repurchase or replacement but does qualify for warranty repair.

## III. Findings of Fact

1. On July 31, 2015, the Complainant, purchased a new 2015 Ford Edge from Maxwell Ford, a franchised dealer of the Respondent, Ford Motor Company, in Austin, Texas. The vehicle had 17 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.

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<sup>29</sup> Complainant's Ex. 7, Invoice 582351.

<sup>30</sup> Respondent's Ex. 3, 206-00 Brake System – General Information.

<sup>31</sup> Complainant's Ex. 4, Excerpt from Owner's Manual.

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

Date	Miles	Issue
September 12, 2015	3,880	Brakes squeak loudly when stopping
October 17, 2015	5,609	Brakes are squeaking
October 26, 2015	6,096	Front and rear brakes squeal
November 18, 2015	7,421	Brakes squeal loudly on most slowdowns to a stop
June 29, 2016	24,160	Squeaking noise when braking at slow speeds

4. On June 17, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On June 22, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the subject vehicle had serious brake noise issues since its purchase.
6. On July 20, 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 29, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maria Diaz, Consumer Legal Analyst, represented the Respondent. Brent Hochberg, Field Service Engineer, testified for the Respondent.
8. The vehicle's odometer displayed 29,025 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. During the test drive at the hearing, the vehicle exhibited louder and more frequent than normal noise when braking. The vehicle otherwise operated normally during the test drive.

#### 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's vehicle does not qualify for replacement or repurchase. The warrantable defect does not create a serious safety hazard or substantially impair the use or market value of the vehicle. TEX. OCC. CODE § 2301.604
7. 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.
8. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.603 and 2301.204.

## V. Order

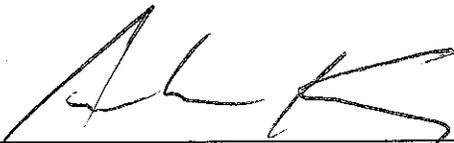
Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's brake noise to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.<sup>32</sup> Within 20 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the

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<sup>32</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.

Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

**SIGNED October 26, 2016**



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