

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0002151 CAF**

**VICTOR DE LA GARZA,
Complainant**

v.

**FCA US LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Victor De La Garza (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by FCA US LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's 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 April 17, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Jan Kershaw, early resolution case manager, represented the Respondent. Tym (Tymothy) Mancini, technical advisor, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, 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 or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 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.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant 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.²⁰ The complaint must 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 forming the basis of the claim

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

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

²⁰ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV'T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

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

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ 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).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On March 20, 2018, the Complainant, purchased a new 2018 Dodge Ram 1500 from Mac Haik Dodge Chrysler Jeep, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 25 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. On August 27, 2018, the Complainant provided a written notice of defect to the Respondent. On October 13, 2018, the Complainant filed a complaint with the department alleging vehicle was not painted properly.

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

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).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

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

Date	Mileage	Issue
May 30, 2018 May 31, 2018	4,084	Discoloration spots and white spots on the paint
June 26, 2018 June 29, 2018	6,632	Discoloration spots and white spots on the paint
July 17, 2018 July 19, 2018	6,276	Discoloration spots and white spots on the paint
August 1, 2018 August 3, 2018	6,750	Discoloration spots and white spots on the paint
August 10, 2018 August 14, 2018	6,928	Discoloration spots and white spots on the paint

The Complainant testified that the vehicle had discoloration spots on the paint. As time went on the vehicle got more spots on the paint. When the vehicle was taken to the dealership to repair the issue, the dealer painted the vehicle. However, the dealer left off the clear coat. The dealer also over sprayed the new paint, which resulted in parts of the vehicle being bumpy. The Complainant testified that he had trouble getting invoices for the repairs from the dealership and the dealer would not give him a rental car when the vehicle was in for repair. The mileage on the invoices were also incorrect. Some of the paint discoloration was repaired in June through August, however, the repair left new rough spots. The Complainant testified the last time the vehicle was brought in for repair, the dealership did not want to repaint the vehicle and claimed that other vehicles experienced the same problem.

On cross-examination, the Complainant testified that the dealership painted the inside and paid for it under warranty. The Complainant explained the dealership fixed a dent on the vehicle on July 17, 2018, which the dealership caused. The Complainant also explained that the first repair was for repainting the rocker panel inside the door. The Complainant clarified his complaints concerned the white spots, the rough spots, and the thinning of the paint in certain areas.

During rebuttal testimony, the Complainant testified that getting invoices from the dealership was difficult and when he did receive invoices, they contained false information. On invoice 28471, from June 29, 2018, the mileage on the vehicle was recorded as 6,632; however, on invoice 28544, from July 19, 2018, the mileage of the vehicle was recorded as 6,276. The Complainant also stated he originally took the vehicle in for repair of the front passenger side. The

dealership repainted the area and added a clear coat. The Complainant, during the same repair attempt, showed the dealership the driver side where the paint was also spotted but the dealership did not repaint that side. The invoices also did not properly record the repairs done to the vehicle for repainting and adding the clear coat on the second and fifth repair attempts.

C. Inspection

Upon inspection at the hearing, the subject vehicle had 13,188 miles on the odometer. The subject vehicle had some areas where the paint appeared lighter. The vehicle also exhibited some roughness on some painted surfaces. The Respondent provided a new same-model vehicle for comparison. The comparison vehicle exhibited the same type of paint variation and roughness as the subject vehicle.

D. Summary of Respondent's Evidence and Arguments

Ms. Kershaw testified that invoice 28471 and 28544 were repairs covered by the dealership and that the Respondent did not have a warranty claim for the repairs. However, the invoice stated that the Complainant paid for the repair, which he did not.

Mr. Mancini testified he had inspected the vehicle with an electronic paint thickness gauge to measure the paint thickness. A typical vehicle will measure about 2 to 4 millimeters. The vehicle was measured at 2.5 and 2.9 to 4 mm. The comparison vehicle was measured at 3.3 and 2.5 to 3 mm. Mr. Mancini stated both vehicle fell within the normal range and some variance between the two vehicles was normal. He continued explaining that the rough spots on the vehicle seemed to be in areas of higher contour. The comparison vehicle displayed more rough spots than the subject vehicle. Mr. Mancini testified the subject vehicle did not require a repair. The white spots on the vehicle appeared to be wax, which was not properly washed off. Mr. Mancini stated that there was no peeling or delamination of the paint and there was no actual damage to the vehicle. He recommended no further repairs.

On cross-examination of Ms. Kershaw and Mr. Mancini, concerning an invoice that did not identify what areas of the vehicle were painted, both responded that the location depended on the extent of the repainting needed. Further, Ms. Kershaw explained that sometimes the dealership will pay for the repair themselves as a demonstration of goodwill to the vehicle purchaser. Mr. Mancini added that the dealership may have internalized and paid for the repair themselves.

Ms. Kershaw also clarified that the dealership was independently owned and the manufacturer had no control over them. Upon questions about painting the vehicle, Mr. Mancini explained that the amount of the vehicle repainted depended on the size of the area that needed to be painted. He elaborated that repainting typically extended about 8 to 9 inches farther than the area that needed to be repainted. He also explained that if the area was large enough then components such as the door would be removed and completely repainted and then reattached to the vehicle.

E. Analysis

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect).²⁷ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific 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 provides that:

The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your vehicle when it left the manufacturing plant that is defective in material, workmanship or factory preparation. There is no list of covered parts since the only exception are tires and Unwired headphones. You pay nothing for these repairs. These warranty repairs or adjustments—including all parts and labor connected with them — will be made by your dealer at no charge, using new or remanufactured parts.²⁸

According to these terms, the warranty only applies to defects in materials, workmanship, or factory preparation (manufacturing defects).²⁹ 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

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁸ Complainant's Ex. 10, 2018 Limited Warranty and Owner Assistance Information.

²⁹ 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.").

at the factory, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects. Design characteristics result from the vehicle's specified design, which exists before the vehicle is manufactured, and not from any error during manufacturing.³⁰ Because the warranty only covers manufacturing defects, any design characteristics, or other non-manufacturing problems, do not qualify for relief.

In the present case, the subject vehicle, after repair, appeared substantially similar to the new comparison vehicle. Although the extent of lighter paint coverage and rough texture varied, the comparison vehicle exhibited the same lighter paint and rough texture in generally the same areas. In sum, the roughness and lighter areas of paint appear to be normally occurring characteristics of the vehicle. Additionally, to the extent the complaint relates to the dealer's repair and not the Respondent's manufacture of the vehicle, the warranty provides no coverage.

III. Findings of Fact

1. On March 20, 2018, the Complainant, purchased a new 2018 Dodge Ram 1500 from Mac Haik Dodge Chrysler Jeep, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 25 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.

³⁰ 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).

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

Date	Mileage	Issue
May 30, 2018 May 31, 2018	4,084	Discoloration spots and white spots on the paint
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August 1, 2018 August 3, 2018	6,750	Discoloration spots and white spots on the paint
August 10, 2018 August 14, 2018	6,928	Discoloration spots and white spots on the paint

4. On August 27, 2018, the Complainant provided a written notice of defect to the Respondent.
5. On October 13, 2018, the Complainant filed a complaint with the department alleging vehicle was not painted properly.
6. On January 25, 2019, 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 April 17, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Jan Kershaw, early resolution case manager, represented the Respondent. Tym Mancini, technical advisor, testified for the Respondent.
8. The vehicle's odometer displayed 13,188 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. Inspection of the vehicle at the hearing showed that the vehicle had some areas where the paint appeared lighter because of thinly applied paint. The vehicle also exhibited some roughness on some painted surfaces. The Respondent provided a new same-model vehicle

for comparison. The comparison vehicle exhibited the same type of paint variation and roughness as the subject vehicle.

11. The lighter painted areas and the roughness of some painted surfaces are normal characteristics of the subject vehicle.

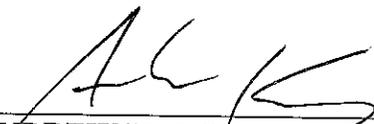
IV. Conclusions of Law

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 Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant's vehicle does not qualify for replacement, repurchase, or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a); TEX. OCC. CODE § 2301.204.
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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED June 12, 2019



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