

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0187724 CAF**

JAMES L. CAUGHMAN,
Complainant

v.

FORD MOTOR COMPANY,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

James L. Caughman (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2016 Ford F-150 pickup truck. Complainant asserts that the vehicle's engine misfires which causes the vehicle to jerk and also causes the vehicle's check engine light (CEL) to illuminate. Complainant feels that the vehicle has not been adequately repaired by Respondent or its agents. Ford Motor Company (Respondent) argued that the vehicle does not have a defect and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on November 30, 2018, in Victoria, Texas before Hearings Examiner Edward Sandoval. Complainant, James L. Caughman, was present and represented himself. Carolyn Johnson, friend, testified for Complainant. Respondent was represented telephonically by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also testified for Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market

¹ Tex. Occ. Code § 2301.604(a).

value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁵

However, if a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁶

A “serious safety hazard” is a life-threatening malfunction or nonconformity in a vehicle that (A) substantially impedes a person’s ability to control or operate a motor vehicle for ordinary use or intended purposes or (B) creates a substantial risk of fire or explosion.⁷

B. Complainant’s Evidence and Arguments

1. James L. Caughman’s Testimony

Complainant purchased a new 2016 Ford F-150 pickup truck from Access Ford–Lincoln of Corpus Christi (Access) in Corpus Christi, Texas, on July 23, 2016 with mileage of 18 at the time of delivery.⁸ Respondent’s bumper-to-bumper warranty for the vehicle provides coverage for three (3) years or 36,000 miles from the date of purchase, whichever comes first.⁹ In addition,

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁷ Tex. Occ. Code § 2301.601(4).

⁸ Complainant Ex. 1, Motor Vehicle Installment Sales Contract dated July 23, 2018.

⁹ Complainant Ex. 4, 2016 Model Year Ford Warranty Guide, p. 8.

Respondent provided a powertrain warranty for the vehicle good for five (5) years or 60,000 miles.¹⁰ On the date of hearing the vehicle's mileage was 32,139. At this time, Respondent's warranties for the vehicle are still in effect.

Complainant testified that he first experienced an issue with the vehicle after he had driven it about 10,000 miles. He noticed that when he was driving the vehicle up an incline that it began to jerk. Complainant initially noticed the issue when the vehicle's cruise control was turned on, but the issue began to occur whether the cruise control was on or off. When the vehicle began to jerk the vehicle's CEL illuminated and flashed.

Complainant took the vehicle to Access, one of Respondent's authorized dealers, for repair on February 27, 2017.¹¹ Access' service technician was able to determine that the vehicle's engine cylinder #3 was misfiring on startup.¹² The technician determined that the misfire was due to a tube to the spark plug getting wet because of a coolant leak in the engine area.¹³ The technician installed a new spark plug in the vehicle in order to address the issue.¹⁴ The vehicle's mileage at the time was 10,124.¹⁵ The vehicle was in the dealer's possession until March 13, 2017.¹⁶ The dealer provided Complainant with a loaner vehicle for the final two (2) weeks that they had possession of the subject vehicle while it was being repaired.

Complainant testified that the vehicle drove fine for a period of time. However, in March of 2018, the vehicle began jerking while Complainant was driving it. In addition the CEL once again illuminated. Complainant took the vehicle to Aztec Ford (Aztec) in Goliad, Texas on April 2, 2018, for repair. Aztec's service technician ran diagnostic tests on the vehicle and determined that the problem seemed to fit within the parameters of technical service bulletin (TSB) 17-2077 issued by Respondent which provided instructions on how to address engine misfires under certain conditions.¹⁷ The TSB required that the technician replace the engine's cylinder heads.¹⁸ The mileage on the vehicle at the time was 25,092.¹⁹ The vehicle was in the dealer's possession for a few weeks. Complainant was provided with a rental vehicle while his vehicle was being repaired.

¹⁰ *Id.*

¹¹ Respondent Ex. 1, Manufacturer Response Form dated November 26, 2018, p. 3.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 5, Repair Order dated April 2, 2018, p. 2.

¹⁸ *Id.*

¹⁹ *Id.*

Complainant stated that the vehicle continued to jerk after the repair. As a result, Complainant returned the vehicle to Aztec for repair on May 14, 2018. The service technician did not find any diagnostic trouble codes during this repair visit.²⁰ The vehicle's mileage at the time was 25,794.²¹ The vehicle was in Aztec's possession for the day.

Complainant also testified that the vehicle's CEL continued to illuminate and the vehicle continued to jerk as if the engine was misfiring throughout the summer of 2018. Complainant took the vehicle to Aztec for repair for the issues on May 21, 2018 and September 12, 2018. The dealer's service technicians could not verify the concerns on either occasion.²² The vehicle's mileage when it was taken to the dealership on these occasions was 25,956 and 29,554 respectively.²³

Complainant wrote a letter to Respondent advising them of the problems with the vehicle's engine and the CEL illuminating sometime during the summer of 2018.²⁴ On June 18, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

Complainant stated that Respondent performed an inspection on the vehicle during the summer of 2018. No repair was performed on the vehicle at the time.

Complainant stated that the issue with the vehicle jerking still occurs. After the repair performed on April 2, 2018, Complainant continued to feel the vehicle jerk due to the engine misfiring and the CEL continued to illuminate intermittently. He took the vehicle several times to Aztec for repair and did not always receive a repair order or service invoice. Complainant testified that he was at the dealer about every other day due to his concerns with the vehicle. He stated that since it appeared that the dealer's service technicians could not repair the vehicle, he parked it for a period of time and didn't drive it. Sometime in August of 2018, he again began to drive the vehicle. He recalled an incident a week or two prior to the hearing that the vehicle began to jerk while he was driving it. Ms. Johnson was a passenger in the vehicle at the time. Complainant also stated that there was another occasion where the vehicle was jerking so badly that he had to cancel his trip to see his son and he had to return to his home. Complainant pointed out a couple of times during the vehicle test drive taken at the hearing where he felt the vehicle jerk.

²⁰ Complainant Ex. 6, Repair Order dated May 14, 2018.

²¹ *Id.*

²² Respondent Ex. 1, Manufacturer Response Form dated November 26, 2018, p. 3.

²³ *Id.*

²⁴ Complainant Ex. 7, Letter to Ford Motor Company, undated.

2. Carolyn Johnson's Testimony

Carolyn Johnson, Complainant's friend, testified in the hearing. She stated that she has often been a passenger in the vehicle when Complainant was driving.

Ms. Johnson testified that as a passenger she has observed the vehicle jerk violently when Complainant is driving it. The jerking was strong enough to cause her to fear for her safety as she thought the vehicle was going to be involved in an accident. Ms. Johnson feels that the jerking of the vehicle was uncontrollable. She said that although the issue occurred intermittently, it happened virtually every time that she rode in the vehicle. Ms. Johnson stated that the issue usually arose when they were driving up an incline or a hill and Complainant was attempting to accelerate in the vehicle. Ms. Johnson also stated that the last time she experienced the vehicle jerking was a week or two prior to the hearing date.

C. Respondent's Evidence and Arguments

1. Anthony Gregory's Testimony

Anthony Gregory, Consumer Affairs Legal Analyst, testified for Respondent. He stated that Respondent's field service engineer, Brian Jay, performed a final inspection on the vehicle on July 13, 2018, at Aztec. Mr. Jay determined that the vehicle did not require any repair at that time, as he was unable to verify any issues with it.²⁵ Mr. Gregory also testified that Evan Whitis, TxDMV case advisor, performed an inspection on the vehicle on September 12, 2018. Respondent did not send an observer to Mr. Whitis' inspection and Mr. Gregory does not know what, if anything, was discovered at the time.

2. Sayyed Asad Bashir's Testimony

Sayyed Asad Bashir, Automotive Technical Consultant, testified for Respondent. Mr. Bashir has been in the automotive industry for 19 years. He is an Automotive Service Excellence (ASE) Master Certified Technician. Mr. Bashir has worked for Respondent since 2007. He's been employed in his present position since 2009. Prior to being hired by Respondent, Mr. Bashir worked as an independent automotive technician for approximately eight (8) years.

Mr. Bashir stated that he has never seen the vehicle in question. Mr. Bashir also stated that during the repair performed on the vehicle on April 2, 2018, two cylinder heads in the engine

²⁵ Respondent Ex. 2, FSE Vehicle Inspection Report dated July 13, 2018.

were replaced. This repair was performed as outlined by procedures contained in TSB 17-2077 issued by Respondent. The vehicle was exhibiting some of the behaviors outlined in the TSB and fell within the parameters of vehicles and problems the TSB was designed to address.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

The evidence establishes the existence of a defect or nonconformity in Complainant's vehicle that creates a serious safety hazard. A vehicle that has an engine misfiring and which jerks while being driven as a result of the misfire is inherently dangerous. The misfire and jerking can cause the vehicle to lose acceleration which could be a problem if the driver is trying to cross traffic or trying to pass other vehicles and can increase the risk of traffic accidents. The engine misfire and subsequent jerking of the vehicle substantially impedes Complainant's ability to control or operate the vehicle for ordinary use or intended purpose, as evidenced by Complainant's inability to continue his trip to see his son as described in the testimony. The hearings examiner must hold that Complainant has met his burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Complainant purchased the vehicle on July 23, 2016, and presented the vehicle to Respondent's authorized dealers for repair due to his concerns with the vehicle's CEL illuminating and the engine misfiring causing the vehicle to jerk on: February 27, 2017; April 2, 2018; May 14, 2018; May 21, 2018; and September 12, 2018. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(2) specifies that a rebuttable presumption that a reasonable number of attempts to repair a vehicle that has a defect or nonconformity that creates a serious safety hazard have been made if "at least one repair attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt." Although Complainant has not met the parameters of the above cited test, the test itself only creates a rebuttable presumption and is not a hard and fast rule. Complainant has

shown due diligence in attempting to have the vehicle repaired and the testimony has established that the problem still exists. As such, the hearings examiner must hold that Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter of the issues with the vehicle and provided Respondent with an opportunity to cure of which Respondent availed themselves. The vehicle was inspected and a final repair attempt was performed on July 13, 2018, by Respondent's representative who could not recreate the problem. However, the problem with the vehicle's engine still persisted after the final repair attempt.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to do so. As such, Complainant has met his burden of proof to establish that the vehicle has a warrantable and existing defect or condition that creates a serious safety hazard.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. James L. Caughman (Complainant) purchased a new 2016 Ford F-150 pickup truck on July 23, 2016, from Access Ford-Lincoln of Corpus Christi (Access) in Corpus Christi, Texas with mileage of 16 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent), issued a bumper-to-bumper warranty for the vehicle which provides coverage for the vehicle for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent provided a five (5) year or 60,000 mile warranty for the vehicle's powertrain.
3. The vehicle's mileage on the date of hearing was 32,123.
4. At the time of hearing the vehicle's warranties were still in effect.
5. About seven (7) months after purchasing the vehicle, the vehicle's check engine light (CEL) began to illuminate and the vehicle's engine began to misfire.

6. Complainant took the vehicle to Respondent's authorized dealers in order to address his concerns with the vehicle's engine on the following dates:
 - a. February 27, 2017, at 10,024 miles;
 - b. April 2, 2018, at 25,092 miles;
 - c. May 14, 2018, at 25,794 miles;
 - d. May 21, 2018, at 25,956 miles; and
 - e. September 12, 2018, at 29,554 miles.
7. Respondent, through its authorized dealers, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
8. Complainant provided written notice of the defect to Respondent and Respondent was given the opportunity to perform a final repair on the vehicle on July 13, 2018.
9. On June 18, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On September 13, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
11. The hearing in this case convened and the record closed on November 30, 2018, in Victoria, Texas before Hearings Examiner Edward Sandoval. Complainant, James L. Caughman, was present and represented himself. Carolyn Johnson, friend, testified for Complainant. Respondent was represented telephonically by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also testified for Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).

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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing nonconformity that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
9. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2016 Ford F-150 pickup truck. Tex. Occ. Code § 2301.604(a)(1).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in this final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$29,302.19** which shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$35,496.00
Delivery mileage	16
Mileage at first report of defective condition	10,024
Mileage on hearing date	32,123
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$35,496.00
Mileage at first report of defective condition				10,024	
Less mileage at delivery				<u>-16</u>	
Unimpaired miles				10,008	
Mileage on hearing date				32,123	
Less mileage at first report of defective condition				<u>-10,024</u>	
Impaired miles				22,099	
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
				<u>10,008</u>	
	120,000	X	\$35,496.00	=	\$2,960.37
Impaired miles					
				<u>22,099</u>	
	120,000	X	\$35,496.00	X .5 =	<u>\$3,268.44</u>
Total reasonable allowance for use deduction:					\$6,228.81
Purchase price, including tax, title, license and registration					\$35,496.00
Less reasonable allowance for use deduction					-\$6,228.81
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$29,302.19

11. Within twenty (20) calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in

accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);.

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department;²⁶
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

²⁶ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED January 8, 2019.



**EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**