

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0187324 CAF**

<b>BERT and KIMBERLY FREY,</b>	§	
<b>Complainants</b>	§	<b>BEFORE THE OFFICE</b>
	§	
v.	§	
	§	<b>OF</b>
<b>THOR MOTOR COACH, INC., and FREIGHTLINER CUSTOM CHASSIS CORP.,</b>	§	
<b>Respondents</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	

**DECISION AND ORDER**

Bert (Lee) and Kimberly (Kim) Frey (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 recreational vehicle (RV) manufactured by Thor Motor Coach, Inc. and Freightliner Custom Chassis Corp. (Respondents). 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 hearing<sup>1</sup> 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 December 4, 2018, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on December 28, 2018. The Complainants, represented and testified for themselves. John Arnold, attorney, represented Thor. Mark Stanley, technical manager, testified for Thor. Deron Wade, attorney, represented Freightliner. Dennis Rostenbach, dealer operations and product litigation, testified for Freightliner.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a 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.<sup>4</sup>

##### 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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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.”<sup>6</sup>

**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.<sup>7</sup>

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.<sup>8</sup>

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:

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<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

**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, or the Department has provided written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1). 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 to provide notice of the defect or nonconformity to the Respondent.

<sup>14</sup> 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).

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.<sup>15</sup>

## 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.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainants.<sup>18</sup> The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.<sup>19</sup> Accordingly, the Complainants cannot prevail where the existence of any required fact appears equally likely or unlikely.

## 4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.<sup>20</sup> 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

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<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

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

<sup>20</sup> “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.”).

claim for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.<sup>24</sup> Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).<sup>25</sup>

### B. Summary of Complainants’ Evidence and Arguments

On November 4, 2017, the Complainants, purchased a new 2018 Thor Palazzo from Motor Home Specialist, LP, an authorized dealer of Thor, in Alvarado, Texas. The vehicle had 1,162 miles on the odometer at the time of purchase. Thor’s warranty provides coverage of the “house” for twelve months after the first retail owner takes delivery of the motorhome from an authorized dealership or after the odometer reaches 15,000 miles, whichever occurs first. Freightliner’s warranty provides coverage of the chassis for three years or 50,000 miles, whichever occurs first. On May 15, 2018, the Complainants mailed a written notice of defect to Thor. On June 5, 2018, the Complainants filed a complaint with the Department alleging that: the full room slide did not function consistently; the solar panels did not charge the batteries; the batteries drain rapidly in store mode. On August 6, 2018, the Complainants filed an amendment to the complaint alleging

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<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

that: fuel overflowed when filling; the fuel tank only took 71 gallons of fuel before overflowing; a side view camera needed adjusting; the RV made a clunking noise above the driver's seat; the driver's side fan hits the dash when lowering the bunk; the bunk would not move up completely; the batteries did not charge with the inverter on; the solar panels, solar panel controller, and batteries were not properly grounded; the solar panel controller remained at 25°C regardless of ambient temperature; the fan for the compartment with the inverter, etc., ran for six to seven hours; the navigation system locked up, rebooted, and displayed Japanese characters; a dinette receptacle plate would come loose; a bathroom GFCI receptacle would trip; the Complainants never received reimbursement for a shore power cable; the dealer did not contact the Complainants about the replacement generator button; the dealer did not contact the Complainants about the replacement compartment latch; and the chassis gets power with the cutoff switch in the off position. On August 20, 2018, the Complainants filed an amendment to the complaint alleging that: the air conditioning (AC) compressor would not come on. On October 2, 2018, the Complainants filed an amendment to the complaint alleging that: the generator would not start; condensation leaked between the awning and roof; the passenger side pass-through compartment leaked; the HDMI splitter box did not work; and DEF (diesel exhaust fluid) filler nozzles would not fit very far into the DEF tank. Freightliner did not receive a copy of the second amendment. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
November 4, 2017 November 29, 2017	1,163	Front slide motor losing power
December 18, 2017 August 7, 2018	1,416	Radio displaying a different language; low battery light on after stored for two days; driver side fan loose; slide malfunction; cannot turn on solar panels
March 12, 2018 March 14, 2018	1,634	Battery disconnect has power
August 30, 2018 October 10, 2018	3,818	GFCI receptacle trips; passenger side camera points too far down; pass-through compartment opens;

Thor's own technicians also performed other repairs during the last repair visit at the dealership. The Complainants identified the following issues as resolved: noise above the driver's seat; the solar panels, solar panel controller, and batteries were not properly grounded; a dinette receptacle plate would come loose; a bathroom GFCI receptacle would trip; reimbursement for a shore power cable; the dealer did not contact the Complainants about the replacement generator button; the air conditioning compressor would not come on; condensation leaked between the awning and roof;

the passenger side pass-through compartment leaked; and the HDMI splitter box did not work.<sup>26</sup> Mr. Frey testified that he believed the leak between the awning and the roof was resolved but did not have an opportunity to test it after repair. He likewise did not have a chance to test whether the pass-through compartment leaked.

Mrs. Frey confirmed that the complaint was the first written notice of defect provided to Freightliner. However, Freightliner had previously been working on the RV. Mr. Frey stated that the work orders in this case reflected the work done by the dealer but not Thor's technicians.

Mr. Frey testified that when filling up the fuel tank, he could only put 71 gallons in the 90-gallon tank. As explained to him, the location of the tank's outlet left about 15 gallons unusable. Accordingly, he could not say this was an actual defect and did not contest this issue. Mr. Frey stated the chassis would get power with the cutoff in the off position. Mrs. Frey noticed that the cutoff switch was set to "off" but the dash still had power. Freightliner apparently did not manufacture the switch and instead, this appeared to be a Thor issue. Video exhibits showed the chassis battery and the house battery at the same levels but also jumping.<sup>27</sup> Clicking could be heard on the video. Mr. Frey opined that the isolation module was bridged. Mr. Frey noted that the jumping voltages may have been due to a bad connection on the tester. Mr. stated that he reported the issue of the solar panels not charging the batteries before using the RV. The house batteries now charged from the solar panels, but had been required to circumvent Thor's design. Mr. Frey stated that the direct wiring means that, instead of shore power, the 15-amp service now used the solar panels to charge the batteries. The solar panels have a maximum of 8 amps and will not charge the batteries as designed. The voltage on the solar panels was not always correct and appeared to be based on temperature – slightly over a volt in difference. When filling up the RV for the first time, diesel overflowed. This last occurred on September 30, 2018. Mr. Frey has not filled the RV since then but believed that the overflow would still happen. Thor contended that this spilling was normal. Regarding the battery charging, a third-party inspector tried to test the RV but could not get any charge with the engine running. Whether the battery would charge with the generator running was uncertain. The batteries would not charge while driving. Instead, the solar panels charged the batteries with the engine running. When the chassis was charging the

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<sup>26</sup> Complainants' Ex. 46, List of Issues.

<sup>27</sup> Complainants' Ex. 13, Chassis Cutoff Videos.

battery, the voltage was 14 or more. With the alternator running and the battery under a certain percentage charge, the battery will charge at high voltage until capacity and then trickle charge. The house batteries died in store mode. After starting the engine, the engine would not charge the house batteries. Mr. Frey commented that the only the Schwintek motors kept the slides in place, so the Complainants did not believe they could take the RV on a trip because the chassis would not charge the house battery. Pressing the auxiliary start button changed the behavior of the system. Pressing the auxiliary button did bridge the chassis and house so some charge went to the house batteries, but the charge slowly went down and did not address the issue of the coach batteries not charging. Mr. Frey added that he could not charge the batteries without moving, could not charge from the generator, and could not connect to shore power. Shore power charged both the chassis and house batteries, though he did not know why they would need charging after driving for 90 minutes. The batteries charged at a high rate, with the shore power disconnected, the house battery charged even when fully charged. The inverter fan would run for six to seven hours and failed on November 24, 2018. The house batteries drained rapidly every time when stored. Fully charged batteries would be dead in two weeks or less. The bunk would fail to go up and last failed on November 30, 2018. The Complainants agreed with Thor that this was a voltage issue. Lights would blink indicating the battery discharged. The battery had less than 6 volts while running. This would occur with the RV plugged in to shore power when camping overnight. The navigation had a problem every time using the RV after the last repair. The navigation would go off and reboot. A repair was attempted by inserting cardboard in the frame (to prevent movement and disconnection) since the problem appeared to be an intermittent loss of power. The DEF nozzle would not fit in the DEF tank. The tank would overflow even when trying to fill slowly. The full-room slide was supposed to have been repaired before the Complainants took ownership. When testing the RV at the dealership, the slide would not go in. Mr. Frey believed the slide was working but also that the slide issue was part of a systemic problem as with the bunk when plugged into shore power. The passenger side camera always pointed too far down. The driver's side fan hitting the dash when lowering the bunk had never been repaired. Thor's documentation showed the fans pointing backwards, though Thor contended that the purpose of the fans was for defogging the windshield. The solar panel controller would read a constant 25°C regardless of ambient temperature. If not the correct value, the batteries will not charge. As the ambient temperature cooled, the reading appeared more consistent with the ambient temperature. Thor mailed latches to replace the broken

latches, but the replacements were not correct. After turning on the AC, the generator stopped. The third-party expert tried to restart the generator from the front and Mrs. Frey tried to restart the generator from the back. The generator eventually started but did not present any codes. The Complainants believed that the generator issue was Thor's responsibility since Thor connected the fuel lines to the generator.

On cross-examination by Freightliner, Mr. Frey confirmed that the fuel tank volume was not an issue in this case. Additionally, Mrs. Frey acknowledged that the cutoff switch did not come with the chassis manufactured by Freightliner. Thor stipulated that the cutoff was installed by Thor. On cross-examination by Thor, Mr. Frey stated that the excess drain in store mode could drain the battery and the RV's wiring resulted in random malfunctions when driving. He confirmed that he addressed the battery drain by setting the cutoff to the "off" position. He affirmed the issue was intermittent. When asked whether with the cutoff "off", the battery still provided power to the chassis causing a drain, Mr. Frey responded that he did not have proof when this occurred. He had checked the RV the morning of the hearing and the house battery voltage had not dropped much. Mr. Frey confirmed storing the RV under a roof so light did not charge the solar panels. The Complaint indicated that the solar panels did not charge the house batteries but Mrs. Frey affirmed that the rewired solar panels did charge the batteries. The Complainants did not contend that solar panel and controller configuration contributed to the house battery drain. However, they did assert that Larry Hill, a Thor technician, had rewired the solar panel and controller differently than Thor had originally designed. Mr. Frey stated that the batteries will trickle charge from the solar panels and not take shore power. Mr. Frey acknowledged that high pressure nozzles were not recommended for filling the RV but Thor manufactured the RV with the larger size fuel filler neck. Mr. Frey agreed that the battery isolation module (BIM) would not allow charging all the time but charging the house and chassis batteries from shore power did not involve the BIM. Mrs. Frey did not know whether the house batteries charged when connected to the converter. He affirmed that the BIM connected the house and chassis batteries. Mr. Frey confirmed that the BIM would disengage with the house batteries fully charged. Mr. Frey recognized that he did not specifically identify the new electrical issues to Thor in response to the October 25th email. Mr. Frey agreed that the house battery would run down in storage, but multiple ways existed to recharge the battery. Mr. Frey stated that he checked the water in the batteries once every three months or less.

Mr. Frey acknowledged that there was never an instance when he could not charge the house battery or could not start the RV. Mr. Frey explained the battery water level should be checked every three months or less but he had not ever checked the RV's batteries. When asked about the fastest house battery discharge, Mr. Frey did not know if the time was less than two weeks. Mr. Frey stated that there was never an instance he could not ultimately get the bunk up. Mr. Frey described the navigation failure as acting as if putting the RV in store mode and then use mode. He explained that filling the DEF tank led to spilling because of awkward positioning and because the DEF filler was so high that the automatic cutoff did not work. Mr. Frey stated that he used both the mirror and camera to change lanes but the camera was pointed to the ground and not back far enough. However, he could see behind with the mirror to change lanes. Mrs. Frey affirmed that the sideview cameras provided a view up to the back wheels.

### **C. Inspection**

Upon inspection at the hearing, the RV had 4,203 miles on the odometer. The electrical control panel was set incorrectly for 1600-amp hours rather than 400-amp hours.

### **D. Summary of Respondent's Evidence and Arguments**

Mr. Stanley testified that diesel foam must be allowed to dissipate before continuing filling. He added that Thor's RVs are not built to handle higher pressure filling. Mr. Stanley explained that the BIM makes a clicking noise when attempting to connect. He elaborated that because the batteries were low on water, the system could misread the voltage and may not keep connected. Even with the cutoff switch to off, the BIM can connect the house and chassis batteries. The BIM will connect with any voltage over 13.2V. The solar panel can provide that voltage. If the system sees the 13.2V go away, for example if the solar panel voltage dropped below 13V, the BIM would kick out and the two banks of batteries would be isolated. Mr. Stanley affirmed that the BIM allows power to the chassis for a limited time. He confirmed, the low water in the batteries can cause performance problems. Mr. Stanley explained that Mr. Hill had rewired the solar panels from the breaker to connect directly to the battery. He added that nothing in the G7 controller controlled the solar panels. Further, the converter did not run through the controller. Also, the inverter charger controlled itself and the solar controller controlled itself and did not connect except in going to the

battery. This configuration prevents the inverter from overcharging. The configuration of the diesel tank to fill from either side was not a hazard, although filling too fast can cause blow back. Regarding house battery charging, four sources can charge the batteries: shore power through the inverter charger, generator power through the inverter charger, solar and the engine alternator. None of these sources charged improperly. The BIM's attempts to connect (demonstrated by the clicking) was not normal but this could be due to the batteries' condition. The BIM will work for one hour and then monitor battery voltage. If the BIM sees a battery drop below 12V, and others operating, the BIM will kick back in. The BIM will not connect just because of driving. The slides have electric brakes active with power to the house. The slides will not come out by themselves, but would require a hard turn. Batteries normally discharge over time and bad batteries will accelerate discharging. The solar panel wiring did not contribute to the batter drain but the 1.5V at the BIM may. Specifically, the signal wire could be the reason for the drain. The voltage stayed at 1.5V whether in use or store mode. The BIM locking or unlocking due to using the auxiliary store button suggest a problem with the BIM. Regarding the bunk, Mr. Stanley stated that loss of battery power caused the malfunction. The Lippert signal board showed all failure codes were for power issues, low voltage. Mr. Stanley did not believe that the navigation system should reset itself but signal wire that powers the BIM also powers the navigation system, so a problem with the signal wire affecting the BIM affects the navigation. Mr. Stanley confirmed that the subject vehicle's DEF tank was the same as other same model vehicles. He noted that the dash fans were designed to defog the windshield. Thought the fans can point in any direction, the fans must be pointed to the windshield when lowering the bunk. The temperature of the solar panel controller would be expected to be the same as the backing plate on which the controller is mounted, which appears consistent with temperatures observed during the inspection at the hearing. The generator started at the inspection and powered the 120V appliances.

On cross-examination, Mr. Stanley testified that a normal drain is less than 10 milliamps. He noted that all Thor diesel motorhomes used the same fuel fill lines. Mr. Stanley recited that the Schwintek slide may move when voltage falls below .8V but the slide should not come out unless driving aggressively. Upon clarifying questions, Mr. Stanley answered that Precision Circuits manufactured the BIM.

### E. Analysis

To qualify for any relief, the vehicle must have a defect covered by warranty (warrantable defect).<sup>28</sup> Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to warrantable defects. 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. Thor's warranty covers:

- (i) ONLY the first retail owner and any second retail owner of the NEW motorhome;
- (ii) ONLY those portions of a NEW motorhome not excluded under the section "What is Not Covered," when sold by an authorized dealership; and,
- (iii) ONLY defects in workmanship performed and/or materials used to assemble those portions of your motorhome not excluded under the section "What is Not Covered." "Defect" means the failure of the workmanship performed and/or materials used to conform with the design and manufacturing specification and tolerances of Thor Motor Coach ("TMC").

Further, Thor's warranty specifically excludes:

- Accessories and equipment added or changed after the motorhome leaves the factory;
- Accessories and equipment that are working as designed, but which you are unhappy with the design;
- Normal wear and usage, such as fading or discoloration of fabrics, or damage caused by condensation;
- Defacing, scratching, dents and chips on any surface or fabric;
- Owner maintenance, including replacement of wiper blades, bulbs, filters, wheel alignments and resealing exterior sealant areas (see "Care and Maintenance" section of the Owner's Manual);
- The leveling jacks, the automotive chassis and power train, including, by way of example the engine, drive-train, steering, ride and handling, braking, wheel balance, muffler, tire wear or failure, tubes, batteries and gauges;
- Appliances and components covered by their own manufacturer's warranty including the microwave, refrigerator, ice maker, stove, oven, generator, roof air conditioners, DVD players, televisions, water heater, furnace, stereo, radio, compact disc player, washer, dryer, and inverter;

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<sup>28</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

- Or flaking, peeling and chips or other defects or damage in or to the exterior or finish caused by rocks or other road hazards, the environment, including chemical off-gassing, airborne pollutants, salt, tree sap and hail causing any damage including but not limited to rust and corrosion.

Freightliner's warranty covers: "defects in material and workmanship that occur under normal use within the applicable warranty period, subject to certain limitations and exclusions as specified in this document." According to these terms, the warranties only apply to defects in materials or workmanship (manufacturing defects).<sup>29</sup> A manufacturing defect is generally 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 vehicle's design (which exists before manufacturing) or dealer representations and improper repairs (which occur after manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.<sup>30</sup> In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or design defects.

**1. Electrical Related Issues: Slide Malfunction; Batteries Draining Rapidly in Store Mode; Bunk Would Not Move Up Completely; the Batteries Did Not Charge with Inverter On; Navigation System Locked Up; Chassis Gets Power with Cutoff Switch Off**

As an initial matter, the record does show an abnormal drain from the constant 1.5V in the signal wire. The problem is determining whether this arises from a warrantable defect, that is, the evidence does not sufficiently reflect a warranted defect. This drain in turn affects the electrical

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<sup>29</sup> 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.").

<sup>30</sup> 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).

problems due to insufficient voltage (slide malfunction, bunk not rising). The BIM and the navigation system are not warrantable. Further, the low water levels in the batteries, which the Complainants admittedly never checked, also clouds the cause of some of these electrical issues. In conclusion, a balance of the evidence does not prove the existence of a warrantable defect.

**2. Solar Panels Did Not Charge Batteries**

The Complainants acknowledged that the solar panels charged the batteries after rewiring, but contended that the rewiring itself was a defect. However, as explained previously, repairs occurring after the manufacturing process are not manufacturing defects. The rewiring of the solar panel is a change occurring after manufacturing, and not a defect in manufacturing.

**3. Fuel Overflowed When Filling**

The record reflects that the fuel spilling was a function of the high-pressure fuel fillers used for tractor trailers and not any defect in the RV. Rather, all like RV's shared the same design. Further, any limitations due to the design is not a manufacturing defect.

**4. Fuel Tank Only Took 71 Gallons of Fuel Before Overflowing**

The Complainants confirmed that the fuel tank capacity was not an issue in this case.

**5. Side View Camera Needed Adjusting**

The record reflects that all of the same model side view cameras are manufactured the same, so replacing the side view camera would not alter the view, indicating a design issue and not a manufacturing defect. Moreover, the side view camera appears akin to a blind spot monitor to supplement the mirror rather than an exact duplicate of the mirror's function.

**6. Driver's Side Fan Hits Dash When Lowering Bunk**

The record reflects that, by design, the fans must be pointed to the windshield when lowering the bunk. Further, the RV's fans appear consistent with the photo of the fans in Thor's documentation. Although the design may be inconvenient, the fans do not have a manufacturing defect.

**7. Solar Panel Controller Remained at 25°C Regardless of Ambient Temperature**

A preponderance of the evidence does not show whether the controller temperature arises from a defect. The temperature may in fact be consistent with its mounting on a metal plate. In sum, the evidence does meet the preponderance standard.

**8. Fan for Compartment with Inverter Ran for Six to Seven Hours**

The evidence showed that the inverter fan operated to cool the inverter but did not necessarily coincide with the inverter running, so that the fan operating for six or seven hours did not equate to the inverter running the same time. This does not appear to be a malfunction but the normal operation of the inverter,

**9. Dealer Did Not Contact Complainants About Replacement Compartment Latch**

The warranty only applies to manufacturing defects. However, the dealer's failure to contact the Complainant is not a defect in material or workmanship during the manufacturing process at the factory but instead arises after the manufacturing of the RV.

**10. Generator Would Not Start**

The RV's warranty specifically excludes the generator from coverage. Although the Complainants point to the fuel lines installed by Thor as the cause of the generator problem, the Complainants must show that a manufacturing defect more likely than not caused the issue. However, the evidence does not show that the fuel lines are any more likely to have caused the problem than the generator itself. Consequently, the generator issue cannot support any relief.

**11. DEF Filler Nozzles Would Not Fit Far into DEF Tank**

The evidence shows that all same model RVs as the subject vehicle used the same design. In other words, any problem with the depth of DEF filler is not a manufacturing defect but an unwarranted design issue.

### **III. Findings of Fact**

1. On November 4, 2017, the Complainants, purchased a new 2018 Thor Palazzo from Motor Home Specialist, LP, an authorized dealer of Thor, in Alvarado, Texas. The vehicle had 1,162 miles on the odometer at the time of purchase.

2. Thor's warranty provides coverage of the "house" for twelve months after the first retail owner takes delivery of the motorhome from an authorized dealership or after the odometer reaches 15,000 miles, whichever occurs first.
3. Freightliner's warranty provides coverage of the chassis for three years or 50,000 miles, whichever occurs first.
4. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
November 4, 2017		
November 29, 2017	1,163	Front slide motor losing power
December 18, 2017		Radio displaying a different language; low battery light on after stored for two days; driver side fan loose; slide malfunction; cannot turn on solar panels
August 7, 2018	1,416	
March 12, 2018		
March 14, 2018	1,634	Battery disconnect has power
August 30, 2018		GFCI receptacle trips; passenger side camera points too far down; pass-through compartment opens;
October 10, 2018	3,818	

5. On May 15, 2018, the Complainants mailed a written notice of defect to Thor.
6. On June 5, 2018, the Complainants filed a complaint with the Department alleging that fuel overflowed when filling; the fuel tank only took 71 gallons of fuel before overflowing; a side view camera needed adjusting; the RV made a clunking noise above the driver's seat; the driver's side fan hits the dash when lowering the bunk; bunk would not move up completely; the batteries did not charge with the inverter on; the solar panels, solar panel controller, and batteries were not properly grounded; the solar panel controller remained at 25°C regardless of ambient temperature; the fan for the compartment with the inverter, etc., ran for six to seven hours; navigation system locked up and rebooted; a receptacle plate would come loose; a GFCI receptacle would trip when camping; and the Complainants never received reimbursement for a shore power cable. On August 20, 2018, the Complainants filed an amendment to the complaint alleging that: the air conditioning compressor would not come on. On October 2, 2018, the Complainants filed an amendment to the complaint alleging that: the generator would not start; condensation leaked between the awning and roof; the passenger side pass-through compartment leaked; the HDMI splitter box did not work; and DEF filler nozzles would not fit very far into the DEF tank.

7. The complaint was the first written notice of defect provided to Freightliner.
8. On August 30, 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.
9. The hearing in this case convened on December 4, 2018, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on December 28, 2018. The Complainants, represented and testified for themselves. John Arnold, attorney, represented Thor. Mark Stanley, technical manager, testified for Thor. Deron Wade, attorney, represented Freightliner. Dennis Rostenbach, dealer operations and product litigation, testified for Freightliner.
10. The vehicle's odometer displayed 4,203 miles at the time of the hearing.
11. Thor's warranty expired on November 4, 2018.
12. Freightliner's warranty was in effect at the time of the hearing.
13. The vehicle appeared normal during the inspection at the hearing.
14. As an initial matter, the record does show an abnormal drain from the constant 1.5V in the signal wire. The problem is determining whether this arises from a warrantable defect, that is, the evidence does not sufficiently reflect a warranted defect. This drain in turn affects the electrical problems due to insufficient voltage (slide malfunction, bunk not rising). The BIM and the navigation system are excluded from the warranty. Further, the low water levels in the batteries, which the Complainants admittedly never checked, may have contributed to some of these electrical issues.
15. The Complainants acknowledged that the solar panels charged the batteries after rewiring, but contended that the rewiring itself was a defect. However, repairs occurring after the manufacturing process are not manufacturing defects. The rewiring of the solar panel is a change occurring after manufacturing.

16. The fuel spilling was a function of the high-pressure fuel fillers used for tractor trailers. Rather, all like RV's shared the same design.
17. The Complainants confirmed that the fuel tank capacity was not an issue in this case.
18. All of the same model side view cameras are manufactured the same, so replacing the side view camera would not alter the view, indicating a design issue and not a manufacturing defect. Moreover, the side view camera appears akin to a blind spot monitor to supplement the mirror rather than an exact duplicate of the mirror's function.
19. The record reflects that, by design, the fans must be pointed to the windshield when lowering the bunk. Further, the RV's fans appear consistent with the photo of the fans in Thor's documentation.
20. The cause of the solar panel controller temperature is unclear. The temperature may in fact be consistent with its mounting on a metal plate.
21. The inverter fan operated to cool the inverter but did not necessarily coincide with the inverter running, so that the fan operating for six or seven hours did not equate to the inverter running the same time. This does not appear to be a malfunction but the normal operation of the inverter.
22. The warranty only applies to manufacturing defects. However, the dealer's failure to contact the Complainant is not a defect in material or workmanship during the manufacturing process at the factory but instead arises after the manufacturing of the RV.
23. The RV's warranty specifically excludes the generator from coverage.
24. The evidence shows that all same model RVs as the subject vehicle used the same design. In other words, any problem with the depth of DEF filler is not a manufacturing defect but an unwarranted design issue.

#### IV. Conclusions of Law

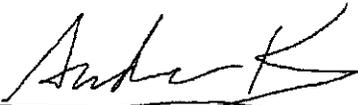
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.

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 February 26, 2019**

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