

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0177327 CAF**

**JEFFREY L. LYNN,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jeffrey L. Lynn (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in his recreational vehicle (RV) manufactured by Forest River, Inc. (Respondent). The record shows that the subject vehicle has a warrantable defect that qualifies for repurchase 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 on November 10, 2017, in Waco, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. The Complainant's spouse, Dawn Lynn, and son, Justin Lynn, also testified for the Complainant. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent, appearing by telephone.

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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

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:

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).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of 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.¹¹ 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.¹²

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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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).

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.¹⁵

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" and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.¹⁶ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.¹⁹ If any required fact appears equally likely or unlikely, then the Complainant 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.²⁰ The complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."²¹ However, the parties may expressly or impliedly consent

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the 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.").

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

to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

A. Complainant's Evidence and Arguments

On January 30, 2016, the Complainant, purchased a new 2016 Sandpiper 378FB from Fun Town RV, an authorized dealer of the Respondent, in Cleburne, Texas. The vehicle's limited warranty provides coverage for one year. On June 8, 2017, the Complainant provided a written notice of defect to the Respondent. On June 20, 2017, the Complainant filed a complaint with the Department alleging that the subject vehicle had the following nonconformities: slides coming loose; rubber insulation tearing; slides stopping – requiring reset; door side slide will not come in all the way; door side slide comes out during transit; icemaker not working properly bad icemaker valve; icemaker not getting enough water – making thin, soft ice. The Complainant confirmed that the issues regarding the rubber insulation, slides stopping, and the slide not coming in all the way have been resolved prior to the hearing.

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

| Date | Issue |
|-----------------------|---------------------------------------|
| 1/3/2017 to 2/9/2017 | Slides are stopping and must be reset |
| 3/14/2017 to 4/4/2017 | Slide not coming out all the way |
| 4/18/2017 to 5/4/2017 | Slide coming out during travel |

The Complainant testified that the slide last came loose during a trip to Galveston sometime in May or June. Justin Lynn clarified that this occurred about mid-May 2017. The Complainant confirmed that the torn rubber insulation was replaced. He also testified that the issue with the slide stopping had been fixed and he had not noticed this issue further. Likewise, the issue with the door side slide not coming in was also resolved.

When asked if the dealer, Funtown RV, or the independent technician, Jim Wilson, contacted the Complainant in October, he responded that the dealer left a voicemail but he had been out of town in Shreveport at the time of the call. The Complainant explained that in July 2017, the technician stated that he would make a repair visit when the refrigerator came in, but the

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

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

Complainant did not hear from him again. Mrs. Lynn added that they attempted to call Mr. Wilson back but were unable to leave a message. When Mr. Wilson ostensibly scheduled service, the Complainant was out of town on vacation. Someone left a message while they were out of town. Mrs. Lynn added that no appointment was ever made. She explained the slide would come out in transit. When the Complainant called the dealer in September 2016 to schedule repair, the dealer responded that they would have to wait three months before the dealer could look at the RV.

B. Respondent's Evidence and Arguments

Mr. Murphy testified that the issue started in July-August 2016 getting the refrigerator shipped with one repair visit from the independent repair technician. Mr. Murphy did not hear until October 2016 that the refrigerator was at the dealer's warehouse an appointment does not appear to have ever been made. The Respondent tried to get a technician to the RV but this did not successfully happen.

C. Analysis

As detailed below, the vehicle has a warrantable defect, but the vehicle does not satisfy the requirement for reasonable repair attempts.

1. Warrantable Defect

As explained below, the subject vehicle's spontaneous slide opening issue is a warrantable defect that qualifies for repurchase relief. The evidence shows that some of the issues on the complaint were successfully resolved, leaving the issues regarding the slides coming loose and opening and the refrigerator issues. Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁴ As an initial matter, the manufacturer only warrants that "the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor." Moreover, the warranty specifically excludes "the chassis, including, without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, routine maintenance, equipment and appliances, or audio and/or video equipment."²⁵ Because the

²⁴ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); Tex. Occ. Code § 2301.204

²⁵ Complainant's Ex. 2, Warranty (emphasis added).

refrigerator is not a warranted item, issues with the refrigerator cannot support Lemon Law relief. However, a preponderance of the evidence shows that slide opening issue is a warrantable defect that poses a serious safety hazard. In particular, the slide spontaneously coming loose and extending poses a risk of collision, which also substantially impairs the use and market value of the RV.

2. Respondent's Opportunity to Cure

As a condition of repurchase/replacement relief, the Lemon Law requires the Respondent to have been given an opportunity to cure the alleged defects. In this case, the Respondent did not actually attempt a repair. However, the record indicates that the Respondent did have an opportunity to repair. Here, the repair attempt did not occur because of a failure in communications not due to any fault of the Complainant. The evidence reflects that the Complainant attempted to arrange for repairs but the independent technician failed to follow through and schedule the repairs. Under these facts, the Complainant provided the Respondent with an opportunity to cure.

3. Reasonable Repair Attempts

The vehicle does not satisfy any of the three express presumptions for reasonable repairs. The record shows one existing defect: the spontaneous slide opening. Accordingly, under the presumptions, the vehicle must have had: four repair attempts for the same slide opening issue; for serious safety hazards, two attempts for the same slide opening issue; and for 30 days out of service, at least two attempts in the first year. However, the record only shows one repair attempt for the slide opening issue and only one repair attempt in the first year. Nevertheless, the evidence may otherwise support finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts. In this case, the Complainant attempted to arrange a subsequent repair attempt, but due to no fault of the Complainant, the final repair attempt was never scheduled. Additionally, vehicle had a total of three repair attempts overall (occurring in a span of less than four months), with one of those attempts occurring in the first 12 months, and a total of 74 days out for repair (37, 21, and 16 days). Furthermore, the vehicle's defect poses a serious safety hazard. Given these considerations, the vehicle has had a reasonable number of repair attempts.

III. Findings of Fact

1. On January 30, 2016, the Complainant, purchased a new 2016 Sandpiper 378FB from Fun Town RV, an authorized dealer of the Respondent, in Cleburne, Texas.
2. The vehicle's limited warranty provides coverage for one year.
3. The Complainant took the vehicle to a dealer for repair as shown below:

| Date | Issue |
|-----------------------|---------------------------------------|
| 1/3/2017 to 2/9/2017 | Slides are stopping and must be reset |
| 3/14/2017 to 4/4/2017 | Slide not coming out all the way |
| 4/18/2017 to 5/4/2017 | Slide coming out during travel |

4. On June 8, 2017, the Complainant provided a written notice of defect to the Respondent.
5. On June 20, 2017, the Complainant filed a complaint with the Department alleging that the subject vehicle had the following nonconformities: slides coming loose; rubber insulation tearing; slides stopping – requiring reset; door side slide will not come in all the way; door side slide comes out during transit; icemaker not working properly bad icemaker valve; icemaker not getting enough water – making thin, soft ice. The Complainant confirmed that the issues regarding the rubber insulation, slides stopping, and the slide not coming in all the way have been resolved prior to the hearing.
6. On August 31, 2017, 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 factual matters asserted.
7. The hearing in this case convened on November 10, 2017, in Waco, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. The Complainant's spouse, Dawn Lynn, and son, Justin Lynn, also testified for the Complainant. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent, appearing by telephone.
8. The warranty expired on January 30, 2017.

9. The Complainant attempted to arrange a final repair attempt by the Respondent. However, due to no fault of the Complainant, the repair was never scheduled.
10. The spontaneously opening slide poses a risk of collision.
11. The appropriate calculations for repurchase are:

| | |
|--|-------------|
| Purchase price, including tax, title, license & registration | \$51,529.52 |
| Date of delivery | 01/30/16 |
| Date of first report of defective condition | 04/18/17 |
| Date of hearing | 11/10/17 |
| Days out of service | 74 |
| Useful life determination | 3,650 |

| | | | | |
|--|----------|---|----------|--------------------------------|
| Purchase price, including tax, title, license & registration | | | | \$51,529.52 |
| <i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery | 04/18/17 | - | 01/30/16 | = 444 |
| <i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair | 11/10/17 | - | 04/18/17 | = 206 -74 <u>132</u> |
| <i>Reasonable Allowance for Use Calculations:</i> Unimpaired days | 444 | ÷ | 3,650 | × \$51,529.52 = \$6,268.25 |
| Impaired days | 132 | ÷ | 3,650 | × \$51,529.52 × 50% = \$931.77 |
| Total reasonable allowance for use deduction | | | | \$7,200.02 |
| Purchase price, including tax, title, license & registration | | | | \$51,529.52 |
| Less reasonable allowance for use deduction | | | | -\$7,200.02 |
| Plus filing fee refund | | | | \$35.00 |
| Plus incidental expenses | | | | \$0.00 |
| TOTAL REPURCHASE AMOUNT | | | | \$44,364.50 |

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including

- the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a 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 Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
 6. The Complainant, a person on behalf of the Complainant, or the Department provided written notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
 7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
 8. The Complainant timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).
 9. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).

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 Order. **IT IS THEREFORE ORDERED** that:

10. 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;
11. The Respondent shall repurchase the subject vehicle in the amount of **\$44,364.50**. 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;
 12. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁶ 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 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);
 13. 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;
 14. 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
 15. 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,

²⁶ (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.

address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

SIGNED January 9, 2018



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