

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0000837 CAF**

<b>THI HUYNH,</b> <b>Complainant</b>	§ § § § § § §	<b>BEFORE THE OFFICE</b>  <b>OF</b>  <b>ADMINISTRATIVE HEARINGS</b>
v.		
<b>THOR LIVIN' LITE, INC.,</b> <b>Respondent</b>		

**DECISION AND ORDER**

Thi Huynh (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 recreational vehicle (RV) manufactured by Thor Livin' Lite, Inc. (Respondent). A preponderance of the evidence shows that the warranty excludes the subject RV. Consequently, the Complainant's RV does not qualify for any relief.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on March 11, 2020, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on April 2, 2020. The Complainant, represented himself. Delbert Miller, Vice President Corporate, represented the Respondent.

**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

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”<sup>2</sup> In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.<sup>3</sup> In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the 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.<sup>4</sup>

**b. Substantial Impairment of Use or Value**

**i. Impairment of Use**

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>5</sup>

**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

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

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

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

<sup>5</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”<sup>6</sup>

**c. Reasonable Number of Repair Attempts**

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</sup>

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>8</sup>

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle’s use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>9</sup>

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<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

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

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

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

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.<sup>10</sup>

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>11</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.<sup>12</sup>

**d. Other Requirements**

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;<sup>13</sup> (2) the respondent was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>15</sup>

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

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

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

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

<sup>14</sup> 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.

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

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

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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 for relief under the lemon law.”<sup>21</sup> However, the parties may expressly or impliedly consent to

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

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

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

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

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

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

hearing issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.<sup>24</sup> Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).<sup>25</sup> However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."<sup>26</sup>

### B. Summary of Complainant's Evidence and Arguments

On May 25, 2018, the Complainant, purchased a new Thor Livin' Lite Camplite Travel Trailer 21BHS from Amazing RVs, an authorized dealer of the Respondent, in Houston, Texas. The Complainant actually took delivery of the RV on June 6, 2018. The vehicle's limited warranty provides coverage for two years from the date of purchase or date when first placed in service, whichever occurs first. On May 9, 2019, the Complainant provided a written notice of defect to the Respondent. On September 19, 2019, the Complainant filed a complaint with the Department alleging that the storage compartment leaked at the doors.

The Complainant testified that the RV had five repair attempts for the leak issue. The first repair attempt occurred at the end of June 2018. He noted that he could not bring the RV in earlier

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

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

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

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

<sup>26</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

because he needed to take it for work. The first three attempts occurred in one visit. He would come back after a repair attempt but not take the trailer back. The RV was out of service for repair for over a year. The Complainant first noticed the leak about the end of June 2018. Both sides leaked, but the passenger side had been fixed. He last noticed rain leaking shortly before filing his Lemon Law complaint. He affirmed that the RV did not leak during every rain but during heavier rain. The Complainant towed the RV in the rain once or twice and found water leaking in. After a downpour at a campsite, he always noticed water in the compartment. Also, while at the dealer for repair, he would find water after rain. He confirmed that a panel required replacement because of water damage in the compartment. He last noticed water leaking in the passenger side of the compartment after the second repair attempt. Repairs appeared to have improved the problem. However, the passenger side leak recurred after taking the RV to PPL Motor Homes for repair. The driver's side of the compartment leaked the same after repairs.

### **C. Inspection**

During the inspection at the hearing, the Complainant sprayed water directly on the storage compartment doors, including the gaps between the doors and door frames. The Complainant dried off and opened the left door. The interior portion of the left door frame exhibited a dime-sized spot of water. The right compartment also exhibited a similar amount of water. The Complainant sprayed the doors from the front of the RV to simulate towing the vehicle in rain. The Complainant dried off and opened the left door. The left side of the compartment floor had a pool of water extending about seven inches along the front panel of the compartment. The Complainant dried off and opened the right door. The interior of the compartment on the right exhibited a few droplets of water. The Complainant noted that he used the RV for business travel as an insurance adjuster.

On cross-examination, the Complainant explained that the RV had many repairs and he did have to come back for different reasons. The repairs did not occur in one visit or in one service cycle. After taking delivery, he was already aware of the leaks and other problems as well. He would use the RV and take it back to the dealer. He had taken the RV to a dealer at least three or four times. The Complainant elaborated that he used the RV for recreation a couple of times a year and at the most, four to five times in a week. He used the RV for work, a couple of times in 2018 and at most, three times in 2019 – two or three weeks. The Complainant noted that he worked catastrophes. He had to decline some deployments because the RV was in for repair.

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

Mr. Miller testified that the two dealerships diagnosed where the leak occurred. The dealers attempted broad repairs instead of systematically replacing parts.

### 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)<sup>27</sup> that continues to exist, even after repair.<sup>28</sup> In part, the warranty generally states that:

LIVIN' LITE warrants that every towable recreational vehicle or truck camper purchased from an authorized LIVIN' LITE dealer to the first retail customer was free from substantial defects in materials and workmanship when it arrived on the dealer's lot, except those exclusions set forth below. Nothing contained herein shall be interpreted as a promise of future performance. The warranty period begins on the date of purchase or the date the unit is first placed in service, whichever is earlier.<sup>29</sup> This Towable Limited Warranty ["TLW"] does not apply to towable recreational vehicles or truck campers purchased from any source other than an authorized LIVIN' LITE dealer.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>30</sup> Additionally, the warranty also specifies some exclusions from the warranty. In relevant part, the warranty provides that: "Excluded from coverage under the TLW are: . . . (2) units used for any commercial purpose; (3) units used for full-time residential use or more than occasional recreational use."

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<sup>27</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>28</sup> TEX. OCC. CODE § 2301.605.

<sup>29</sup> Complainant's Ex. 2, Towable Limited Warranty, Two Year Limited Warranty.

<sup>30</sup> Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").



In the present case, the Complainant testified that he used his RV for business travel as an insurance adjuster. However, the warranty expressly excludes RVs used for: any commercial purpose or more than occasional recreational use. Consequently, the Complainant's use of the RV for business purposes excludes the RV from coverage. Because, repurchase/replacement and warranty repair relief require warranty coverage, the subject RV does not qualify for any relief.

### III. Findings of Fact

1. On May 25, 2018, the Complainant, purchased a new Thor Livin' Lite Camplite Travel Trailer 21BHS from Amazing RVs, an authorized dealer of the Respondent, in Houston, Texas. The Complainant actually took delivery of the RV on June 6, 2018
2. The vehicle's limited warranty provides coverage for two years from the date of purchase or date when first placed in service, whichever occurs first.
3. In part, the warranty generally states that:

LIVIN' LITE warrants that every towable recreational vehicle or truck camper purchased from an authorized LIVIN' LITE dealer to the first retail customer was free from substantial defects in materials and workmanship when it arrived on the dealer's lot, except those exclusions set forth below. Nothing contained herein shall be interpreted as a promise of future performance. The warranty period begins on the date of purchase or the date the unit is first placed in service, whichever is earlier.<sup>31</sup> This Towable Limited Warranty ["TLW"] does not apply to towable recreational vehicles or truck campers purchased from any source other than an authorized LIVIN' LITE dealer.

4. The warranty also provides that: "Excluded from coverage under the TLW are: . . . (2) units used for any commercial purpose; (3) units used for full-time residential use or more than occasional recreational use."
5. On May 9, 2019, the Complainant provided a written notice of defect to the Respondent.
6. On September 19, 2019, the Complainant filed a complaint with the Department alleging that the storage compartment leaked at the doors.

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<sup>31</sup> Complainant's Ex. 2, Towable Limited Warranty, Two Year Limited Warranty.

7. On October 29, 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.
8. The hearing in this case convened on March 11, 2020, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on April 2, 2020. The Complainant, represented himself. Delbert Miller, Vice President Corporate, represented the Respondent.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The Complainant used the subject RV for business travel as an insurance adjuster.

#### **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 or repurchase. The Complainant did not prove that the Respondent's warranty covers the vehicle. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The Complainant 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. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the Respondent's warranty covers the vehicle. TEX. OCC. CODE §§ 2301.204 and 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 1, 2020**



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