

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 20-0005294 CAF**

<b>PAIGE MCKEE,</b>	§	<b>BEFORE THE OFFICE</b>
<b>Complainant</b>	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
<b>FOREST RIVER, INC.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Paige McKee (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 her recreational vehicle (RV) manufactured by Forest River, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by warranty. Consequently, the Complainant’s vehicle does not qualify for repurchase/replacement or warranty repair.

**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 September 1, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the September 17, 2020. Adam Mott, attorney, represented the Complainant. D.G. Majors, attorney, represented the Respondent.

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<sup>1</sup> 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.”<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>

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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).

**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.”<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>

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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) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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).

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>

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

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

<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

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>

## 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

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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).

<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

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 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 August 25, 2018, the Complainant, purchased a new 2018 Columbus 1492 383FB from Fun Town RV, an authorized dealer of the Respondent, in Fate, Texas. The vehicle’s limited warranty covers the body structure for one year from the date of purchase. On November 8, 2018, the Complainant’s attorney provided a written notice of defect to the Respondent; however, the notice only generally stated that the “vehicle is defective” and did not identify any alleged defects or nonconformities. On November 23, 2019, the Complainant filed a complaint alleging that the

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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).

<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).

RV leaked when raining with the slideouts out. On August 11, 2020, the Complainant file an amendment to the complaint alleging that 1) the roof leaked; 2) the leveling system did not work correctly; 3) the outside control panel malfunctioned; 4) the rear air conditioner (AC) did not cool; 5) the half bath toilet was positioned incorrectly; 6) water damaged carpet near the door-side slideout; 7) water damaged the kitchen light fixture; and 8) the wine chiller was installed incorrectly.

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

<b>Date</b>	<b>Invoice</b>	<b>Issue</b>
9/5/2018 10/3/2018	417691A	Bedroom slide leaking (roller came off slide), wine chiller not working (wine cooler came in wrong), toilet seat will not stay up (factory mounted too close to wall)
10/4/18 2/28/2019	417691B	Wine chiller not working (wine cooler came in wrong), crack in slide fiberglass, toilet seat will not stay up (factory mounted too close to wall)
6/29/2019 8/28/2019	420972	Water leaking through slide
12/9/2019 6/6/2020	422656	Slide leaking, leaking at light fixture, water damage under carpet

Jay McKee, the Complainant's spouse, testified that on Labor Day weekend of 2018, water trailed from the slideout into the bathroom and he contacted the dealer. He described he rain as ordinary, steady, with some breaks, and not torrential. He affirmed that the RV continued to leak. He explained that he was a member of a non-profit, the Pasadena Livestock Show and Rodeo (Rodeo), which required much of his time, so he kept the RV on the Rodeo's property for convenience. After discovering the leak, Mr. McKee dropped off the RV at Fun Town in Wharton, which represented that it had fixed the issue. When purchasing the RV, Mr. McKee briefly inspected the RV, which amounted to a quick walkthrough. The RV had no visible nonconformities. He did not test drive the RV before purchase. He confirmed that the RV had not been in any accidents or natural disasters. He added that the RV was in storage most of the time at the dealer. He confirmed that his RV storage had a roof. He asserted that he did not use the RV as a residence of for commercial purposes. To his knowledge, the warranty covered all repairs. He explained that dealer took care of routine maintenance and the state inspection and he would do his part to the best of his ability. He affirmed that water leaked from the bedroom slideout on

September 5, 2018, the first time out with the RV. He elaborated that water leaked into the basement (storage compartment), below the bedroom, right below the leaking slideout. The bottom of the slideout was soaking wet with visible water stains. He noted that he could see daylight at a hole on the bedroom slideout. After dealer repairs, the RV leaked a second time from the bedroom slideout and onto the floor and into the vents. Mr. McKee described that the RV leaked gallons and gallons of water. In October, he took the RV to the dealer a second time for the extensive leaking, which went to the bathroom as well as the bedroom and basement under the slideout. He picked up the RV on April 20th (2019), after six months out of service. The dealer had notified him the RV was ready in March around Easter. He did not have a loaner RV. Before the October 4th repair visit, Mr. McKee noticed a six-inch crack at the end of the kitchen area slideout. A nail or screw had penetrated causing a crack over time. Additionally, storage compartment leaked again but worse than before: the moisture rusted the slider tray, nuts, and bolts, and the carpet had caved in. Mr. McKee testified that no Forest River representative contacted him but the week before the hearing, a transport company, on behalf of the Respondent, asked when the RV would be available to take to the manufacturer. No one from the Respondent contacted Mr. McKee, prior to August 27, 2020, about a repair attempt. After picking up the RV in April 2019, the bedroom slideout leaked and water seeped into the storage compartment. Mr. McKee took the RV in for repair on June 29, 2019. After getting the RV back, the RV took longer to leak but also leaked at the light fixture in the kitchen and flowed to the living room, in addition to the leak in the bedroom in September 2019. The water went underneath the carpet on the slideout and leaked into the storage compartment. Mr. McKee called the dealership but he could not get the RV in for repair until December 2019, due to a backlog at the dealer. Mr. McKee affirmed that the RV was out of service for six to seven months during this repair visit. He understood those repairs to be warranted. He did not know what the “denied customer maintenance” note in the December 2019 repair order meant. Mr. McKee expressed that neither he nor the dealer declined any repairs. He added that the RV leaked up to the present. He stated that he checked the RV on Monday (June 22, 2020) when raining and did not really see anything. He also checked the RV the next day during an all-day shower and Mr. McKee found water coming from the light fixture and bedroom slideout. Water ran down the island to the floor. In the basement storage compartment, water soaked the leveling system control panel making it inoperable. When a representative of the Respondent came to pick up the RV, the leveling system took about an hour and a half to work because of the damage. Water



could be seen on the basement floor and the glue adhering the carpet was falling off. The RV remained in storage until the day before the hearing started, when a transport company called on behalf of the Respondent to pick up the RV for transport to Indiana. Mr. McKee had no prior contact with the Respondent about transporting the RV. Current issues included the leak at the bedroom slideout, the leak at the kitchen light fixture, water leaking onto the electronics in the basement, the rear AC malfunction, and a crack in the fiberglass.

On cross-examination, Mr. McKee testified that he and the Complainant used the RV together. She purchased the RV in her name because she had better credit. They bought the RV for recreation, but the rodeo occupied much of his time, so he and the Complainant would stay on the grounds of the Rodeo for convenience. He elaborated that they used the RV for recreation and occasionally to shower, change clothes, and get ready for his duties as a board member of the Rodeo. One of the uses of the RV was to have a convenient place to stay at the Rodeo grounds for about three weeks. Mr. McKee stated that he made five or six repair visits to a dealer. He affirmed that the RV was bought in Fate and kept at a storage facility. He explained that they had not had the RV in their possession long enough to replace the seals around the roof but the RV did pass the state inspection. Mr. McKee confirmed that he himself had not performed routine maintenance on the RV. Mr. McKee affirmed that he never corresponded with the Respondent but always went through the dealer. Additionally, he never contacted the Respondent directly except through an attorney. He also confirmed that neither he nor the Complainant spoke to the Respondent. Regarding the December 9, 2019, repair order, Mr. McKee explained that he actually brought the RV in on the December 7, 2019. The warranty expired while the RV was at the dealer. Mr. McKee confirmed that the slideout roller came out of the first time but the next repair did not address the slideout roller. When asked if the silicone application to the slideout was denied as a customer maintenance item, Mr. McKee answered that nothing was denied. Though the RV was not brought in for the leak at the light fixture until the warranty expired, Mr. McKee asserted that he had reported this issue to the dealer in late September, within the warranty period. He did not know if the respondent warranted the leveling jacks or AC.

On redirect examination, Mr. McKee testified that he used the RV for a family reunion as well as camping trips. He also would have used it the week of the hearing but for leaking and being transported to Indiana. He acknowledged using the RV for the Rodeo but for personal purposes not business. Mr. McKee affirmed that RV always leaked from the structure at various spots, that

the repair orders mentioned seal replacement several times but did not mention that the seals should be replaced shortly after.

Upon clarification questions, Mr. McKee testified that he first noticed leaking from the bedroom slideout one week from delivery and last noticed the leaking in September 2019. He first noticed the leaking from the light fixture in April 2019 and last noticed the leak probably in June 2020. He first noticed the leak in the basement compartment in September 2018 and last noticed it in June 2020. He noticed the water damage on the carpet in September 2019. When asked if the dealer applied silicone around the plastic drip cover on the sides of the slideout and flap seal, Mr. McKee responded that he did not know the technical details of what the dealer did. However, he had never applied any sealant to the slideout himself.

### **C. Summary of Respondent's Evidence and Arguments**

Warren Murphy, assistant director, parts, service and warranty, testified that the Complainant did not contact the Respondent within the one-year warranty period. The warranty covered defects in the body but also expressly excluded various items. Mr. Murphy affirmed that the Respondent did not have an opportunity to repair any items arising during the one-year warranty. He also affirmed that the Respondent was offering to repair the RV whether the defect was under warranty or not. Mr. Murphy confirmed that the Respondent recently picked up the RV for the first and only repair attempt by the Respondent. He indicated that a slideout roller coming out of alignment after hauling was not unusual. However, the August 28, 2019, repair order did not mention a roller as a cause of the leak. Rather the leak was new. Mr. Murphy attested that the warranty had expired by the time of the December 9, 2019, repair visit. He explained that the "denied customer maintenance" notation means that the customer should have inspected and replaced worn seals. He expounded that the seals would likely leak if not replaced and no documentation indicates the seals were replaced. Mr. Murphy averred that the Respondent did not warrant the leveling system. Mr. Murphy did not know if the claim for the outside control panel related to the leveling system or water tanks. The Respondent did not have any record of the half-bath toilet position issue until it was raised recently. Mr. Murphy did not know what the specific problem was with the half-bath toilet issue. The dealer did submit a commode-related claim as a completed repair, which the Respondent paid. In response to the leak at the light fixture, the dealer

ran water tests but found no leaks. The Respondent did not have any record of a complaint about the wine chiller but a previous claim was submitted and paid.

On cross-examination Mr. Murphy testified that he did not have a technical degree or certifications. He did not personally inspect the RV. He became aware of the complaint (November 29, 2018) after suit was filed. Mr. Murphy acknowledged that the Respondent was aware of the complaint from November 8, 2018, the date of the notice of defect, but did not arrange a repair attempt because the Complainant refused. Mr. Murphy confirmed that August 2020 was the Respondent's first attempt to repair. He affirmed that he approved the repairs on the December 9, 2019, repair order. Though the dealer could not find the leak, he noted that the Respondent had a rain bay and better equipment than the dealer. Mr. Murphy confirmed that the warranty covered the roof, walls, and floors.

On redirect examination, Mr. Murphy testified that the November 8, 2018, letter from the Complainant's attorney did not specifically reference any condition. He affirmed that the letter had no repair orders attached. He stated that the dealer submitted repair claims and the Respondent paid for the repairs. Mr. Murphy confirmed the dealer could not find a leak after three tests and the dealer concluded that the slideout leak was a customer maintenance issue requiring sealant. He acknowledged that the Complainant had also filed a claim in state court, after which he was not allowed to contact the customer. Additionally, the Complainant's attorney instructed the Respondent not to contact the Complainant back in November 2018. In reference to the December 9, 2019, repair order, Mr. Murphy did not know if "lawyers" referred to the dealer's lawyers, the Respondent's lawyers, or otherwise. He testified that he instructed the dealer to repair the subject RV although the warranty had expired.

## **D. Analysis**

### **1. Warrantable Defect**

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) that continues to exist after repairs.<sup>27</sup> The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for

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

vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally states that:

Forest River Inc., 55470 CR 1, P.O. Box 3030, Elkhart, Indiana 46515-3030 (Warrantor) warrants to the ORIGINAL CONSUMER PURCHASER ONLY, when purchased from an authorized Forest River Inc. dealer, 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.

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects) attributable to the Respondent.<sup>28</sup> A defectively manufactured vehicle has a flaw because of some error in making it at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. 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 and design defects result from the vehicle's specified design, which exists before manufacturing, and not from any error during manufacturing.<sup>29</sup> In sum the warranty only covers manufacturing defects attributable to the Respondent. Additionally, the warranty lists the following exclusions:

Warrantor expressly disclaims any responsibility for damage to the unit where damage is due to condensation, normal wear and tear or exposure to elements. Warrantor 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. Their respective manufacturers and suppliers may warrant some of these items. Warranty information with respect to these items is available from your dealer. The Warrantor further makes no warranty with regard to any product used for commercial

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<sup>28</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.").

<sup>29</sup> 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).

purposes, as a permanent or full time residence or as a rental unit, or any product not registered and normally used in the United States or Canada. For purposes of this warranty, it shall be deemed conclusive evidence of commercial purposes if the product is licensed, titled, registered, or insured in the name of any corporation, LLC, or any other form of business or commercial entity. “Full time” for the purposes of this warranty shall mean continuous occupation of the Recreational Vehicle for a period exceeding 30 days or 18 days per month in two or more consecutive months.

The warranty also specifies certain conditions that void the warranty altogether:

Misuse or neglect, including failure to provide reasonable and necessary maintenance, unauthorized alteration, accident, and improper loading, use as a permanent or full time residence, commercial use or leasing of the recreational vehicle, shall discharge Warrantor from any obligation under this Warranty. Notwithstanding these or other terms discharging the warrantor, the provision of service by a Forest River authorized service center, authorization of repairs by Forest River, or any other attempt to resolve a complaint or request for warranty service shall not constitute a waiver of warrantor’s rights.

As delineated in the terms above, the warranty does not apply to all problems that may occur with the subject vehicle but only to those that fall within the warranty’s coverage. Critically, applicability of the warranty is one of the essential elements for relief under either the Lemon Law or Warranty Performance Law.

**a. Issues Raised After Warranty Expiration**

The warranty period runs for one year from the date of purchase. In this case, the Complainant purchased the subject RV on August 25, 2018, so that the warranty expired on August 25, 2019. Consequently, any issues raised for the first time after August 25, 2019, cannot support any relief. On the other hand, if the owner or owner’s agent reported the defect to “the manufacturer, converter, or distributor, or to a designated agent or franchised dealer of the manufacturer, converter, or distributor” during the warranty term, the respondent has a continuing obligation to address the defect.<sup>30</sup> In this case, the leak from the roof and damage to the kitchen light fixture and the water damaged carpet first appeared on the December 9, 2019, repair order, after the warranty expired. Although the repair orders include a concern about the wine chiller not working, the repair orders do not address the incorrect installation of the wine chiller, which appears to be raised for the first time in the amendment filed on August 11, 2020, well after the

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<sup>30</sup> TEX. OCC. CODE § 2301.603(b)(1).

warranty expired. Because these issues fall outside of the warranty period, they cannot support any relief.

**b. Express Warranty Exclusions**

As specified above, the warranty excludes certain items/conditions from coverage altogether. In particular, the warranty excludes coverage if the RV is used commercially or residentially and the warranty also provides no coverage of equipment and appliances.

**i. Commercial or Residential Use**

The Respondent argued that Mr. McKee used the subject RV for commercial or residential purposes. The warranty essentially voids coverage if the RV is “used for commercial purposes, as a permanent or full time residence”. However, the evidence does not appear to show such commercial or residential use. Mr. McKee would stay in the RV in conjunction with his volunteer activities with the Rodeo as a board member. The warranty does not define “commercial” but Dictionairy.com defines “commercial” as: “of, relating to, or characteristic of commerce”; “engaged in commerce”; or “prepared, done, or acting with sole or chief emphasis on salability, profit, or success.”<sup>31</sup> Also, Dictionairy.com defines “commerce” as: “an interchange of goods or commodities, especially on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce); trade; business.”<sup>32</sup> Given the ordinary meaning of “commercial,” Mr. McKee’s volunteer activity appears more akin to a personal hobby than a commercial endeavor. With respect to residential use, the warranty states: “‘Full time’ for the purposes of this warranty shall mean continuous occupation of the Recreational Vehicle for a period exceeding 30 days or 18 days per month in two or more consecutive months.” Though the evidence shows Mr. McKee spent significant time staying in the RV on Rodeo grounds, his stays do not appear to reach the level of full time residence. In sum, Mr. McKee’s use of the RV does not preclude the warranty’s applicability.

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<sup>31</sup> *Commercial. Dictionary.com Unabridged. Random House, Inc.*  
<http://www.dictionary.com/browse/commercial>.

<sup>32</sup> *Commerce. Dictionary.com Unabridged. Random House, Inc.*  
<http://www.dictionary.com/browse/commerce>.

**ii. Equipment and Appliances**

By way of example, the warranty excludes “equipment and appliances.” Accordingly, the leveling system, control panel, and rear AC issues cannot support any relief. Additionally, the record indicates that the current slideout leak arises from a different nonconformity than the original slideout leak. Previously, the dealer found that a displaced roller under the slideout allowed the slideout to come out of square, allowing water in. In contrast, the dealer identified a different cause for the slideout leak on the December 9, 2019, repair order. Specifically, the dealer noted that the slideout needed silicone applied around the drip cover on both sides. However, the evidence reflects that the application of such sealant is a “routine maintenance” item, which the warranty excludes. Consequently, the present slideout leak does not support any relief.

**c. Currently Existing Defect**

Under either the Lemon Law or Warranty Performance Law, the Complainant must prove that the alleged defect continues to exist even after repairs. As addressed above, the alleged defects are not warranted, except for the half-bath toilet positioning. However, the record does not show that the toilet positioning issue continues to exist after repairs. Significantly, the latest repair order did not include this issue. Accordingly, a preponderance of the evidence does not show that a warrantable defect continues to exist.

**2. Written Notice of Defect**

As a prerequisite for repurchase or replacement relief, § 2301.606(c)(1) of the Lemon Law requires providing a written notice of the alleged defect(s) to the Respondent. In this case, the November 8, 2018, letter from the Complainant’s attorney stated that “our client’s vehicle is defective” without identifying any actual defects.<sup>33</sup> Consequently, the November 8th letter cannot support any repurchase or replacement relief. However, as outlined in the discussion of applicable law, the Lemon Law also allows notice from the Department to satisfy this notice requirement. The Department’s records show that the Lemon Law Section of the Department’s Enforcement Division sent a copy of the complaint to the respondent on December 3, 2019. Additionally, on March 10, 2020, the Office of Administrative Hearings (OAH) sent a notice of hearing, with the complaint attached, to all parties. Accordingly, the Department provided the required written

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<sup>33</sup> Complainant’s Ex. 7.

notice of defect for the water leak issue (the complaint filed on November 23, 2019, only identified this one issue). On August 11, 2020, the Complainant filed a complaint amendment with OAH to add seven other issues: the leveling system did not work correctly; the outside control panel malfunctioned; the rear AC did not cool; the half bath toilet was positioned incorrectly; water damaged carpet near the door-side slideout; water damaged the kitchen light fixture; and the wine chiller was installed incorrectly.

### **3. Opportunity to Cure**

As a condition to repurchase and replacement relief, § 2301.606(c)(2) of the Lemon Law requires that the Complainant provide the Respondent, as opposed to a dealer, an opportunity to cure the alleged defects. Though an actual repair attempt clearly constitutes an opportunity to cure, the Lemon Law only requires an opportunity to cure. Under the Department's precedents, if a respondent approves repairs by a dealer after receiving written notice of the defects, then the respondent is deemed to have had an opportunity to cure. Likewise, if a respondent engages in settlement negotiations after receiving written notice of the defects, the respondent is deemed to have had an opportunity to cure.

In the present case, the respondent was provided notice of the water leak allegation as early as December 3, 2019, and again on March 10, 2020, and the respondent was copied on the complaint amendment filed on August 11, 2020, providing notice of the additional issues. The testimony shows that the Respondent approved repairs for the December 9, 2019, repair visit. Accordingly, the Respondent was provided an opportunity to repair the originally alleged water leak. The record also shows that the Respondent picked up the RV for repair the week before the hearing, so the Respondent appears to have been provided an opportunity to cure the additional issues as well.

### **III. Findings of Fact**

1. On August 25, 2018, the Complainant, purchased a new 2018 Columbus 1492 383FB from Fun Town RV, an authorized dealer of the Respondent, in Fate, Texas.
2. The vehicle's limited warranty covers the body structure for one year from the date of purchase.



3. In part, the warranty generally states that:

Forest River Inc., 55470 CR 1, P.O. Box 3030, Elkhart, Indiana 46515-3030 (Warrantor) warrants to the ORIGINAL CONSUMER PURCHASER ONLY, when purchased from an authorized Forest River Inc. dealer, 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.

4. The warranty also provides the following exclusions:

Warrantor expressly disclaims any responsibility for damage to the unit where damage is due to condensation, normal wear and tear or exposure to elements. Warrantor 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. Their respective manufacturers and suppliers may warrant some of these items. Warranty information with respect to these items is available from your dealer. The Warrantor further makes no warranty with regard to any product used for commercial purposes, as a permanent or full time residence or as a rental unit, or any product not registered and normally used in the United States or Canada. For purposes of this warranty, it shall be deemed conclusive evidence of commercial purposes if the product is licensed, titled, registered, or insured in the name of any corporation, LLC, or any other form of business or commercial entity. "Full time" for the purposes of this warranty shall mean continuous occupation of the Recreational Vehicle for a period exceeding 30 days or 18 days per month in two or more consecutive months.

5. The warranty also specifies certain conditions that void the warranty altogether:

Misuse or neglect, including failure to provide reasonable and necessary maintenance, unauthorized alteration, accident, and improper loading, use as a permanent or full time residence, commercial use or leasing of the recreational vehicle, shall discharge Warrantor from any obligation under this Warranty. Notwithstanding these or other terms discharging the warrantor, the provision of service by a Forest River authorized service center, authorization of repairs by Forest River, or any other attempt to resolve a complaint or request for warranty service shall not constitute a waiver of warrantor's rights.

6. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Invoice	Issue
9/5/2018 10/3/2018	417691A	Bedroom slide leaking (roller came off slide), toilet seat will not stay up (factory mounted too close to wall)
10/4/18 2/28/2019	417691B	Toilet seat will not stay up (factory mounted too close to wall)
6/29/2019 8/28/2019	420972	Water leaking through slide
12/9/2019 6/6/2020	422656	Slide leaking, leaking at light fixture, water damage under carpet

7. On November 8, 2018, the Complainant's attorney provided a written notice to the Respondent; however, the notice only generally stated that the "vehicle is defective" and did not identify any alleged defects or nonconformities.
8. On November 23, 2019, the Complainant filed a complaint alleging that the RV leaked when raining with the slideouts out.
9. On August 11, 2020, the Complainant file an amendment to the complaint alleging that 1) the roof leaked; 2) the leveling system did not work correctly; 3) the outside control panel malfunctioned; 4) the rear air conditioner (AC) did not cool; 5) the half bath toilet was positioned incorrectly; 6) water damaged carpet near the door-side slideout; 7) water damaged the kitchen light fixture; and 8) the wine chiller was installed incorrectly.
10. On March 10, 2020, 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.
11. The hearing in this case convened on September 1, 2020, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the September 17, 2020. Adam Mott, attorney, represented the Complainant. D.G. Majors, attorney, represented the Respondent.
12. The warranty expired on August 25, 2019.

13. The issues regarding: the leak from the roof and damage to the kitchen light fixture and the water damaged carpet first appeared on the December 9, 2019, repair order, after the warranty expired.
14. The repair orders do not address the incorrect installation of the wine chiller, which appears to be raised for the first time in the amendment filed on August 11, 2020, after the warranty expired.
15. The warranty excludes “equipment and appliances.” The leveling system, control panel, and rear AC are excluded from the warranty.
16. The current slideout leak arises from the need for silicone applied around the drip cover on both sides of the slideout. The application of such sealant is a “routine maintenance” item, which the warranty excludes.

#### **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 vehicle has a currently existing defect covered by the Respondent’s warranty. 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 vehicle has a currently existing defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

#### V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED November 18, 2020**



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