

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0374 CAF**

**DARREL R. MYERS and
MARLA G. MYERS,
Complainants**

v.

**KEYSTONE RV COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Darrel R. Myers and Marla G. Myers (Complainants) 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 their recreational vehicle (RV) manufactured by Keystone RV Company (Respondent). The record shows that the Complainants did not file timely file their complaint and the manufacturer's warranty provides no coverage of the subject vehicle. Consequently, the Complainants' vehicle does not qualify for repurchase/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 November 1, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented, and testified for, himself and Marla G. Myers. Randall D. Davis, Product Manager, represented and 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

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁸

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

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

⁸ TEX. OCC. CODE § 2301.605(a)(3).

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.⁹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹⁰

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹¹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹² and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹³

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or

⁹ "[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'" *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

¹⁰ "[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute." *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

¹¹ TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words "mailed" or "mail", so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines "mail" as "to send by mail; place in a post office or mailbox for transmission" or "to transmit by email." mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹² TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹³ TEX. OCC. CODE § 2301.606(d)(2).

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

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁶ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants 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. Complainants' Evidence and Arguments

On May 16, 2014, the Complainants, purchased a new 2015 Dutchmen Voltage 3990 from ExploreUSA RV Supercenter, an authorized dealer of the Respondent, in Kyle, Texas.²² The

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 Complainants' Ex. 2, Purchase Contract.

vehicle's limited warranty expired one year from the date of purchase.²³ On or about August 26, 2015, the Complainants or a person on behalf of the Complainants e-mailed a written notice of defect to the Respondent. On August 12, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the air conditioning (AC) in the living area did not cool; the refrigerator did not cool properly and ran intermittently; the roof leaked; the bedroom floor squeaked; and the generator tripped the breaker.

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

Date	Issue
May 28, 2014	AC is freezing and leaking water; AC trips breaker; refrigerator intermittent running; roof leaking at antenna ²⁴
June 19, 2014	AC leaked ²⁵
August 3, 2015	Refrigerator not working ²⁶
December 3, 2014	Replace living area AC ²⁷

The Mr. Myers confirmed that five issues affected the subject vehicle: the AC not cooling in the living area; the refrigerator not cooling intermittently; the roof leaking; a squeaking bedroom floor; and the generator tripping the breaker. He testified that none of these issues have been successfully repaired. Mr. Myers testified that he first noticed the AC problem on May 28, 2014. He explained that a major flood occurred, the roof leaked, short-circuiting the AC and requiring its replacement. He elaborated that rain penetrating the roof from improper installation of the AC caused the problems. He stated that he would notice the problem every day. He explained that if the (outside) temperature were 100, the AC would run all day long but cool down to no more than 82 to 83 degrees. Mr. Myers averred that he first noticed the refrigerator issue on May 28, 2014. The refrigerator may run without a problem but then turn off and not start for a day or two until unplugging and re-plugging the wire to the thermistor. After maybe hours or days, the refrigerator will shut off again. He last recalled the refrigerator not functioning in July of 2016. Mr. Myers testified that he first noticed the roof leaking on May 28, 2014. He affirmed that water leaked in from the center AC, the TV antenna, and the coach's front cap. He last noticed water leaking in

²³ Complainants' Ex. 17, Limited One Year Warranty.

²⁴ Complainants' Ex. 5, WO A1645.

²⁵ Complainants' Ex. 6, WO A1848.

²⁶ Complainants' Ex. 7, WO A4667.

²⁷ Complainants' Ex. 10, WO A3088.

May 2016. Mr. Myers stated he first noticed the squeaking bedroom floor on May 28, 2014, a result of the floor not being screwed down. He last noticed the squeaking the day of the hearing. Mr. Myers said he first noticed the generator tripping the breaker on May 28, 2014. The breakers on the generator would trip after a couple of hours of running the AC units. Mr. Myers last noticed the breakers tripping the weekend before the hearing. When asked if the Complainants occupied the RV full time, Mr. Myers answered no. Mr. Myers then explained that they had temporarily resided in the RV but had authority to do so from the Respondent. Mr. Myers elaborated that “we have had so many water problems, I explained to ‘em it was easier to stay in it ‘til they could get it back to the manufacturer to repair it.” When asked if they stayed in the RV until it went back to the Respondent, Mr. Myers answered, “yes, because there were so many issues every time it rained, you know, it dumped a hundred gallons of water inside of it. Every time it gets ready to rain I’d have to tarp it ‘til they could get it back to the factory.”

B. Respondent’s Evidence and Arguments

Mr. Davis reviewed the Respondent’s pre-authorizations against the work orders. He pointed out that he did not have a pre-authorization for the refrigerator repair on the May 28, 2014, work order. The pre-authorizations also did not show any work on the AC units in December of 2014. On pre-authorization 1103732, the ceiling panels were not worked on because the customer wanted to leave. Mr. Davis explained that in pre-authorization 1297200, nothing was approved because of Brian Booker’s comments that “I just informed Mr. Myers that ExploreUSA is through performing any remaining or future warranty work on his coach. I am also not interested in ExploreUSA being involved in any communication between him and Voltage.”²⁸ Mr. Davis explained that Mr. Booker, the dealer’s general manager, backed out of everything. Mr. Davis did not know what happened but the Respondent did not pay for anything in that pre-authorization. Mr. Davis did not know how much of the work on pre-authorization 1348303 was actually done because work was stopped to take the RV to the factory. Pre-authorization 1378509 showed the work done at Keystone. The AC was inspected at zone 1 and the entire roof was replaced, in addition to sheets of decking. The refrigerator was run for days with nothing wrong, the antenna was replaced. The refrigerator had two repairs: the thermistor was replaced then the refrigerator

²⁸ Respondent’s Ex. 1, Pre-Authorization PA01297200.

was replaced. The generator repair had a pre-authorization but work was stopped to bring the RV to Keystone. The dealer did not submit anything about breakers and only submitted that the generator was leaking. Mr. Davis asked Mr. Myers: "I was told you were living in it [the RV] while you were building a house, is that not true?" Mr. Myers responded "No."²⁹ Then Mr. Davis asked, "You never lived in it?" Mr. Myers answered "Well, I lived in it temporarily when I was having all the water problems and Mr. Stephen Holmes knew I was living in it. He approved my lodging. He paid for my lodging." The hearings examiner asked "when you said that Mr. Holmes would approve your lodging, you mean alternative lodging like a hotel or something like that?" Mr. Myers answered "Yes." Mr. Davis inquired, "So he paid for you to stay in a hotel while it was at Keystone being worked on?" Mr. Myers responded, "I never made him pay."

C. Inspection

The inspection of the vehicle at the hearing showed some water damage on the light fixture underneath the zone 1 AC unit. The bedroom floor squeaked when stepping on it.

D. Analysis

The Complainants filed their complaint past the deadline for Lemon Law relief. Accordingly the vehicle cannot qualify for repurchase or repair relief. Additionally, the record shows that the manufacturer's warranty does not apply to the subject vehicle because it had been used for residential purposes. Accordingly, the vehicle does not qualify for any relief.

1. Filing Deadline

With respect to a towable recreational vehicle, Section 2301.606(d) of the Lemon Law requires a complaint to be filed no later than six months after the expiration of the express warranty. In this case, the warranty expired one year after the purchase date.³⁰ The Complainants purchased the vehicle on May 16, 2014, so the warranty expired on May 16, 2015, making November 16, 2015, the deadline for filing the complaint. However, the Complainants filed the complaint on

²⁹ During the October 12, 2016, prehearing conference, Michelle Diaz, the retail claims manager for the Respondent, asked, "I think Mr. Myers resides in the unit as well. Is that correct Mr. Myers?" Mr. Myers answered, "I do temporarily. I sold my house and I'm just in the midst of buying a new house."

³⁰ Complainants' Ex. 17, Limited One Year Warranty.

August 12, 2016, approximately nine months past the deadline. Consequently, the vehicle cannot qualify for repurchase or replacement relief.

2. Warranty Coverage

The warranty specifies that it does not provide any coverage in this case. As a result, the vehicle does not qualify for any relief. The Lemon Law, and the related warranty repair provision, only provides relief for warrantable defects, i.e., defects covered by warranty.³¹ The Lemon Law does not require a manufacturer to provide any particular level of warranty coverage or any warranty coverage at all, but only requires manufacturers to comply with whatever coverage it does provide.³² Therefore, if the warranty does not cover the vehicle or the complained of problem, then the vehicle does not qualify for any relief. In this case, reviewing the vehicle's warranty shows that it does not cover trailers used for residential purposes or any purpose other than recreational travel and camping. Under the heading "Warranty Exclusions" the warranty states that "This Limited Warranty Shall Not Apply To: . . . Trailers used for business, rental, commercial, residential, or disaster relief purposes, or any purposes other than recreational travel and family camping."³³ In this case, Mr. Myers testified that the Complainants did reside in the vehicle, although temporarily. Nevertheless, the warranty specifies that any non-recreational travel, non-family camping use, and in particular residential use, makes the warranty inapplicable. Consequently, the warranty does not apply to the subject vehicle and therefore it cannot qualify for any relief.³⁴

III. Findings of Fact

1. On May 16, 2014, the Complainants, purchased a new 2015 Dutchmen Voltage 3990 from ExploreUSA RV Supercenter, an authorized dealer of the Respondent, in Kyle, Texas.
2. The vehicle's limited warranty covers the vehicle for one year from the date of purchase.
3. The Complainants took the vehicle to a dealer for repair as shown below:

³¹ TEX. OCC. CODE §§ 2301.204, 2301.603 and 2301.604.

³² TEX. OCC. CODE §§ 2301.603.

³³ Complainants' Ex. 17, Limited One Year Warranty (emphasis added).

³⁴ TEX. OCC. CODE §§ 2301.604(a) and 2301.204.

Date	Issue
May 28, 2014	AC is freezing and leaking water; AC trips breaker; refrigerator intermittent running; roof leaking at antenna
June 19, 2014	AC leaked
August 3, 2015	Refrigerator not working
December 3, 2014	Replace living area AC

4. On or about August 26, 2016, the Complainants or a person on behalf of the Complainants e-mailed a written notice of defect to the Respondent.
5. On August 12, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the air conditioning in the living area did not cool; the refrigerator did not cool properly and ran intermittently; the roof leaked; the bedroom floor squeaked; and the generator tripped the breaker.
6. On August 31, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants 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 November 1, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented, and testified for, himself and Marla G. Myers. Randall D. Davis, Product Manager, represented and testified for the Respondent.
8. The warranty expired on May 16, 2015.
9. The warranty does not apply to vehicles used for residential purposes or for any purpose other than recreational travel and family camping.

IV. Conclusions of Law

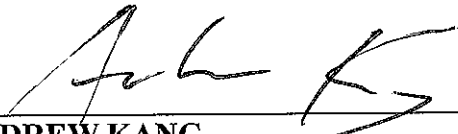
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainants did not timely file the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
8. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604, 2301.606(d).
9. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 and § 2301.204 is **DISMISSED**.

SIGNED November 14, 2016



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