

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0382 CAF**

**PHYLLIS B. TYLER,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Phyllis B. Tyler (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 her vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's market value after a reasonable number of repair attempts. Consequently, the Complainant's vehicle qualifies for repurchase/replacement.

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 20, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Amanda Bemiller, 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).

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 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

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.¹⁹ 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."²⁰ However, the parties may expressly or impliedly consent

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 "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.").

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

to trying issues not included in the pleadings.²¹ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Complainant's Evidence and Arguments

On June 11, 2016, the Complainant, purchased a new 2016 Ford Edge from Big Star Ford, a franchised dealer of the Respondent, in Manvel, Texas. The vehicle had two miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On August 12, 2016, the Complainant mailed a written notice of defect to the Respondent. On August 22, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the transmission strained and jerked when shifting. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

| Date | Miles | Issue |
|-----------------|-------|---|
| June 21, 2016 | 425 | Hesitation in shifts from 2nd to 3rd gear on takeoffs |
| July 21, 2016 | 1,817 | Transmission will jerk violently when shifting gears |
| July 27, 2016 | 1,917 | Transmission jerks |
| August 9, 2016 | 2,199 | Transmission shifts hard |
| October 7, 2016 | 2,861 | Transmission jerking after rebuild |

The Respondent's opportunity to repair occurred on September 15, 2016. The Complainant testified she first noticed the hard shifting on the day after purchasing the vehicle. When accelerating, or sometimes braking, the transmission would shift hard, sometimes once, sometimes twice. The issue occurred intermittently. After driving for two weeks without improvement, the Complainant took the vehicle to the dealer. Repairs would resolve the issue for 12 to 24 hours but the problem would gradually return. The Complainant stated that she last felt a really hard shift a couple of days before the hearing. She also explained that the issue would occur about 15 to 20 times a week at a minimum. She confirmed that she would typically hear a clicking/tapping sound with the hard shifts. She would also hear straining as if the transmission were in the wrong gear, especially on the freeway. The Complainant expressed a preference for replacement relief.

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

²² See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

B. Respondent's Evidence and Arguments

The Respondent contended that the vehicle did not qualify for repurchase or replacement. It did not have four or more repair attempts, was not out of service 30 or more days, and did not have a serious safety defect. The repair history reflects that three visits resulted in repairs. The manufacturer's final repair attempt indicated that the vehicle was operating as intended. At the final repair attempt, the field service engineer test drove the vehicle for 63 miles in varying areas without encountering any diagnostic codes or abnormal conditions.

C. Inspection

Upon inspection at the hearing, the vehicle's odometer displayed 6,902 miles before the test drive. The vehicle was driven approximately 18 miles over mostly local roads controlled by traffic lights and some stop signs. During the test drive the vehicle exhibited several instances of relatively light rough shifts as well as two instances of a click noises when letting off the accelerator apparently associated with the shifts. The Complainant noted that the rough shifts occurring during the test drive were light compared to other rough shifts the vehicle had exhibited.

D. Analysis

The record reflects that the vehicle continues to have a defect that substantially impairs the market value after a reasonable number of repair attempts, making the vehicle eligible for repurchase/replacement relief.

1. Reasonable Repair Attempts

The record shows a total of five service visits. Although, as the Respondent pointed out, not all visits resulted in repairs. As explained previously in the discussion of applicable law, a service visit without an actual repair may still count as a repair attempt under the Lemon Law.²³ In this case the vehicle had at least two repair attempts in the first 12 months or 12,000 miles and another two repair attempts in the following 12 months or 12,000 miles.

²³ *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

2. Existing Defect

During the test drive at the December 20, 2016, hearing, the vehicle exhibited some rough shifts as well as some clicking/tapping noises with some of those shifts. The Complainant testified that she last felt a really hard shift a couple of days before the hearing, all of which occurred after the last service visit on October 7, 2016.

3. Substantial Impairment of Market Value

To determine whether the vehicle has a substantial impairment in market value, the Department applies the reasonable prospective purchaser standard (as opposed to a reasonable technician or reasonable dealer standard). This simplified approach, which avoids the need for technical experts, comports with the Lemon Law's goal to "encourage extrajudicial resolution of warranty-related disputes between purchasers of new cars and automobile manufacturers, and to mitigate the economic advantages of manufacturers in those disputes."²⁴ In this case the reasonable prospective purchaser may reasonably be deterred from purchasing the vehicle because of concerns with prospective transmission problems. Accordingly, the vehicle's market value is substantially impaired.

III. Findings of Fact

1. On June 11, 2016, the Complainant, purchased a new 2016 Ford Edge from Big Star Ford, a franchised dealer of the Respondent, in Manvel, Texas. The vehicle had two 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 21, 2016 | 425 | Hesitation in shifts from 2nd to 3rd gear on takeoffs |
| July 21, 2016 | 1,817 | Transmission will jerk violently when shifting gears |
| July 27, 2016 | 1,917 | Transmission jerks |
| August 9, 2016 | 2,199 | Transmission shifts hard |
| October 7, 2016 | 2,861 | Transmission jerking after rebuild |

²⁴ *Chrysler Motors Corp. v. Texas Motor Vehicle Commission*, 846 S.W.2d 139, 142 (Tex. App.—Austin 1993, no writ).

4. The Respondent's opportunity to repair occurred on September 15, 2016.
5. On August 12, 2016, the Complainant mailed a written notice of defect to the Respondent.
6. On August 22, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the transmission strained and jerked when shifting.
7. On October 17, 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 20, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Amanda Bemiller, Consumer Legal Analyst, represented the Respondent.
9. The vehicle's odometer displayed 6,902 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. The vehicle exhibited very hard shifting with two days before the hearing.
12. The vehicle exhibited some rough shifts during the test drive at the hearing as well as some clicking/tapping noises accompanying some of the shifts.
13. The appropriate calculations for repurchase are:

| | |
|--|-------------|
| Purchase price, including tax, title, license & registration | \$40,502.11 |
| Delivery mileage | 2 |
| Mileage at first report of defective condition | 425 |
| Mileage on hearing date | 6,902 |
| Useful life determination | 120,000 |

| | | | | | | | | | | |
|--|--------------|---|---------|---|-------------|---|----------|---|------------|--------------------|
| Purchase price, including tax, title, license & registration | | | | | | | | | | \$40,502.11 |
| Mileage at first report of defective condition | 425 | | | | | | | | | |
| Less mileage at delivery | -2 | | | | | | | | | |
| Unimpaired miles | 423 | | | | | | | | | |
| Mileage on hearing date | 6,902 | | | | | | | | | |
| Less mileage at first report of defective condition | -425 | | | | | | | | | |
| Impaired miles | 6,477 | | | | | | | | | |
| <i>Reasonable Allowance for Use Calculations:</i> | | | | | | | | | | |
| Unimpaired miles | 423 | ÷ | 120,000 | × | \$40,502.11 | = | \$142.77 | | | |
| Impaired miles | 6,477 | ÷ | 120,000 | × | \$40,502.11 | × | 50% | = | \$1,093.05 | |
| Total reasonable allowance for use deduction | | | | | | | | | | \$1,235.82 |
| Purchase price, including tax, title, license & registration | | | | | | | | | | \$40,502.11 |
| Less reasonable allowance for use deduction | | | | | | | | | | -\$1,235.82 |
| Plus filing fee refund | | | | | | | | | | \$35.00 |
| TOTAL REPURCHASE AMOUNT | | | | | | | | | | \$39,301.29 |

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 had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).

7. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604.

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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$39,301.29**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁵ the parties shall complete the return and repurchase of the subject vehicle. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the

²⁵ (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.

vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);

4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

SIGNED February 17, 2017



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