

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0011658 CAF**

ANDREW HARGER,	§	BEFORE THE OFFICE
Complainant	§	
	§	
v.	§	OF
	§	
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Andrew Harger (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence shows that the Complainant’s vehicle qualifies 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 December 15, 2020, by videoconference/teleconference, before Hearings Examiner Andrew Kang, and the record closed on January 4, 2021. The Complainant, represented himself and Nelda Harger, the Complainant’s spouse, also appeared for the Complainant. Anthony Gregory, Consumer Affairs Legal Analyst, represented the Respondent.

¹ TEX. GOV’T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² 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.”³ 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.⁴ 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.⁵

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

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁶

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.”⁷

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.⁸

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

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

⁷ *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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

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.¹⁰

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.¹¹

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.¹² 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.¹³

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;¹⁴ (2) the respondent was given an opportunity to cure the defect or

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

¹⁴ 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

nonconformity;¹⁵ 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.¹⁶

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.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁹ 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.²⁰ Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ The complaint must state “sufficient facts to enable the department and the party complained against to know the nature

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy 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.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX.

of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

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.²⁶ 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).²⁷ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁸

GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

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

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

B. Summary of Complainant's Evidence and Arguments

On September 21, 2019, the Complainant, purchased a new 2020 Ford Explorer from Planet Ford, a franchised dealer of the Respondent, in Spring, Texas. The vehicle had 50 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years and 60,000 miles, whichever occurs first. On June 5, 2020, the Complainant provided a written notice of defect to the Respondent. On May 25, 2020, the Complainant filed a complaint with the Department alleging issues with: a transmission clunking noise when shifting; hard shifts while driving; a passenger seat tear; the touchscreen freezing, making the phone inoperable; a popping noise when rolling up the driver's window; and intermittently erratic distance to empty fuel readings. In relevant part, the Complainant took the vehicle to a dealer for repair as follows:

Date	Miles	Issue
11/06/19	8	Mechanical seat recliner inspection
01/09/20- 01/27/20	7,632	Intermittent popping noise when rolling down left front window
03/04/20- 03/07/20	9,401	Transmission fluid leaking
04/13/20- 04/28/20	10,406	Popping noise when rolling down the driver front window; passenger second row seat has material snagged and ripped; intermittent abnormal transmission noise – clunking and rough clunking shift
08/16/20	17,587	transmission makes a clunking noise when shifting into other gears; hard shifting while driving; passenger side seat has a tear where seam coming apart; part on back order; radio flat screen freezes up, making phone inoperative; driver door window makes a popping noise when rolling up; gas gauge readings as far as miles left in tank are erratic
09/09/20- 10/19/20	18,610	Clunk when shifting out of park; slams into gear when accelerating from stop; popping noise when rolling driver front window up; passenger second row seat has material snagged and ripped; radio display intermittently freezing; transmission oil cooler recall

The visit on November 6, 2019, at eight miles,²⁹ to inspect the rear outboard seat recliner mechanism concerns an issue that the complaint did not include and that the Complainant did not otherwise raise in this proceeding. The Respondent's opportunity to cure occurred on August 16, 2020.

²⁹ Note: the repair invoice shows the mileage as eight though the vehicle had 50 miles at delivery.

Nelda Harger testified that she was the primary driver of the subject vehicle and that sometimes her son and husband drove the vehicle. She further stated that she drove a mix of highway and city miles. Mrs. Harger confirmed that the touchscreen did not freeze after repair and that the torn passenger side seat cover was replaced. However, she identified two new issues not included in the complaint: the passenger window will not stay up using the driver's window controls and radio static when the rear defroster is turned on.

Mrs. Harger described that the transmission clunked when shifting gears—out of park, into drive, into park, shifting to any gear—and when the transmission changed gears. The noise occurred from when she first acquired the vehicle. She testified that she probably last heard the clunk a week before the hearing.

Mrs. Harger explained that during take-offs, the transmission would jerk when changing gears, probably between 1st and 2nd gears. The Complainant last noticed a hard shift the morning of the hearing. The hard shifts appeared random. The hard shifts also seemed to happen after replacement of the transmission cooler, which leaked. Gullo Ford reset the transmission but the transmission subsequently seemed to change gears harder. Planet Ford also reset the transmission but the hard gear changes recurred in the last week (before the hearing).

Mrs. Harger stated that the driver's window would still make a popping noise when rolling up. She explained that the noise seemed to happen only the first time rolling the window down and up but not a second time. She first noticed the noise when the vehicle was first acquired and last heard it the week before the hearing.

Mrs. Harger recounted that while traveling in Florida, the distance to empty on the information display showed 200 miles with a full tank of gas, which seemed inaccurate. However, the distance to empty fluctuations appeared to go away. She did not currently notice a big difference.

Mrs. Harger testified that the passenger window would roll up and go back down and the window would not stay up using the driver's window switch. Mrs. Harger stated that the window kept coming back down after being rolled up while her son drove the vehicle and a cousin rolled up the window using the passenger's window switch. In another instance, Mrs. Harger rolled up the window and it came back down, so her niece rolled up the window using the passenger's

window switch. The issue did not reoccur after these two instances. The issue last occurred in October of 2020.

Mrs. Harger explained that after the touch screen repair, which involved replacing a part, she heard static when streaming internet radio through her phone with the rear defroster turned on, but heard no static with the defroster turned off. She first noticed the audio system static about two weeks before the hearing.

On cross-examination, Mrs. Harger testified that she did not apply the parking brake when shifting the transmission into park. Mrs. Harger did not know whether the distance to empty issue occurred once or twice.

During clarifying questions, the Complainant and Mrs. Harger confirmed that a loaner vehicle was provided when the subject vehicle was out for repair.

C. Summary of Respondent's Evidence and Arguments

Mr. Gregory recited the repair visits and noted that the Respondent's field service engineer inspected the vehicle on August 6, 2020, at 17,587 miles. The Respondent contended that the vehicle was operating as designed based on the inspection.

Asad Bashir, the Respondent's technical expert, testified that, in relation to the transmission concern, the owner's manual warns to always apply the parking brake and shift into park and failure to do so may result in injury or death. When on an incline the weight of the vehicle rests on the transmission's parking pawl, so the parking brake helps prevent rolling if the transmission becomes dislodged from park. Also shifting out of park may cause a noise. The vehicle has an electronic shifter with a selector dial with the positions, Park, Reverse, Neutral, Drive, that sends a signal to the transmission to shift for the driver. An electronic shift actuator actually does the shifting, which may make noise. Also, the vehicle has an electric parking brake that automatically sets at times. If on a steep slope, the brake automatically sets. The parking brake makes noise as noted in the owner's manual. The parking brake can be manually applied as well. Mr. Bashir noted that the November 6, 2019, service visit concerned a compliance recall to inspect the seat recliner to ensure it would retain its position if a passenger did not wear a seat belt. Mr. Bashir explained that the vehicle has a one-touch up and down system. Using the driver's switch, the windows can go all the way up or down, depending on how pressed. The one-touch function

may require resetting as described in the owner's manual: lift the switch all the way then press the switch down. If a window loses the stop position, it may make a popping noise. On March 4, 2020, at Gullo Ford, the technician found a leak at the transmission cooler and replaced the cooler. On August 6, 2020, the field service engineer (FSE) inspected the vehicle for: transmission clunking noise when shifting into other gears; hard shifting while driving; passenger side seat tear where seam coming apart (part on back order); radio flat screen freezing up, making phone inoperative; driver door window popping noise when rolling up; gas gauge readings as far as miles left in tank are erratic. The FSE could not duplicate the concerns. Mr. Bashir pointed out that the technician, during the September 9, 2020, visit, replaced the Auxiliary Protocol Interface Module (APIM) because the freezing concern remained after updating the software. The APIM connected to the touchscreen and provided video output and handled functions related to the hands-free system. The technician also replaced the transmission cooler under a customer satisfaction program to address possible leaks, noise, hard shifts, and inability to shift out of park. The technician found a crack in the transmission cooler and installed a new cooler, which was an updated part, different from the part installed in March. Mr. Bashir explained that the vehicle employs an adaptive transmission strategy, which adjusts to different driving conditions and can adjust shift intensity, shift timing. The transmission learns the driver's driving pattern over time. Having more than one driver can affect how the vehicle drives. Certain driving can command a harder shift by design. Both soft shifts and hard shifts are normal and are a part of the transmission's self-preservation. Harder shifts prevent slippage in scenarios such as: stop and go driving, hilly terrain, pulling a trailer, etc. Shifting may seem harder because of learned strategies. The learned strategies can be confirmed by resetting the transmission strategy. If the hard shift goes away but then returns, then the shifts were learned characteristics based on the driver.

On cross-examination, Mr. Bashir elaborated that the adaptive transmission can have multiple drivers, but different driving styles can contribute to undesired shifting, which is a normal characteristic and not a defect or failure. The parking brake was a different issue from the transmission strategy. The electric parking brake may automatically set, depending on how the vehicle is parked, for example, on a steep hill or other incline, and the brake will automatically release. If the incline is not steep, the parking brake will not auto set and the weight of the vehicle will rest on the parking pawl. A loud noise may be heard when shifting out of park. The noise may be intermittent based on how the vehicle is parked and the degree of incline/decline.

D. Analysis

As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every required element by a preponderance of the evidence. As delineated below, a preponderance of the evidence shows that the driver's window noise qualifies for repair relief.

1. Reasonable Repair Attempts

The Lemon Law requires reasonable repair attempts for an issue to support granting repurchase or replacement relief. In this case, the relevant presumption for reasonable repairs, as described in the discussion of applicable law, requires four or more attempts before the earlier of: the warranty expiration; or 24 months or 24,000 miles, whichever occurs first. A review of the repair history shows no more than three repair visits for the same issue. Though a reasonable number of attempts may be found based on different circumstances and fewer attempts than required for the presumption, the record in this case does not warrant varying from the presumption. Additionally, testimony shows that a loaner vehicle was provided when the subject vehicle was out for repair. Consequently, the subject vehicle cannot qualify for repurchase or replacement relief under the Lemon Law. However, repair relief under the Warranty Performance Law does not require reasonable repair attempts.

2. Warrantable Defect

As explained above, the subject vehicle does not qualify for repurchase or replacement. However, to qualify for any relief, whether repurchase/replacement or warranty repair, the law requires the vehicle to have defect covered by the Respondent's warranty (warrantable defect)³⁰ that continues to exist, even after repair.³¹ In part, the warranty generally states that:

Under your New Vehicle Limited Warranty if:

- your Ford vehicle is properly operated and maintained, and
 - was taken to a Ford dealership for a warranted repair during the warranty period,
- then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during

³⁰ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³¹ TEX. OCC. CODE § 2301.605.

the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.³²

Additionally, the warranty explains that “Ford provides the New Vehicle Limited Warranty only to remedy manufacturing defects that result in vehicle part malfunction or failure during the warranty period”³³ According to these terms, the warranty only covers defects in materials or workmanship (manufacturing defects).³⁴

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer’s specifications, and is not identical to other same model vehicles.³⁵ A manufacturing defect occurs when the vehicle varies from the manufacturer’s design standards, causing that vehicle to differ from other vehicles of the same kind.³⁶ In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer’s specifications.³⁷ 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. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the

³² Complainant’s Ex. 1, Limited One-Year Warranty.

³³ Complainant’s Ex. 11, Limited One-Year Warranty.

³⁴ 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.”).

³⁵ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff’d* in part on other grounds, *rev’d* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) (“Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer’s own specifications, and are not identical to their mass-produced siblings.”).

³⁶ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev’d on other grounds*, 135 S.W.3d 598 (Tex. 2004) (“A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.”).

³⁷ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“This distinction between ‘aberrational’ defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].”).

manufacturer's design of the vehicle, even though manufactured without any flaws.³⁸ Design defects/characteristics exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.³⁹ Accordingly, a design defect/characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.⁴⁰ 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. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

a. Clunking Noise When Shifting

The available evidence does not show that the noise when shifting is more likely to be a warranted defect as opposed to an unwarranted issue. The symptoms of the issue are consistent with noise that may normally occur when the parking pawl disengages under load. Mrs. Harger testified that she did not use the parking brake before shifting into park, thereby allowing the vehicle to move and rest its weight on the parking pawl. Though the evidence reflects that the vehicle was not used in a hilly area, a steep incline does not appear necessary to place a load on the parking pawl. Instead the evidence reflects that any condition that allows the vehicle to rest its weight on the parking pawl may lead to the clunking noise, such as slight grades sufficient to allow movement and presumably any vehicle momentum when shifting into park. Additionally, the evidence shows that vehicle employs an electric gear selector dial that signals the actuator to

³⁸ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.--Texarkana 1985), aff'd in part on other grounds, rev'd in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.").

³⁹ 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).

⁴⁰ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) ("This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].").

physically shifts the gears, which may itself produce noise. Given these considerations, the clunking noise appears as likely to be an unwarranted design characteristic as a warrantable defect.

b. Hard Shifts While Driving

A preponderance of the evidence does not show that the current hard shifting results from a manufacturing defect. Though some of the hard shifting appears attributable to defects in the transmission cooler, it was replaced at the September 9, 2020, repair visit. The existing hard shifting appears to be a design issue. The evidence shows that the vehicle may normally exhibit hard shifts, with multiple factors affecting the shift quality. The vehicle utilizes an adaptive transmission, which learns the driver's driving habits and adjusts the shifting accordingly. Furthermore, having more than one driver may affect how the transmission responds. That is, the strategy learned from multiple drivers may cause harder shifting. The evidence shows that resetting the transmission's shifting strategy can confirm whether hard shifting results from a learned strategy or an actual mechanical problem. If resetting the learned shift strategy initially eliminates hard shifting but the hard shifting ultimately returns, then the transmission learned the hard shifts. In this case, testimony shows that the hard shifts returned in the week before December 15, 2020, after Planet Ford reset the transmission. In addition to learned strategies, the record shows that the transmission will shift harder by design under certain conditions to prevent slippage. In sum, the hard shifting appears as likely to be an unwarranted design characteristic as a warranted manufacturing defect.

c. Passenger Seat Tear

The testimony shows that the seat tear was successfully repaired by replacement of the seat cover.

d. Touchscreen Freezing

The testimony shows that the problem with the touchscreen freezing was successfully repaired.

e. Driver's Window Popping Noise

The totality of the evidence indicates that the popping noise at the driver's window is more likely than not a warranted defect. The evidence shows that a window may make a popping noise if it loses its stop position, which can be addressed by resetting the power windows. However, the

record reflects that the noise occurred when first opening and closing the window but not after. This issue occurred from the beginning of ownership and occurred as late as the week before the hearing. Accordingly, this issue supports repair relief.

f. Distance to Empty Fuel Readings

A preponderance of the evidence does not show that the distance to empty issue currently exists. The evidence indicates that the issue may have last occurred in March 2020. Additionally, Mrs. Harger testified that she did not currently notice a significant variance in the readings.

3. Unpleaded Issues: Passenger Window Will Not Stay Up and Radio Static

At the hearing, the Complainant identified two new issues not included in the complaint: (1) the passenger window will not stay up using the driver's window controls and (2) the radio (audio system) produces static noise when the rear defroster is turned on. The Respondent did not object to these issues at the hearing so they may be considered here. However, the record does not show that the Complainant provided the notice required for relief under either the Lemon Law or the Warranty Performance Law. Further, the evidence reflects that the windows may normally require resetting. Additionally, the evidence reflects that the window issue last occurred in October of 2020, and does not appear to currently exist. With respect to the radio static, the Complainant's evidence indicates that the audio static issue originated from the touchscreen repair, as opposed to a defect occurring during manufacturing. Accordingly, the static issue does not appear to be warranted manufacturing defect.

III. Findings of Fact

1. On September 21, 2019, the Complainant, purchased a new 2020 Ford Explorer from Planet Ford, a franchised dealer of the Respondent, in Spring, Texas. The vehicle had 50 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first and powertrain coverage for five years or 60,000 miles, whichever occurs first.
3. The warranty provides that:
Under your New Vehicle Limited Warranty if:

- your Ford vehicle is properly operated and maintained, and
- was taken to a Ford dealership for a warranted repair during the warranty period, then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust 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

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

Date	Miles	Issue
11/06/19	8	Mechanical seat recliner inspection
01/09/20- 01/27/20	7,632	Intermittent popping noise when rolling down left front window
03/04/20- 03/07/20	9,401	Transmission fluid leaking
04/13/20- 04/28/20	10,406	Popping noise when rolling down the driver front window; passenger second row seat has material snagged and ripped; intermittent abnormal transmission noise – clunking and rough clunking shift
08/16/20	17,587	transmission makes a clunking noise when shifting into other gears; hard shifting while driving; passenger side seat has a tear where seam coming apart; part on back order; radio flat screen freezes up, making phone inoperative; driver door window makes a popping noise when rolling up; gas gauge readings as far as miles left in tank are erratic
09/09/20- 10/19/20	18,610	Clunk when shifting out of park; slams into gear when accelerating from stop; popping noise when rolling driver front window up; passenger second row seat has material snagged and ripped; radio display intermittently freezing; transmission oil cooler recall

5. The Respondent's opportunity to cure occurred on August 16, 2020.
6. On June 5, 2020, the Complainant provided a written notice of defect to the Respondent.
7. On May 25, 2020, the Complainant filed a complaint with the Department alleged issues with: a transmission clunking noise when shifting; hard shifts while driving; a passenger seat tear; the touchscreen freezing, making the phone inoperable; a popping noise when rolling up the driver's window; and intermittently erratic distance to empty fuel readings.
8. On September 14, 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.

9. The hearing in this case convened on December 15, 2020, by videoconference/teleconference, before Hearings Examiner Andrew Kang, and the record closed on January 4, 2021. The Complainant, represented himself and Nelda Harger, the Complainant's spouse, also appeared for the Complainant. Anthony Gregory, Consumer Affairs Legal Analyst, represented the Respondent.
10. The vehicle's odometer displayed 21,467 miles at the time of the hearing.
11. The vehicle's warranty was in effect at the time of the hearing.
12. At the hearing, the Complainant identified two new issues not included in the complaint: (1) the passenger window will not stay up using the driver's window controls and (2) the radio (audio system) produces static noise when the rear defroster is turned on. The Complainant did not provide notice of these issues.
13. The clunk noise when shifting may normally occur when the parking pawl disengages under load. The vehicle's parking brake was not set before shifting into park, thereby allowing the vehicle to move and rest its weight on the parking pawl.
14. The actuator that physically shifts the gears may produce noise.
15. The vehicle utilizes an adaptive transmission that learns the driver's driving habits and adapts the shifting strategy to the driver. Having more than one driver may affect how the transmission responds and may lead to rough shifts. Multiple persons have driven the subject vehicle.
16. Resetting the transmission's shifting strategy can confirm whether hard shifting results from a learned strategy or an actual mechanical problem. If resetting the learned shift strategy initially eliminates hard shifting but the hard shifting ultimately returns, then the transmission learned the hard shifts. In this case, the hard shifts returned in the week before December 15, 2020, after Planet Ford reset the transmission.
17. The transmission will shift harder by design under certain conditions to prevent slippage.
18. The passenger seat tear and touchscreen freezing were successfully resolved.

19. A window may make a popping noise if it loses its stop position, which can be addressed by resetting the power windows. In this case, the driver's window noise occurred when first opening and closing the window but not after. This issue occurred from the beginning of ownership and occurred as late as the week before the hearing.
20. The distance to empty issue has not recurred since March 2020 or earlier. The distance to empty readings do not currently exhibit a significant variance.

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 transmission clunking noise; hard shifts; passenger seat tear; touchscreen freezing; and erratic distance to empty fuel readings do not support replacement or repurchase. The Complainant did not prove that these conditions are currently existing defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not meet the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The passenger window not closing and radio static do not support replacement or repurchase. The Complainant or a person on behalf of the Complainant did not provide

sufficient notice of the alleged defect(s) to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

9. 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.
10. If the Complainant's 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).
11. The transmission clunking noise; hard shifts; passenger seat tear; touchscreen freezing; and erratic distance to empty fuel readings do not support warranty repair. The Complainant did not prove that these conditions are currently existing defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
12. The passenger window not closing and radio static do not support warranty repair. Neither the Complainant nor an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
13. The popping noise when rolling up the driver's window qualifies for warranty repair. The Complainant proved that this condition is a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
14. 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed

to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the popping noise exhibited when rolling up the driver's window. Upon this Order becoming final under Texas Government Code § 2001.144:⁴¹ (1) the Complainant 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 Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant 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 March 5, 2021



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

⁴¹ 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.