

TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0178539 CAF

LANCE M. AND JANICE C. RAYNE,
Complainants

v.

FOREST RIVER, INC.,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Lance M. and Janice C. Rayne (Complainants) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in their recreational vehicle manufactured by Forest River, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainants' vehicle does not qualify for warranty repair.

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 January 24, 2018, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Michael (Mike) Rahmn, attorney, represented the Respondent. Dan Evans, director of service and warranty for the Respondent, 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 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 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

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 satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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 Complainants.¹⁸ 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.¹⁹ If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainants cannot prevail.

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

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).

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).

A. Complainants' Evidence and Arguments

On February 27, 2015, the Complainants, purchased a new 2014 Legacy 340KP from Camping World RV Supercenter, an authorized dealer of the Respondent, in Katy, Texas. The vehicle had 1,634 miles on the odometer at the time of purchase. The vehicle's limited warranty provides coverage for one year or 12,000 miles, whichever occurs first. 3. On August 2, 2017, the Complainants filed a complaint with the Department, which alleged performance of repairs for various issues including the water heater temperature, water pressure, and bunk bed operation. At the hearing, the Complainants identified the following problems as existing issues: hot water heater temperature, water pressure, and a rattling noise.

Mr. Rayne testified that the drop-down bunk, kitchen slide, or something under the RV would make a popping sound when braking. He answered that he last noticed the noise issue on the way to the hearing. Mr. Rayne explained that the hot water heater would not hold a constant temperature, running hot and then cold, which he asserted was a known issue with that model of water heater. Mrs. Rayne confirmed that the issue was particular to that model of water heater. Mr. Rayne testified that he last noticed the hot water heater fluctuation in September 2017. Regarding the water pressure, Mr. Rayne testified that the shower, whether city or pump water, the pressure was extremely low, just enough to take a shower. Mrs. Rayne added that the water pressure was not enough to wash soap off. Mr. Rayne testified that he last noticed the low water pressure in September of 2017. Mr. Rayne stated that the bunk bed did not consistently lower but replacement of the motors supposedly fixed the issue. He last noticed the bunk bed malfunction in March 2017. He answered that he picked up the RV on June 30, 2017, after the last repair attempt on the bunk. Mr. Rayne answered that the RV was transported to the manufacturer for repair on October 5, 2016, and transported back on October 26, 2016.

On cross-examination, Mr. Rayne confirmed that: the warranty applied for one year or 12,000 miles and excluded appliances; the dealership notified him that the water heater functioned as intended; he did not recall if the complaint addressed the noise issue and could not see the noise issue in the complaint.

Mrs. Rayne added that they were never told to keep two faucets running when taking a shower. Mr. Rayne noted that he always left the shower running hot water and only used the cold water to adjust the temperature.

B. Respondent's Evidence and Arguments

Mr. Evans testified that the water heater is designed to be hot instantly, so that when the water flows, the water heats it instantly. However, the water must have a certain volume of water. This limit is a safety feature so the water heater will not combust. If the water is not flowing, then it is not cooling the water heater. The water heater may require having another faucet on to keep up the water needed by the water heater. Mr. Evans did not see anything abnormal with the subject vehicle's water heater. Additionally, the Respondent's warranty did not cover the water heater. Mr. Evans affirmed that the Complainants' description of the water pressure did not include anything indicating a malfunction. He elaborated that the Respondent's RV employ water savers (restricting water flow but conserving water). Regarding vibration, Mr. Evans described RVs as being constructed like a house on wheels. The RV has many components and appliances that may rattle. Mr. Evans pointed out that the Respondent had the RV serviced about eight months after the warranty period.

On cross-examination, Mr. Evans explained that he has heard complaints about anything that could be in a motorhome. He answered the Respondent had replace the same-model water at times for good will, or for damage done by the Respondent, or when customers did not want an instant-on water heater.

C. Inspection and Test Drive

At the inspection during the hearing, the bunk appeared to lower and rise normally, except that the driver's side of the bunk remained approximately a 1/4" to a 1/2" higher than the passenger side of the bunk; however, this appeared to be a maintenance issue and Mr. Rayne noted that the height could be adjusted manually. The hot water from the shower head exhibited the fluctuation in temperature described in Mr. Rayne's testimony. The temperature of the hot water from the bathroom faucet did not appear to vary as much as from the showerhead. The water pressure appeared normal and Mr. Rayne pointed out that the water pressure improved after draining the water lines. The vehicle had 23,731 miles on the odometer at the start of the test drive. The vehicle was driven through a parking lot, on service roads, and the main lanes of I-45. The noise exhibited during the test drive did not appear abnormal. The odometer displayed 23,736 miles at the end of the test drive.

D. Analysis

1. Warranty Coverage

The record shows that the Complainants have experienced extensive problems with their vehicle. However, the applicable law only provides relief for defects covered by warranty (warrantable defects).²⁴ In the present case, none of the currently existing issues are warrantable defects. The law does not require that a manufacturer provide any particular warranty coverage nor does the law specify any standards for vehicle characteristics. Instead, the law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the Respondent warrants “for a period of one (1) year from date of purchase or (12,000) twelve thousand miles, whichever comes first (Warranty Period), that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor.” Significantly, the warranty expressly excludes: “the motorhome chassis including without limitation, the engine and drivetrain, any mechanical parts or systems of the chassis, tires, tubes, batteries and gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment.”

2. Filing Deadline for Repurchase or Replacement

To qualify for repurchase or replacement relief, the law requires the complaint to have been filed no later than six months after the earliest of: (1) the expiration of the warranty; or (2) the dates on which 24 months or 24,000 miles have passed since the date of the RV’s delivery to the Complainants. In this case, the Complainants purchased their RV on February 27, 2015, so the warranty expired on February 27, 2016. Consequently, the complaint must have been filed by August 27, 2016. The complaint in this case was filed on August 2, 2017, almost a year past the deadline. Accordingly, the vehicle cannot qualify for repurchase or replacement.

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

3. Alleged Defects**a. Noise**

The noise exhibited during the test drive did not appear abnormal for the subject vehicle's type. Additionally, the complaint did not include the noise issues. Significantly, the law requires the complaint to specify the alleged defect for the Department to grant any relief for that issue.²⁵

b. Water Heater

As explained in the discussion of warranty coverage above, the warranty expressly excludes components manufactured by third parties. Consequently, even if the water heater has a defect, the vehicle's warranty does not cover such defect and provides no basis for any relief.

c. Water Pressure

The water pressure demonstrated during the inspection of the vehicle appeared normal.

d. Bunk Beds

At the inspection during the hearing, the bunk operated normally. The driver's side of the bunk remained approximately a 1/4" to a 1/2" higher than the passenger side of the bunk; however, this appeared to be a maintenance issue (which the warranty excludes) requiring an adjustment and not a defect.

III. Findings of Fact

1. On February 27, 2015, the Complainants, purchased a new 2014 Legacy 340KP from Camping World RV Supercenter, an authorized dealer of the Respondent, in Katy, Texas. The vehicle had 1,634 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides coverage for one year or 12,000 miles, whichever occurs first.
3. On August 2, 2017, the Complainants filed a complaint with the Department, which alleged performance of repairs for various issues including the water heater temperature, water pressure, and bunk bed operation.

²⁵ TEX. OCC. CODE § 2301.204.

4. On October 17, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
5. The hearing in this case convened on January 24, 2018, in Conroe, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Michael (Mike) Rahmn, attorney, represented the Respondent. Dan Evans, director of service and warranty for the Respondent, testified for the Respondent.
6. The vehicle's odometer displayed 23,731 miles at the time of the hearing.
7. The warranty expired on February 27, 2016.
8. At the inspection during the hearing, the bunk appeared to lower and rise normally, except that the driver's side of the bunk remained approximately a 1/4" to a 1/2" higher than the passenger side of the bunk, which appeared to be a maintenance issue. The hot water from the shower head exhibited the fluctuation in temperature described in Mr. Rayne's testimony. The temperature of the hot water from the bathroom faucet did not appear to vary as much as from the showerhead. The water pressure appeared normal and Mr. Rayne pointed out that the water pressure improved after draining the water lines. The vehicle had 23,731 miles on the odometer at the start of the test drive. The vehicle was driven through a parking lot, on service roads, and the main lanes of I-45. The noise exhibited during the test drive did not appear abnormal. The odometer displayed 23,736 miles at the end of the test drive.

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 bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle cannot qualify for replacement or repurchase. The Complainants did not timely file the complaint for repurchase or replacement relief. The proceeding must have been commenced not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner. TEX. OCC. CODE § 2301.606(d).
7. The Complainants' vehicle does not qualify for warranty repair. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204.

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 § 2301.204 if repair is **DISMISSED**.

SIGNED March 12, 2018



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