

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0366 CAF**

REY MENDEZ,
Complainant

v.

FORD MOTOR COMPANY,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Rey Mendez (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 Ford Motor Company (Respondent). A preponderance of the shows that the subject vehicle has a warrantable defect. However, the Respondent did not have an opportunity to repair the vehicle as specified in the Lemon Law. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but does qualify for 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 5, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maria Diaz, Consumer Legal Analyst, 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

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).

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.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 *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.'").

¹⁰ *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.").

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. Burden of Proof

The law places the burden of proof on the Complainant.¹⁶ 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.¹⁷

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁸ 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."¹⁹ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²⁰ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²¹

A. Complainant's Evidence and Arguments

On April 3, 2015, the Complainant, purchased a new 2015 Ford Taurus from Five Star Ford, a franchised dealer of the Respondent, in North Richland Hills, Texas.²² The Complainant

¹⁴ TEX. OCC. CODE § 2301.204.

¹⁵ TEX. OCC. CODE § 2301.603(a).

¹⁶ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁷ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁸ "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.").

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

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

²¹ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

²² Complainant's Ex. 9, Retail Installment Contract.

actually took delivery of the vehicle on April 4, 2015. The vehicle had 620 miles on the odometer at the time of purchase.²³ The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.²⁴ On July 28, 2016, the Complainant submitted correspondence about the vehicle's issues through the Respondent's website.²⁵ On August 8, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the brakes vibrated and made a loud noise when slowing down. On August 26, 2016, the Complainant mailed a written notice of defect to the Respondent.²⁶ The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
June 11, 2015	3,783	Vibration in steering and noise when braking ²⁷
October 6, 2015	9,712	Grinding and vibration when braking on highway ²⁸
March 22, 2016	18,462 18,482	Brake vibration when slowing from highway speeds ²⁹
August 2, 2016	24,596	Brake vibration growl ³⁰
November 1, 2016	29,887	Intermittent brake grinding/vibration ³¹

The Complainant testified that the braking noise/vibration would occur when slowing down, sometimes when slowing down at highway speeds and other times in city driving. The issue otherwise appeared to occur randomly. The noise/vibration may occur one time and may not reoccur for a week or two. The Complainant first noticed the issue a couple of days before the first service visit on June 11, 2015. The Complainant did not identify any effect on the vehicle's performance. The Complainant noted that the vibration was so noticeable that it made him want to take his foot off the brake and that sometimes the noise was loud like the brakes on a semi-truck. The Complainant last noticed the brake issue soon before taking the vehicle for the November 1, 2016, service visit. The Complainant noted that servicing the brakes would temporarily resolve

²³ Complainant's Ex. 10, Odometer Disclosure Statement.

²⁴ Complainant's Ex. 13, Warranty.

²⁵ Complainant's Ex. 7, Online Submission.

²⁶ Complainant's Ex. 1, Notice of Defect.

²⁷ Complainant's Ex. 2, Invoice 651702.

²⁸ Complainant's Ex. 3, Invoice 666414.

²⁹ Complainant's Ex. 4, Invoice 685827; Complainant's Ex. 5, Duplicate Invoice 685827.

³⁰ Complainant's Ex. 6, Invoice 702029.

³¹ Complainant's Ex. 12, Invoice 713222.

the issue but the noise and vibration would eventually recur. The Complainant pointed out that the dealer did not have the correct part to properly repair the brakes, so the dealer applied a work-around repair until the correct part comes in.

B. Respondent's Evidence and Arguments

On cross-examination, the Complainant confirmed that the vehicle never failed to stop, but he thought the anti-lock brake system did not engage properly. Nevertheless, the vehicle does stop. Ms. Diaz asserted that the vehicle did not qualify for Lemon Law relief because the vehicle was not out of service for 30 or more days and the Respondent did not have an opportunity to cure. The respondent received the complaint on September 6, 2016, and contacted the Complainant to arrange for a final repair attempt. However, the Complainant declined the manufacturer's repair attempt. Ms. Diaz noted that though the Complainant asked the dealership for an inspection by a manufacturer's engineer, the dealership does not schedule or sent out engineers.

C. Inspection

The vehicle had 30,830 miles on the odometer upon inspection at the hearing. The vehicle did not exhibit any vibration or brake noise during the test drive and otherwise appeared to perform normally. The Complainant explained that he did not believe the vehicle would exhibit the noise/vibration because of the recent service to the brakes but that the issue eventually recurred after every repair.

D. Analysis

The evidence shows that the vehicle currently has a temporary repair to a brake with parts with the wrong specifications. Although the vehicle has an existing warrantable defect, the manufacturer, as opposed to the dealer, did not have an opportunity to cure as required by section 2301.606(c) of the Lemon Law. Specifically, the Lemon Law states that:

An order issued under this subchapter may not require a manufacturer, converter, or distributor to make a refund or to replace a motor vehicle unless: (1) the owner or a person on behalf of the owner has mailed written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor; and (2) the

manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity.³²

The record reflects that the Complainant filed his complaint on August 8, 2016, and mailed a written notice of defect on August 26, 2016. After receiving the complaint on September 6, 2016, the Respondent contacted the Complainant to arrange a manufacturer's repair attempt but the Complainant declined. Although the record shows a sufficient number of repairs, the dealer performed all of those repairs and the manufacturer itself did not have a repair attempt. Consequently the Lemon Law prohibits granting repurchase or replacement. Nevertheless, because the vehicle has a warrantable defect, it qualifies for warranty repair relief.

III. Findings of Fact

1. On April 3, 2015, the Complainant, purchased a new 2015 Ford Taurus from Five Star Ford, a franchised dealer of the Respondent, in North Richland Hills, Texas. The Complainant actually took delivery of the vehicle on April 4, 2015. The vehicle had 620 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage 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
June 11, 2015	3,783	Vibration in steering and noise when braking
October 6, 2015	9,712	Grinding and vibration when braking on highway
	18,462	
March 22, 2016	18,482	Brake vibration when slowing from highway speeds
August 2, 2016	24,596	Brake vibration growl
November 1, 2016	29,887	Intermittent brake grinding/vibration

4. On August 8, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the brakes vibrated and made a loud noise when slowing down.
5. On August 26, 2016, the Complainant mailed a written notice of defect to the Respondent.

³² TEX. OCC. CODE § 2301.606(c).

6. After receiving notice of the Complaint on September 6, 2016, the Respondent contacted the Complainant to arrange a manufacturer's repair attempt of the vehicle but the Complainant declined the repair.
7. On September 6, 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.
8. The hearing in this case convened and the record closed on December 5, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
9. The vehicle's odometer displayed 30,830 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. The vehicle operated normally during the test drive at the hearing.

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 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 Respondent did not have an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
7. The Complainant's vehicle does not qualify for replacement or repurchase. This Order may not require repurchase or replacement of the vehicle without an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c).
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§-2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. 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.
10. 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.

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 and vibration 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 § 2001.144.³³ Within 20 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the

³³ (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.

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 February 3, 2017



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