

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0362 CAF**

**TROY L. ARRINGTON,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Troy L. Arrington (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 by FCA US LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Additionally, the complaint was not timely filed. Consequently, the Complainant's vehicle does not qualify for repurchase or replacement or warranty repair relief.

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 December 8, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Jane Kershaw, Early Resolution Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for 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

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.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)(2).

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.⁹

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹⁰ 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.¹¹

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;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

¹¹ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹² 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.

¹³ 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).

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.¹⁴

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."¹⁵ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that every required fact is more likely than not true.¹⁸ With respect to affirmative defenses, the Respondent bears the burden of proof.¹⁹

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ 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

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

¹⁵ TEX. OCC. CODE § 2301.204.

¹⁶ TEX. OCC. CODE § 2301.603(a).

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁹ TEX. OCC. CODE § 2301.606(b).

²⁰ "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.").

claim for relief under the lemon law.²¹ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²² Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

A. Summary of Complainant's Evidence and Arguments

On July 14, 2014, the Complainant, purchased a new 2014 Ram 5500 Chassis Tradesman Crew Cab from Huffines Chrysler Jeep Dodge, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 48 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage of the vehicle for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 100,000 miles, whichever occurs first. On August 3, 2016, the Respondent received a written notice of defect mailed by the Complainant. On August 4, 2016, the Complainant filed a Lemon Law complaint with the Department stating: "check engine light, tires throwing rubber from all tires" and "check engine light service DEF system, going into limp mode with 5 mph max still at dealer with a multitude of engine codes." In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
August 7, 2015	20,121	Loud explosion driving on highway (front axle housing); water in fuel light on
October 10, 2015	22,820	Check engine light on
January 27, 2016	24,691	Limp mode - service DEF system
March 7, 2016	25,430	Check engine light
March 29, 2016	26,359	Check engine light, limp mode
July 13, 2016	28,479	Limp mode, DEF system light on

The Complainant explained that the vehicle would go into limp mode, set engine codes, and display a message to see the dealer to service the DEF (Diesel Exhaust Fluid) system. He took the vehicle for the first time for these issues in October of 2015. After about another 1,500 miles, the Complainant had to take the vehicle back because of the DEF system. The Complainant recounted that previously, the front axle exploded, sounding like a shotgun, shaking the steering wheel with horrible front end noise and causing a complete stop. He inspected the vehicle and found a penny-sized hole in the front differential cover and lubricant pouring out. After taking the cover off, he

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(2).

²² 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

found a gear had completely worn down to a rounded edge and took the vehicle to a dealer. The Complainant had already planned to take the vehicle to a dealer because the water in the fuel light came on. The dealer initially asserted that the warranty did not cover the front axle problem. However, the manufacturer's representative determined that the warranty did cover the issue. The Complainant saw the water in the fuel light remained on. The Complainant did not have the money to do a fuel flush so the dealer did not service the vehicle for water in the fuel. The Complainant used Lucas Fuel Treatment and the water in fuel light turned off and never came back on. He took the vehicle to the dealer in October 2015 and within less than 1,800 miles, the vehicle went into limp mode, not because of water in the fuel but because of the DEF system. In January 2016, the dealer replaced the fuel filter. On March 7, 2016, the check engine light came on again because the knock sensors needed replacement but nothing indicated an issue with water in the fuel. On March 29, 2016, the Complainant brought the vehicle back in because it went into limp mode. In July 2016, the Complainant took the vehicle to the dealer because the DEF system light came on. The vehicle went into limp mode 100 miles earlier than specified by the vehicle. The dealer could not fix the vehicle under warranty. The Complainant had not driven the vehicle enough to completely go through a tank of DEF. He explained that needed a long downhill slope to reach the speed limit (anything over 65 mph). He noted that he could pull his fishing trailer with a 3/4 ton Excursion but not with the subject vehicle. He testified that the vehicle could not adequately pull a 5,500 pound aluminum trailer. The truck could not be repaired because of the fuel additive. The Complainant drained the fuel tank, cleaned it, reinstalled it, and put fresh fuel in. He identified various repairs that the dealer would not do because of the earlier water in the fuel. The dealer found a contaminant in the DEF system the reductant was not up to current levels, and was too old. The Complainant pointed out that the vehicle sat waiting for repair for months with the same DEF. The dealer advised removing one injector for inspection. The Complainant asserted that the dealer did not find any rust or pitting in the inside of the fuel injector. He testified that he last noticed problems the day before the hearing. He explained that the problems usually begin when pulling a trailer. However, he also notices effects on performance when not pulling a trailer. Sometimes the vehicle does not respond to the gas pedal. The vehicle may hesitate when trying to hurry.

B. Summary of Respondent's Evidence and Arguments

On cross-examination, the Complainant confirmed that the axle was repaired. He also acknowledged not having any DEF issues since the dealer told the Complainant that the warranty would not cover the DEF system repair. Mr. Ritchey pointed out the vehicle was an ambulance with a particular gear ratio and a different use would require a different gear package. The Complainant affirmed that the check engine light has not come on again since being given the list of diagnostic trouble codes (DTC).²⁴ Mr. Ritchey explained that some codes were active, others stored. If a code is erased and does not come back, then there is no issue. He noted that sometimes the system clears codes by itself. He also added that one condition may set multiple codes. Ms. Kershaw asserted that at the first repair for the axle and the water in fuel light, the dealer determined that the vehicle had water in the fuel but the Complainant declined service for this and therefore had issues. Looking at photos of one of the vehicle's fuel injectors, Mr. Ritchey stated that he would replace the connector tube and an injector due to the rust on it. Mr. Ritchey elaborated that the ball in the injector is about 1/16" at most and corrosion, dirt, rust will etch the ball and the injector will leak, result in an over-fuel condition, could cause engine knock, wash out a cylinder and require engine block replacement. Moreover, water unlubricates moving parts. Ms. Kershaw pointed out that issues from contaminated fuel are not warranted. Mr. Ritchey testified that the system had a DTC for contaminated DEF. He pulled a sample out of the DEF tank, which measured at 16%, which caused the DTC, but should be about 32%. He advised draining and cleaning the system. If the vehicle has contamination, the nozzle could be plugged, and result in an exhaust system fault. The dealer found a problem with the harness going to the injector nozzle and repaired the harness and replaced the DEF. Such problems would affect emissions and could put the vehicle in limp mode. Mr. Ritchey confirmed that fuel injector problems may affect performance. Fuel leaking past injectors may cause excessing fuel in the crankcase and lead to injector pump damage, noticeable as problems with pulling heavy loads and hard acceleration. Mr. Ritchey pointed out that the July 13, 2016, repair order identified pitting on the supply tube.

²⁴ Complainant's Ex. 18, Diagnostic Trouble Codes Present.

C. Inspection

Upon inspection at the hearing, the vehicle's odometer showed 30,332 miles before the test drive. The vehicle, test driven without a trailer, possibly showed some hesitation during acceleration.

D. Analysis

1. Warrantable Defect

The DEF system issues, along with the various DTCs, appear to have been successfully repaired given that they have not recurred. With respect to the power/acceleration/towing problems, the warranty does not cover these issues in this case. The warranty states that "Your warranties don't cover the following: corrosion caused by accident, damage, abuse, or truck alteration."²⁵ These issues appear to more likely than not result from water-contaminated fuel and not from a manufacturing defect. The photographs of the fuel injector appear to show corrosion on the fuel injector needle. More importantly, the technician documented pitting on the supply tube in the July 13, 2016, repair order. The record reflects that corrosion/rust may cause the type of power issues affecting the subject vehicle.

2. Filing Deadline

To qualify for repurchase or replacement, the Lemon Law requires the complaint to be filed no later than six months after the earlier of the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle. The record shows that the vehicle had 24,691 miles on the odometer (24,643 miles after delivery) at the January 27, 2016, service visit.²⁶ Accordingly, the vehicle exceeded 24,000 miles after delivery at some point before January 27, 2016. In the present case, six months after 24,000 miles falls on a date before July 27, 2016. However, the Department received the complaint on August 4, 2016, after the filing deadline. Consequently, the Lemon Law prohibits granting repurchase or replacement.

²⁵ Respondent's Ex. 2, Warranty Excerpts.

²⁶ Complainant's Ex. 11, Invoice DOCS706371.

III. Findings of Fact

1. On July 14, 2014, the Complainant, purchased a new 2014 Ram 5500 Chassis Tradesman Crew Cab from Huffines Chrysler Jeep Dodge, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 48 miles on the odometer at the time of purchase
2. The vehicle's limited warranty provides basic coverage of the vehicle for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 100,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
August 7, 2015	20,121	Loud explosion driving on highway (front axle housing); water in fuel light on
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March 29, 2016	26,359	Check engine light, limp mode
July 13, 2016	28,479	Limp mode, DEF system light on

4. On August 3, 2016, the Respondent received a written notice of defect mailed by the Complainant.
5. On August 4, 2016, the Complainant filed a Lemon Law complaint with the Department alleging: "check engine light, tires throwing rubber from all tires" and "check engine light service DEF system, going into limp mode with 5 mph max still at dealer with a multitude of engine codes."
6. On October 27, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, 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 December 8, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself.

Jane Kershaw, Early Resolution Case Manager, represented the Respondent. Stuart Ritchey, Technical Advisor, testified for the Respondent.

8. The vehicle's odometer displayed 30,332 miles at the time of the hearing.
9. The vehicle's basic and powertrain warranty coverage were in effect at the time of the hearing.
10. The warranty states that "Your warranties don't cover the following: corrosion caused by accident, damage, abuse, or truck alteration."
11. The vehicle exhibited a water in fuel warning for approximately one to two weeks over about 300 miles.
12. A photo of the fuel injector needle exhibited corrosion and the July 13, 2016, repair order document corrosion on the supply tube.
13. Corrosion of fuel injector components may cause the type of power issues affecting the subject vehicle.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
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 filed a 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 Complainant did not timely file the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
9. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.606(d).
10. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
11. 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.

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 February 6, 2017



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