

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0181638 CAF**

**DAVID D. and PATRICIA A.
GUTIERREZ,
Complainants**

v.

**FORD MOTOR COMPANY,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

David D. Gutierrez and Patricia A. Gutierrez (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in their vehicle manufactured by Ford Motor Company (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 repurchase/replacement or 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 March 13, 2018, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on March 27, 2018, the deadline for filing responses to exhibits. The Complainants, represented and testified for themselves. Charles Hickey, Consumer Affairs Legal Analyst - Dispute Resolution Specialist, represented and testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and 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 June 16, 2016, the Complainants, purchased a new 2017 Ford F-150 from Jordan Ford, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 28 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, and powertrain coverage for five years or 60,000 miles, whichever occurs first. On September 3, 2017, the Complainants provided a written notice of defect to the Respondent. On December 5, 2017, the Complainants filed a complaint with the Department alleging that the vehicle exhibited a knocking noise and shaking, had a bulge in a tire, and had a flaw in the paint. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
07/08/17	734	Engine shaking
08/22/2017	1,706	Paint/refinish hood
07/18/17	2,680	Feeling like misfiring at idle (tappet), rattling noise
11/14/17	4,587	Noise while running

Mrs. Gutierrez testified that a tire on the subject vehicle had a bubble. So, Mrs. Gutierrez contacted the tire manufacturer, Michelin, who instructed the Complainant, to take the vehicle to Discount Tire to have the tire replaced if defective. The hood of the vehicle had a manufacturing defect, which Jordan Collision Repair repaired under warranty. The vehicle also required body work for dealer-caused damage to a door during a service visit. Mrs. Gutierrez stated that after replacement of the engine, the knocking noise continued to occur but the shaking subsided some. She explained that the knocking noise differed from the shaking and the vehicle did not always exhibit the knocking noise. She added that the vehicle "pulled" after the engine replacement. She clarified that while driving, the vehicle would suddenly "pull" (jerk) and return to normal. Mrs. Gutierrez testified that the vehicle did not currently shake as much as before. When asked if she had driven other same model vehicles, she answered that she did not. Mrs. Gutierrez stated that the vehicle still knocked occasionally.

On cross-examination, Mrs. Gutierrez confirmed that the engine had been replaced. She believed the replacement engine was remanufactured because she did not think the engine looked new.

B. Respondent's Evidence and Arguments

Mr. Hickey stated that the Respondent's documentation and information showed the vehicle received a new engine. He elaborated that the Respondent does not offer remanufactured engines for vehicles under the bumper to bumper warranty. Instead, remanufactured engines are offered if the vehicle is out of warranty, the vehicle is at least five model years old, or the engine is no longer produced at the plant. Mr. Hickey stated that the Respondent's field service engineer (FSE) would have noted in his inspection report if the engine were remanufactured. The Respondent expedited the shipping of the new replacement engine so delivery would occur almost overnight.

Mr. Hickey claimed that the vehicle did not meet the substantial impairment and reasonable repair requirements under the Lemon Law. The dealer provided loaner vehicles for the Complainants. The service history shows only two repair attempts and less than 30 days out of service. The FSE could not duplicate the complained of issues at the inspection for the manufacturer's opportunity to repair. Mr. Hickey explained that the vehicle's aluminum engine, which is more powerful than the Complainant's 1999 truck's 4.2 V6 cast iron engine, will normally produce vibration and noise. The engine may exhibit a tap (which the Complainants described as knocking), due to valve clearance. The engine initially starts cold but the air and engine components will expand. When the engine reaches operating temperature, the components will expand to the dimensions designed for normal operations and the tapping noise will decrease. To eliminate the noise, the clearances would have to be eliminated, but that would increase engine wear. Mr. Hickey also pointed out that the vehicle's engine has twin turbos, which also make noise that may seem disturbing and undesirable but is a normal characteristic. He also answered that the surge from the turbochargers can be felt.

Upon cross-examination, Mr. Hickey reiterated that the Complainants heard a noise with the old engine, which was much improved with the new engine. The old engine appeared to have an issue with cylinder #1. He stated that the dealer tested the engine and found it to be operating within specifications. However, the valve clearance was smaller on the exhaust side, so the dealer replaced a tappet. On a test drive, the oil pressure dropped to zero. The dealer found some scoring in the oil filter and metal in the oil, which would explain the noise. Accordingly, the engine was replaced under warranty.

C. Inspection and Test Drive

The vehicle had 10,089 miles on the odometer upon inspection at the hearing before the test drive. Mrs. Gutierrez confirmed that she would hear the noise when idling the vehicle. The vehicle was test driven in the parking lot and on a major arterial road (Nacogdoches Road) controlled by traffic lights. The test drive ended with 10,099 miles on the odometer. The vehicle did not exhibit any unusual noise or vibration.

D. Analysis

To qualify for any relief, the Complainants must prove by a preponderance that the vehicle has a currently existing defect covered by warranty. Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁴ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states that “authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.”²⁵ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁶ A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer’s specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the

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

²⁵ Complainants’ Ex. 1, 2017 Model Year Ford Warranty Guide.

²⁶ Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues. *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 (“The manufacturer’s express warranty in the case sub judice provides: ‘Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship’ The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty.”); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“the language in the contract of May 12, 1980, expressly limited TCR’s recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

vehicle's design (which exists before manufacturing) or damage caused by the dealer (which occur after manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.²⁷ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics.

In this case, a preponderance of the evidence does not show that a warrantable defect continues to exist. As an initial matter, the issues with the bulging tire and flawed hood were resolved prior to the hearing: the bulging tire was replaced under the tire manufacturer's warranty and the hood's paint was repaired under the Respondent's warranty, leaving the complained of vibration and noise²⁸ for resolution. However, the remaining noise and vibration appear consistent with the vehicle's normal operation. Therefore, Lemon Law relief does not apply.

1. Tapping Noise

The evidence shows that the vehicle's engine will normally exhibit some noise and vibration due to the vehicles design. Because of the clearances and fluctuations in dimensions due to temperature changes, the vehicle's engine will normally exhibit some noise. When the engine is cold, the valve train will make a tapping noise because of larger clearances. However, warming the engine expands the engine's components to their normal operating dimensions, thereby tightening the valve clearances and diminishing the tapping noise.

2. Vibration

The evidence shows that the vehicle's engine will normally exhibit vibration due to the vehicles design. The more powerful turbocharged 3.5 L Cyclone engine may normally exhibit more vibration as compared to older, less powerful F-150 engines, such as that in the Complainant's 1999 F-150. Furthermore, "pull" described by Mrs. Gutierrez is consistent with the surge from the turbochargers' normal boost during acceleration.

²⁷ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

²⁸ Complainants' Exhibits 10, 11 and 12, videos of the complained of noise, confirm that the complained of noise is a tapping noise.

III. Findings of Fact

1. On June 16, 2016, the Complainants, purchased a new 2017 Ford F-150 from Jordan Ford, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 28 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, and powertrain coverage for five years or 60,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
07/08/17	734	Engine shaking
08/22/2017	1,706	Paint/refinish hood
07/18/17	2,680	Feeling like misfiring at idle (tappet), rattling noise
11/14/17	4,587	Noise while running

4. On September 3, 2017, the Complainants provided a written notice of defect to the Respondent.
5. On December 5, 2017, the Complainants filed a complaint with the Department alleging that the vehicle exhibited a knocking noise and shaking, had a bulge in a tire, and had a flaw in the paint.
6. On January 22, 2018, 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.
7. The hearing in this case convened on March 13, 2018, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on March 27, 2018, the deadline for filing responses to exhibits. The Complainants, represented and testified for themselves. Charles Hickey, Consumer Affairs Legal Analyst - Dispute Resolution Specialist, represented and testified for the Respondent.
8. The vehicle's odometer displayed 10,089 miles at the time of the hearing.

9. The vehicle's bumper to bumper warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The bulging tire was replaced under the tire manufacturer's warranty.
12. The paint on the hood was successfully repaired under the Respondent's warranty.
13. The vehicle may normally exhibit a tapping noise due to valve clearances existing in the engine while cold, but which diminishes as the engine heats up and the engine components expand.
14. The vehicle will normally exhibit vibration from the engine.

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 does not qualify for replacement or repurchase. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. 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**.

SIGNED May 25, 2018



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