

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0146141**

**ALEJANDRO A. MENDOZA and
ALAN G. RENDON,
Complainants**

v.

**FCA US LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Alejandro Mendoza and Alan Rendon (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 vehicle manufactured by FCA US LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has warrantable defects that qualify for warranty repair but not repurchase or 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 June 20, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Tym Mancini, 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 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 Complainants.¹⁷ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that each required fact is more likely than not true.¹⁸ If any required fact appears equally likely or unlikely, then the Complainants has not met the burden of proof.

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 factual 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 Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Complainants' Evidence and Arguments

On March 3, 2016, the Complainants, purchased a new 2015 Ram Promaster from Helfman Dodge Chrysler Jeep Ram, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 42 miles on the odometer at the time of purchase. The vehicle's basic limited warranty coverage lasts for three years or 36,000 miles, whichever occurs first and the powertrain limited warranty lasts for five years or 100,000 miles, whichever occurs first. On or about August 25, 2016, Timothy McLean, the Dealer's service director, on behalf of the Complainants forwarded the Complainants' written notice of defect to the Respondent. On December 9, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the fuel system had metal shavings, the check engine light turned on, and the vehicle did not run well (bogging down). The Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
04/04/2017	16,162	Electronic throttle warning light comes on, vehicle stalls
02/13/2017	12,188	Electronic throttle control light comes on, electronic stability control (ESC) warning light comes on
07/29/2016	6,258	Check engine light and electronic throttle control warning lights are on, vehicle stalls
07/08/2016	5,946	Check engine light and throttle control light are on
06/27/2016	5,738	Check engine and electronic throttle control warning lights are on

The Respondent's final opportunity to repair the vehicle occurred on April 4, 2017.

Mr. Rendon testified that the dealer had to replace the fuel system because of metal shavings. With respect to the check engine light, the dealer attempted three times to resolve the check engine light. He did not notice any conditions associated with the check engine light coming on but subsequently, other warning lights would come on and the vehicle had other minor issues including a door not opening and an ammonia smell now coming from the air conditioning (AC). Regarding the vehicle not running well, Mr. Rendon explained that the vehicle would bog down like the transmission was downshifting, not slipping. He confirmed that the vehicle had been

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).

repaired for the metal shavings in the fuel system. He answered that the last time the check engine light was on was when they took the vehicle in on April 4, 2017, and told the dealership that the check engine light came on. Mr. Rendon added that Mr. Mendoza felt the vehicle bog down about a month ago. Mr. Rendon confirmed that repairs did improve the fuel system but the vehicle has bogged down at times.

B. Respondent's Evidence and Arguments

On cross-examination, Mr. Rendon confirmed that the Complainants last took the vehicle for a repair visit on April 4 (2017). Mr. Rendon responded that a warning light (red electrical "lightning bolt") came on once after the last repair visit but turned itself off. Mr. Rendon affirmed that the fuel system did not have any issues after repair.

Mr. Mancini testified about his inspection of the vehicle on April 4, 2017, for the complaints at the time: check engine light, throttle light, and an intermittent engine concern. He found no active diagnostic trouble codes, except for the radio, which would not affect the issues. When test driving the vehicle, accelerating and decelerating, it operated properly with no surging or concern that it would stall. He believed that the metal fuel contamination came from a high pressure pump coming apart. He believed the dealer addressed the throttle body issues before his visit. Both concerns (fuel system and throttle) appeared fixed and no repairs were needed at that time. At the hearing, Mr. Mancini found the vehicle had stored (not active) codes for the radio, GPS, antenna, and speaker. He answered that a communication code could cause a check engine light, but not these codes. Mr. Mancini testified that he did not experience any bogging during the test drive at the hearing or before. He explained that the vehicle's transmission (an automatically shifted manual transmission) was like a stick shift and can feel unusual compared to a conventional automatic transmission. The hearing examiner asked Mr. Mancini if he had any idea about the nature of the clicking/chattering noise during the test drive at the hearing. Mr. Mancini answered that he was not sure of the source of the noise and added that the noise was not there when inspected the vehicle (on April 4, 2017).

C. Inspection and Test Drive

Mr. Mancini scanned the subject vehicle for any trouble codes. The only codes shown would not have affected the vehicle's performance. The subject vehicle had 24,193 miles on the

odometer before the two test drives at the hearing. Both test drives consisted primarily of highway miles over mostly the same route. The first test drive, with Mr. Rendon driving, started at 24,193 miles and ended at 24,217 miles, for a total of 24 miles driven. Mr. Rendon explained that the bogging typically occurred on the freeway. He added that they noticed the ammonia smell on the day of the hearing. He pointed out at least one instance during the test drive when he felt the vehicle bog down. However, the hearing examiner did not notice anything unusual at that point. Towards the end of the first test drive at lower speeds, the vehicle made a clicking/chattering noise. The second test drive, with Mr. Mancini driving, started at 24,217 miles and ended at 24,246 miles, for a total of 29 miles driven. At the start of the test drive, at lower speeds, the vehicle made the clicking/chattering noise. Mr. Mancini accelerated and decelerated while on the highway. The vehicle appeared to operate normally during acceleration and deceleration. When approaching the parking lot, at lower speeds, the vehicle again made the clicking/chattering noise.

D. Analysis

The record does not support repurchase or replacement but does show that the vehicle has two warrantable defects eligible for warranty repair relief. The metal shavings in the fuel system and the check engine light issues do not appear to continue to exist. As reflected in the record, the fuel system was successfully repaired and the check engine light issue has not recurred since the last repair. A preponderance of the evidence does not show that the bogging is a warrantable defect. The bogging issue appears consistent with the characteristics of the vehicle's automated manual transmission. As Mr. Rendon testified, the bogging feels like the transmission downshifting. However, the vehicle did exhibit a clicking/chattering noise at low speeds during the test drive at the hearing. Mr. Mancini did not know the cause of the noise. Additionally, the vehicle's AC appeared to currently produce an ammonia smell (not a mildew like smell). The Complaint did not include the chattering/clicking or the ammonia smell, which appear to be new issues. In conclusion, the low speed chattering/clicking and the ammonia smell qualify for warranty repair.

III. Findings of Fact

1. On March 3, 2016, the Complainants, purchased a new 2015 Ram Promaster from Helfman Dodge Chrysler Jeep Ram, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 42 miles on the odometer at the time of purchase.

2. The vehicle's basic limited warranty coverage lasts for three years or 36,000 miles, whichever occurs first and the powertrain limited warranty lasts for five years or 100,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
04/04/2017	16,162	Electronic throttle warning light comes on, vehicle stalls
02/13/2017	12,188	Electronic throttle control light comes on, electronic stability control warning light comes on
07/29/2016	6,258	Check engine light and electronic throttle control warning lights are on, vehicle stalls
07/08/2016	5,946	Check engine light and throttle control light are on
06/27/2016	5,738	Check engine and electronic throttle control warning lights are on

4. On or about August 25, 2016, the Dealer on behalf of the Complainants forwarded the Complainants' written notice of defect to the Respondent.
5. On December 9, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the fuel system had metal shavings, the check engine light turned on, and the vehicle did not run well.
6. On March 30, 2017, 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 factual matters asserted.
7. The hearing in this case convened and the record closed on June 20, 2017, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Tym Mancini, Technical Advisor, testified for the Respondent.
8. The vehicle's odometer displayed 24,193 miles at the time of the hearing.
9. The vehicle's basic and powertrain warranty coverages were in effect at the time of the hearing.

10. During the test drive at the hearing, the vehicle made a chattering noise several times at low speeds. The vehicle otherwise operated normally.
11. The vehicle's AC exhibits an ammonia smell.

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. 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 bear the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The metal shavings in the fuel system, check engine light, and bogging issues do not qualify the Complainants' vehicle for replacement, repurchase or warranty repair. The Complainant did not prove that the metal shavings in the fuel system and check engine light issues continue to exist. The Complainant did not prove that the bogging issue is a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 2301.603(a), and 2301.604(a).
7. The low speed clicking/chattering and ammonia smell are existing defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 2301.603(a), and 2301.604(a).
8. The low speed clicking/chattering and ammonia smell do not qualify the Complainants' vehicle for replacement or repurchase. (1) The Complainants did not meet the requirement for a reasonable number of repair attempts for these issues. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a). (2) The Complainants or a person on behalf of the Complainants did not

provide notice of these issues to the Respondent. This Order may not require repurchase or replacement of the vehicle without mailed written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1). (3) The Respondent did not have an opportunity to cure these issues. 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)(2).

9. If the Complainants' 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).
10. The Complainants' vehicle does qualify for warranty repair regarding the low speed clicking/chattering and ammonia smell. 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 warranty. TEX. OCC. CODE § 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 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle to the applicable warranty, specifically, the Respondent shall address the clicking/chattering noise and ammonia smell described above. The Complainants shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.²³ Within 20 days after receiving the vehicle from the Complainants, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

²³: (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, 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 Order.

SIGNED August 4, 2017



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