

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0003072 CAF**

ANTHONY and GENEVIEVE THOMAS,	§	BEFORE THE OFFICE
Complainants	§	
	§	
v.	§	OF
	§	
FOREST RIVER, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Anthony and Genevieve Thomas (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 Forest River, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle’s warranty provides any coverage in this case. Consequently, the Complainants’ vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on April 23, 2019, in Tyler, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and 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 mailed 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, someone on behalf of the owner, or the Department 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 of: the warranty's

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

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

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

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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.

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 Complainants.¹⁸ 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.¹⁹ 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.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 Complainants 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 Complainants’ Evidence and Arguments

On December 29, 2016, the Complainants, purchased a new 2016 Palomino Columbus 381 FL from Tyler R.V. Center, Inc., an authorized dealer of the Respondent, in Tyler, Texas. The Complainants took delivery of the RV on January 18, 2017. The vehicle’s limited warranty provides coverage for a period of one year from the date of purchase. On October 23, 2018, the Complainants provided a written notice of defect to the Respondent. On November 12, 2018, the Complainants filed a complaint with the Department alleging that the RV had leaking slide-outs, water damage on the walls, water damage on the carpets, and water-stained plywood underneath the flooring.

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 Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Issue
May 15, 2017	Slide-out leaks, wet carpet, water damage on the wall, plywood underneath stained from water
June 22, 2017 August 3, 2017	Slide-out leaks, wet carpet, water damage on the wall, plywood underneath stained from water
February 6, 2018	Slide-out leaks, wet carpet, water damage on the wall, plywood underneath stained from water
May 15, 2018 June 27, 2018	Slide-out leaks, wet carpet, water damage on the wall, plywood underneath painted to hide water damage, mold spots on the slide-out

The Complainants testified that the vehicle's slide-outs leaked and the leaking caused water damage to multiple parts of the vehicle. The Complainants reached out to a mold specialist because the water damage caused mold to grow in the vehicle. The mold specialist informed the Complainants that to fully test for mold, the wall must be opened up, which was not always possible with a recreational vehicle. The water leaks were first noticed the day the Complainants first took possession of the vehicle on January 18, 2017. Rain leaked from the air conditioning unit onto the bed in the vehicle. After the initial leak through the air conditioning unit, more leaks were noticed in the bathroom and then other parts of the vehicle, including all the slide-outs in 2017. In the first eight months the air conditioning unit leaked in the bedroom and the shower would flood and spill onto the bathroom floor. The air conditioning unit in the bedroom no longer leaked; however, all the slide-outs continued to leak. The slide-outs leaked more with heavier rain. The walls inside the slide-outs would become wet when raining and remained damp afterwards. The kitchen slide-out would randomly leak when raining but not every time. The other slide-outs would leak when raining. The carpet and around the edging of the slide-outs would become wet when raining. The last time the Complainants noticed that the vehicle leaked was on April 13, 2019. The leak was noticed on the slide-out on the opposite side of the front door. The vehicle had also been moved to different locations but moving the vehicle did not stop the leaks.

The vehicle had been repaired for leaks a minimum of five times. The vehicle was brought for repair at both the dealership and the manufacturer. The manufacturer held the vehicle for repair from May 15, 2018, to July 7, 2018. The dealership held the vehicle for eight weeks from about June through August 2017. On June 6, 2017, the Complainants called the dealership concerning

the repair of the vehicle. The dealership had not worked on the vehicle in three weeks and did not know where the vehicle was.

On cross-examination, the Complainants explained that the leak in the kitchen slide-out that flooded the floor occurred in December 2018 when the slide-out was extended. The Complainants testified that they checked the roof for debris weekly. The roof was also checked for bubbles but the sealant was not checked. The bubbles were pockets of air trapped under the roof. The Complainants also testified that they lived in the vehicle full time.

C. Inspection

During the inspection at the hearing, the vehicle exhibited mold on the carpet around the living room slide-out. There was also mold on the couch and in various spots around the vehicle. There was also evidence of water damage inside the vehicle. Panels on the slide-out inside the vehicle were discolored from water damage. One of the electrical outlets hung out of the wall because the hole was too large for the outlet. The outside of the vehicle also displayed some water discoloration at the bottom of the slide-outs. The front basement compartment had standing water. The seal on the side molding slid off. There rear door-side wall had some discoloration. Bubbling on the roof was visible. The rollers that helped extend and retract the slide-outs would not roll. The awning did not unroll properly. There was also a small hole in the sealant on the roof by the skylight over the bathroom

D. Summary of Respondent's Evidence and Arguments

The Respondent testified that the potential source of the leak could be the result of debris trapped under the seal. However, the only way to confirm is by lifting the roof during repair. The seal on the roof has not had any maintenance and could be a source for water leaking into the vehicle. The Respondent also emphasized that the vehicle is used as a full-time residence and therefore the remedy should be limited to repairs only.

E. Analysis

1. Filing Deadline for Repurchase/Replacement Relief

As an initial matter, the subject RV cannot qualify for repurchase or replacement because the Complainants did not timely file their Lemon Law complaint. In relevant part (as described in

the discussion of applicable law), the Lemon Law requires a complaint for repurchase/replacement relief to be filed no later than six months after the express warranty expires. In this case, the warranty expired on January 18, 2018, one year after the actual delivery date. Accordingly, the deadline for filing the complaint fell on July 18, 2018. However, the complaint was filed on November 12, 2018, about four months after the filing deadline.

2. Applicability of Warranty

To qualify for any relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁷ The Lemon Law does not require that a manufacturer provide any particular warranty coverage. Instead, the Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. However, as detailed below, the warranty provides no coverage in this case.

Generally, the Respondent warrants “for a period of one (1) year from the date of purchase (Warranty Period), that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor.”²⁸ Although the subject RV had a “Columbus Care 2 Year Warranty” label attached on the outside, the warranty specifies: “There is no warranty of any nature made by the Warrantor beyond that contained in this Warranty.”²⁹ Consequently, the warranty’s express language supersedes any representations outside of the warranty itself, including the “Columbus Care 2 Year Warranty” label. Therefore, the actual warranty term lasts for one year. Nevertheless, the warranty provides that: “The Warrantor further makes no warranty with regard to any product used for commercial purposes, as a permanent residence or as a rental unit, or any product not registered and normally used in the United States or Canada”³⁰ and that “use as a permanent residence, commercial use or leasing of the recreational vehicle, shall discharge Warrantor from any obligation under this Warranty.”³¹ Because the subject RV was used as a full-time residence, the warranty provides no coverage in this case. Therefore, the RV cannot qualify for any relief.

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

²⁸ Complainant’s Ex. 9, Limited Warranty Towable Products.

²⁹ Complainant’s Ex. 9, Limited Warranty Towable Products.

³⁰ Complainant’s Ex. 9, Limited Warranty Towable Products (emphasis added).

³¹ Complainant’s Ex. 9, Limited Warranty Towable Products (emphasis added).

III. Findings of Fact

1. On December 29, 2016, the Complainant, purchased a new 2016 Palomino Columbus 381 FL from Tyler R.V. Center, Inc., an authorized dealer of the Respondent, in Tyler, Texas. The Complainants took delivery of the RV on January 18, 2017.
2. The vehicle's limited warranty provides coverage for a period of one year from the date of purchase.
3. On October 23, 2018, the Complainants provided a written notice of defect to the Respondent.
4. On November 12, 2018, the Complainants filed a complaint with the Department alleging that the RV had leaking slide-outs, water damage on the walls, water damage on the carpets, and water-stained plywood underneath the flooring.
5. On February 7, 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.
6. The hearing in this case convened on April 23, 2019, in Tyler, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent.
7. The warranty expired on January 18, 2018.
8. The warranty specifies that the Respondent makes no warranty with regard to any product used as a permanent residence.
9. The warranty states that use of the RV as a permanent residence discharges the Respondent from any obligation under the warranty.
10. The Complainants occupied the RV full-time as a permanent residence.

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, repurchase, or warranty repair. The Respondent's warranty provides no coverage of any defects. TEX. OCC. CODE §§ 2301.603 and 2301.604(a); TEX. OCC. CODE § 2301.204.
7. The Complainants do not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

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 June 13, 2019



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