

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0003936 CAF**

**NEAL and JUDY DESHAZO,
Complainants**

v.

**FOREST RIVER, INC. and
FORD MOTOR COMPANY,
Respondents**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Neal and Judy DeShazo (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. and Ford Motor Company (Respondents). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that creates a serious safety hazard or substantially impairs the vehicle's use or market value after a reasonable number of repair attempts. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement but does qualify for 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 June 18, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Jane Reinert, attorney, represented the Complainants. The Complainants testified for themselves. Michael Locke, warranty relations manager, appearing by telephone, represented and testified for Forest River. Dionne Grace, consumer affairs legal analyst, appearing by telephone, represented and testified for Ford. Asad Bashir, automotive technical specialist, appearing by telephone, also testified for Ford.

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 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 hearing 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 May 31, 2018, the Complainants, purchased a new 2018 Leprechaun 240 FS from Holiday World of Katy, an authorized dealer of the Respondent, in Katy, Texas. The vehicle had 1,386 miles on the odometer at the time of purchase. The Forest River limited warranty provides coverage of the body structure for 12 months or 12,000 miles, whichever occurs first. The Ford limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On November 5, 2018, the Complainants provided a written notice of the defects to Forest River. Ford did not appear to receive notice of the defects until receiving a copy of the complaint. On December 10, 2018, the Complainants filed a complaint with the Department

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).

alleging that the slide-out was inoperable, the jack's alarm malfunctioned, the water pump malfunctioned and leaked, the driver's side mirror could only be adjusted by hand, the drawer under stove would not stay closed, and the cruise control was inoperable. The Complainants identified the leveling jacks, and cruise control as issues remaining for resolution in this case. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issues
June 20, 2018 July 14, 2018	1,800	Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
July 17, 2018 July 30, 2018	2,928	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
July 30, 2018 July 31, 2018	2,929	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
August 6, 2018 August 10, 2018	3,000	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
October 2, 2018 January 2, 2019	5,545	Slide-out stuck and inoperable; Jack alarm malfunctioning; Water pump malfunctioning and leaking; Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed

When asked if any of the issues were successfully repaired, Mr. DeShazo responded that the leveling system, slide-out, and cruise control issues were not resolved. When asked whether other issues were successfully repaired, he answered that he had not driven the vehicle (since repair) because he was afraid to drive it, adding that the leveling jacks would go down (spontaneously). Mr. DeShazo testified that when picking up the vehicle from the Holiday World of Katy, the fireplace was broken and the side mirror's electrical controls were broken, requiring the mirrors to be adjusted by hand. The Complainants took the vehicle back to Holiday World to repair the issues. Holiday World had the vehicle for twenty-five days during the first repair attempt. During that repair attempt a panel on the door was cracked. Mr. DeShazo stated that each time the vehicle was brought in for repair at Holiday World, the vehicle was returned in worse condition than when brought in.

Mr. DeShazo also testified that on the first trip, other issues were noticed including a drawer not closing, damage to the table, and the cruise control not functioning. Mr. DeShazo explained that Appel Ford unsuccessfully attempted three repairs on the cruise control. On the second trip, the slide-out would not retract and the leveling jack alarm malfunctioned. The vehicle

was subsequently brought in for repair at Holiday World on October 2, 2018. Mr. DeShazo testified that he contacted Holiday World concerning the slide-out on September 26, 2018. During a trip, the slide-out had to be manually pushed in because the electronic controls stopped working. The back closet was blocked by the slide-out and the bed was double folded because of the malfunctioning slide-out.

The vehicle was taken to Holiday World for repair on October 2, 2018, and remained there until January 2, 2018. After notice of the Lemon Law filing, Holiday World called the Complainants on November 12, 2018, and told the Complainants their technicians were having difficulties repairing the slide-out. Holiday World gave the Complainants the phone number of Doug, an employee of Forest River. The Complainants called Doug who told the Complainants that Holiday World was working on the wrong issue. During the same repair attempt Holiday World installed new parts on the slide-out requiring a modification of the entire slide-out. The Complainants testified after the repair attempt the slide-out continued to malfunction. Additionally, after the repair the slide-out no longer held flush against the body of the vehicle causing gaps between the slide-out and the vehicle.

The levelers were repaired at Holiday World two separate times and the vehicle was held for repair a total of 90 days. After the levelers were repaired on the second attempt, the leveling jack alarm went off before the Complainants reached home with the vehicle. Mr. DeShazo testified the levelers were in worse shape after the repairs than they were at the time of purchase. Additionally, after the last repair attempt Mr. DeShazo noticed a crack on the weld leading to the tow bar.

Mr. DeShazo called Ford concerning the malfunctioning cruise control. Ford told the Complainants that they would send an engineer to inspect the vehicle. However, the engineer went to Holiday World instead of Appel Ford. The engineer told Holiday World not to make any repairs to the vehicle. The Ford engineer never inspected the vehicle because the Complainants picked up the vehicle shortly afterwards. The trip odometer and the cruise control also remained broken. The trip odometer would clear upon starting the vehicle. With respect to the cruise control, Mr. DeShazo testified that the technicians stated the cruise control needed recalibration for the extra weight of the vehicle. The Complainants were informed about recalibrating the cruise control during the repair attempt on July 30, 2018.

Mr. DeShazo testified the Complainants' concern with the cruise control stemmed from Ford E-450s catching fire from their cruise control. Mr. DeShazo also expressed concern because the levelers would deploy while driving and he could not stop in traffic to reset the levelers as directed by the manual. Additionally, the Complainants testified that he was fearful he would not be able to get the slide-out retracted while on a trip.

Mr. DeShazo explained that during a repair attempt for the slide-out, the slide-out was not repaired to the manufacturer's specification. The repair attempt left gaps in the seal and the slide-out became difficult to close because the slide-out got stuck when extended. The dealer installed sticky rubber to seal the vehicle. However, the rubber fell off after the Complainants brought the vehicle home after the repair attempt. Mr. DeShazo also expressed concern that because of the gaps in the seal, the generator that runs the air conditioning may cause the vehicle to fill with carbon monoxide.

During the last visit for the slide-out in March of 2019, the technician at Holiday World inspected the vehicle. The technician installed rubber on the side where rubber had fallen off and installed a new sensor on the leveler. Mr. DeShazo testified that the vehicle was in a worse condition after the repair attempt. The newly installed sensor on the leveler also remained broken.

The vehicle was taken to Appel Ford, a franchised dealer of Ford, for four repair attempts. Mr. DeShazo testified that the vehicle was taken on two occasions for the slide-out issue, for a total of 101 days. The Complainants took the vehicle to Appel Ford to repair the jacks on three occasions, totaling 127 days. The Complainants also took the vehicle to Appel Ford for repair of the jack alarm on two separate occasions, for which the vehicle was under repair a total of 15 days.

Mr. DeShazo explained that he could run his hand underneath the slide-out because it was not installed correctly. The vehicle has been in for repair for one year and two weeks' time. Mr. DeShazo elaborated that every time the vehicle was taken to Holiday World, not only was the vehicle not repaired but returned to the Complainants with additional issues. The issues included: a broken door panel, a crack in the cabin door, a torn screen door, a torn mattress, a valve installed backwards, which resulted in the inability to fill the gas tank, and the loss of a remote, which controlled the television, sound bar, and fireplace.

The last time the leveling jacks "dropped" in transit was during the last trip taken by the Complainants. Mr. DeShazo explained that the warning lights would go off and the only way to

stop the lights was to hit the retract button. The last time the slide-out would not retract was on February 21, 2019. The last time the cruise control malfunctioned was in January of 2019.

On cross examination the Complainants explained the leveling system was set up by Holiday World. The levelers worked properly for a few months after the purchase of the vehicle; however, the levelers started malfunctioning and no longer leveled the vehicle correctly. Mr. DeShazo testified that for the first leveling system repair, Holiday World reset the leveling system. For the second repair attempt, Holiday World replaced a leaking hose. On the third repair attempt a broken sensor was replaced. However, after each repair, the alarm for the levelers would go off.

On cross examination the Complainants stated that the gaps in the slide-out remained whether the slide-out was extended or not. Additionally, the cruise control would disengage when the vehicle was going uphill when slowing by five mph. Finally, the Complainants testified that the vehicle was unsafe because in 2009, NHTSA released a bulletin concerning E-450s catching fire due to malfunctioning cruise controls.

C. Inspection

Upon inspection at the hearing, the subject vehicle displayed 5,898 miles on the odometer. The bottom of the slide-out exhibited a roughly quarter inch to half inch gap between the slide-out's exterior wall and the wall of the body. The gap was narrowed at the front and back ends of the slide-out. The slide-out was missing approximately two inches of gasket/seal towards the rear of the slide-out. The leveling jacks extended and leveled the RV. Placing a level on the bumper showed about a one to two degrees difference from the level of the ground. Mr. Locke commented that this difference was probably within specifications. The rear leveling jacks did not initially retract, but did retract on a second attempt. Mr. DeShazo stated that the bed platform became uneven after repair by Holiday World. Some screws were not flush on the platform and would scrape the bed when the slide-out moved. Light could be seen inside from a gap at the slide-out. Mr. DeShazo noted that the cruise control did not malfunction that day.

D. Summary of Respondents Evidence and Arguments

1. Forest River

Mr. Locke, testified that the leveling jack alarm resulted from the leveling jacks losing pressure (not from the jacks extending). The alarm indicated that the leveling jacks were pressurizing. He elaborated that the levelers will pressurize automatically. Mr. Locke explained that low fluid and voltage can cause the pressure issue. Holiday World added 1.5 quarts of fluid after they repaired the leaking hose to fix the leveling jack alarm issue. Mr. Locke testified that the leveling system was functioning properly. Mr. Locke also stated that the leveling system is a Lippert system that has a one-year warranty that works in tandem with the Forest River warranty.

Mr. Locke testified that the slide-out gaps were likely the result of Holiday World pulling the seal in the middle first, whereas they should have started from the corners and finished in the middle. Therefore, the gaps are the cause of an improper installation of the slide-out because the rollers were not being installed first. Mr. Locke qualified the assessment stating that the work orders do not state if his assessment is accurate.

Mr. Locke stated that as for the time the vehicle was out for repairs, he calculated the amount, via work orders, to be 60 days at Holiday World and not 93 days.

Lastly, Mr. Locke testified that Holiday World addressed most of the issues. He also stated that the slide-out was no longer under warranty but because the problem was noted before the expiration of the warranty Forest River would warranty the repair. He also stated that the leveling issue is a Lippert issue and not a Forest River issue and the vehicle must be sent to Lippert for that repair. Mr. Locke explained Lippert would also be able to inspect the crack on the weld as well.

On cross examination Mr. Locke explained that despite the issues being minor and the warranty excluding them, Forest River typically repairs all issues with their vehicle during the first year of ownership out of goodwill to the purchaser. Mr. Locke also explained that with respect to the improper field repair of the slide-out, Forest River deferred to Holiday World's judgment for repairs because they were the ones who physically had possession of the vehicle at the time of the repair.

On cross examination Mr. Locke testified there were no recalls or repair bulletins from Forest River or published by NHTSA. Mr. Locke also testified that he was unaware of the NHTSA

10154104 bulletin published December 2, 2018, concerning the Leprechaun recreational vehicle, submitted to NHTSA by Forest River. The bulletin summarizes the problem of the slide-out not sealing properly. Mr. Locke stated that the slide-out is also Lippert made and that repair of the slide-out would involve bringing a Lippert technician out for the repair.

On cross examination Mr. Locke explained that the leveling jacks were calibrated to a specific point and to fix the issue of the levelers making the vehicle unlevel, the leveling jacks must be reset to the ground underneath it each time the vehicle is used. The leveling jacks are preset to the ground where the repair at Holiday World was performed and therefore the leveling jacks will not make the vehicle perfectly level at any place except for the ground it was programmed on. Mr. Locke clarified that the levelers are not limited to the concrete but they must be reprogrammed each time for the vehicle to level itself automatically. Mr. Locke also stated that Forest River did not contact Lippert about the leveling issues because there was no reason to get Lippert involved since each issue was unique and not one continuous problem.

On cross-examination, Mr. Locke testified that Forest River never filed a recall with NHTSA for gaps in the slide-out posing a risk for carbon monoxide poisoning. Mr. Locke also stated that the recall of the Forest River recreational vehicle, Dynamax, for risks of carbon monoxide poisoning through open doors and cabinets, is not related to the Complainants' vehicle because it is a different vehicle with a different slide-out.

2. Ford Motor Company

Mr. Bashir testified that the Complainants' concern about a fire caused by the cruise control only affected vehicles made from 1992 to 2004. The Complainants' vehicle was a 2018 and therefore did not use the same deactivation switch as the vehicle that caught fire. The vehicles that caught fire had a switch mounted on the brake master cylinder. However, if the fluid leaked, the cruise control switch would become a fire hazard. As a result, Ford redesigned the new cruise control with a different switch that no longer sits on the brake master cylinder. There has been no recall for the E-450 cutaway chassis, the one the subject vehicle uses.

Mr. Bashir testified that the issue the complainant had with the cruise control sent no diagnostic trouble code. As a result, at the first repair attempt the technician believed the issue was either voltage or an open circuit. The technician followed a pinpoint test and replaced the steering wheel switches and box spring, a series of contacts in the steering wheel that allows the wheel to

carry electrical circuits through it. On the second repair attempt, the technician found the cruise control inoperable and the clock spring not seated properly, so the clock spring was replaced. On July 31, 2018, the technician found a diagnostic trouble code, so he performed another pinpoint test, which led to a malfunctioning power train control module being replaced. When the power train control module was replaced technical support reached out to Mr. Bashir to help them find the serial number to properly reprogram the module. On the last visit for the cruise control, the field service engineer determined the cruise control was operating as designed. Mr. Bashir explained that when the vehicle loses or cannot maintain speed, losing 10 miles per hour, the cruise control will deactivate itself. Mr. Bashir also stated that the deactivation is normal function and it is described in the owner manual.

Lastly on cross examination, Mr. Bashir testified that he did not think the trip-odometer was related to any of the other issues and that he did not see the issue diagnosed.

Ms. Grace testified that based on the service history of the vehicle, the vehicle did not qualify for repurchase. Ms. Grace stated the vehicle was not taken in for four or more repair attempts during the presumption period for the same nonconformity. Additionally, the vehicle was not out of service for 30 or more days. Finally, the vehicle does not meet the time periods for serious safety hazards.

E. Analysis

Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).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 relevant part, Forest River warrants that: “for a period of one (1) year or twelve thousand (12000) miles, whichever occurs first 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” but Forest River “makes no warranty with regard to, but not limited to, the chassis including without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and

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

gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment.”²⁸ The Ford chassis warranty covers: “all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.”²⁹ According to these terms, the warranties only apply to defects in materials or workmanship (manufacturing defects).³⁰ Moreover, the Forest River warranty narrowly covers “the body structure of this recreational vehicle” and excludes defects in third party components (e.g., “equipment”). 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 the vehicle’s design characteristics (which exist before manufacturing) or improper dealer 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.³¹ In sum, the Lemon Law only provides relief to the extent that the warranty covers the issue.

1. Slide Out - Failure to Retract

Any malfunctions in the slide-out mechanism are not warrantable defects. Forest River’s warranty specifically excludes equipment, such as the slide-out mechanism, manufactured by third parties, in this case, Lippert Components, Inc. Accordingly, this issue does not support any relief.

²⁸ Complainants’ Ex. E, Limited Warranty Motorized Products (emphasis added).

²⁹ Complainants’ Ex. F, 2017 Model Year Ford Warranty Guide (emphasis added).

³⁰ 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.”).

³¹ 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).

2. Slide-Out - Gaps in Seal

As described above, the warranty only applies to manufacturing defects. However, the evidence reflects that Holiday World caused the gaps in the slide-out when repairing the vehicle as opposed to the Forest River's causing the gaps when manufacturing of the vehicle. Any nonconformity caused by a dealer's negligent repair is not a manufacturing defect since the nonconformity did not exist until after Forest River's manufacturing process. Accordingly, the slide-out gaps cannot support any relief.

3. Leveling Jacks

As with the slide-out mechanism, Forest River's warranty does not cover the leveling jacks, which are also components manufactured by Lippert Components. Accordingly, this issue does not support any relief.

4. Cruise Control

As an initial matter, to qualify for Lemon Law relief, the alleged nonconformity must create a serious safety hazard or substantially impair the use or market value of the vehicle. The Complainants alleged that the vehicle's cruise control posed a threat of fire based on a NHTSA bulleting for 2009 model year Ford E-450s. However, the subject vehicle employs a different cruise control design that does not present a hazard like the older model. Moreover, the record does not show that any cruise control malfunction substantially impairs the use of the vehicle. A preponderance of the evidence does not show a substantial impairment in the actual use of the vehicle. Moreover, the record reflects that the cruise control malfunctioned intermittently. Specifically, testimony indicated that the cruise control would disengage when going uphill and losing about five mph of speed. On the other hand, the owner's manual specifies that "Cruise control will disengage if the speed decreases more than 10 mph (16 km/h) below the set speed while driving uphill."³² So the cruise control disengaging itself is not a nonconformity. Rather, any nonconformity appears to concern the degree of speed loss that causes the cruise control to disengage (five mph for the subject vehicle as testified by Mr. DeShazo compared to 10 mph in the owner's manual). Accordingly, the nonconformity here is that the cruise control disengages five mph too soon, not that it disengages at all. Given these consideration, the defect does not

³² Ford Ex. 1, Owner's Manual Excerpt, Cruise Control.

substantially impair the value of vehicle under the reasonable prospective purchaser test. Therefore, the vehicle qualifies for warranty repair but not repurchase or replacement.

III. Findings of Fact

1. On May 31, 2018, the Complainants, purchased a new 2018 Leprechaun 240 FS from Holiday World of Katy, an authorized dealer of the Respondent, in Katy, Texas. The vehicle had 1,386 miles on the odometer at the time of purchase
2. The Forest River limited warranty covers the body structure for 12 months or 12,000 miles, whichever occurs first.
3. The Ford limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
4. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issues
June 20, 2018 July 14, 2018	1,800	Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
July 17, 2018 July 30, 2018	2,928	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
July 30, 2018 July 31, 2018	2,929	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
August 6, 2018 August 10, 2018	3,000	Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed
October 2, 2018 January 2, 2019	5,545	Slide-out stuck and inoperable; Jack alarm malfunctioning; Water pump malfunctioning and leaking; Cruise control inoperable; Water pump malfunctioning and leaking; Mirror electronics do not work; Drawer will not stay closed

5. On November 5, 2018, the Complainants provided a written notice of defect to Forest River.
6. On December 10, 2018, the Complainants filed a complaint with the Department alleging that the slide-out was inoperable, the jack's alarm malfunctioned, the water pump malfunctioned and leaked, the driver's side mirror could only be adjusted by hand, the drawer under stove would not stay closed, and the cruise control was inoperable. The Complainants identified the slide-out, leveling jacks, and cruise control as issues remaining for resolution in this case.

7. Ford did not receive written notice of the defects until receiving a copy of the complaint.
8. On February 6, 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.
9. The hearing in this case convened on June 18, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Jane Reinert, attorney, represented the Complainants. The Complainants testified for themselves. Michael Locke, warranty relations manager, appearing by telephone, represented and testified for Forest River. Dionne Grace, consumer affairs legal analyst, appearing by telephone, represented and testified for Ford. Asad Bashir, automotive technical specialist, appearing by telephone, also testified for Ford.
10. The vehicle's odometer displayed 5,898 miles at the time of the hearing.
11. The Ford chassis warranty was in effect at the time of the hearing.
12. The Forest River warranty expired on May 31, 2019.
13. Forest River warrants that: "the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor." However, Forest River "makes no warranty with regard to, but not limited to, the chassis including without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment." The Ford chassis warranty covers: "all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship."
14. Upon inspection at the hearing, the subject vehicle displayed 5,898 miles on the odometer. The bottom of the slide-out exhibited a roughly quarter inch to half inch gap between the slide-out's exterior wall and the wall of the body. The gap was narrowed at the front and back ends of the slide-out. The slide-out was missing approximately two-inch portion of

the gasket/seal towards the rear of the slide-out. The leveling jacks extended and leveled the RV. Placing a level on the bumper showed about a one to two degrees difference from the level of the ground. Mr. Locke commented that this difference was probably within specifications. The rear leveling jacks did not initially retract, but did retract on a second attempt. Mr. DeShazo stated that the bed platform became uneven after repair by Holiday World. Some screws were not flush on the platform and would scrape the bed when the slide-out moved. Light could be seen inside from a gap at the slide-out. Mr. DeShazo noted that the cruise control did not malfunction that day.

15. Lippert Components, Inc. manufactured the slide-out mechanism.
16. The Holiday World caused the gaps at the slide-out while repairing the vehicle.
17. Lippert Components, Inc. manufactured the leveling jack system.
18. The Ford owner's manual reflects that the cruise control will normally disengage after losing 10 mph from the set speed.
19. The subject vehicle's cruise control will disengage when the speed falls five mph below the set speed.

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 warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
7. The Complainants does 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.
8. If the Complainants' vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. The Complainants' vehicle qualifies for warranty repair. The Complainants proved that the vehicle has a defect covered by Ford's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainants notified Ford or Ford's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
10. 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**. It is **FURTHER ORDERED** that Ford Motor Company shall make any repairs needed to conform the subject vehicle's cruise control to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:³³ (1) the

³³ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

Complainants shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED August 19, 2019



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