

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0013281 CAF**

**ANDREW SMITH,
Complainant**

v.

**FCA US LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Andrew Smith (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 FCA US LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that qualifies for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened telephonically on November 9, 2021, before Hearings Examiner Andrew Kang. A post-hearing conference was held on January 26, 2022, to address a fuel pump recall. The record was reopened on March 8, 2022, to admit a previously omitted exhibit. The record closed. The Complainant, represented himself. Grace Smith, the Complainant's mother also appeared for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Geoffrey Cothran, Technical Advisor, and Stephen Patrick, Area Manager, also testified for 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

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

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).

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

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.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.

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 authorizes 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *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).

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 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

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. 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.

or similar written documents).²⁷ However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."²⁸

B. Summary of Complainant's Evidence and Arguments

On November 19, 2020, the Complainant, purchased a new 2020 Dodge Ram 3500 from Don Davis Dodge Chrysler, a franchised dealer of the Respondent, in Arlington, Texas. The vehicle had 61 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic "bumper to bumper" coverage for three years or 36,000 miles on the odometer, whichever occurs first, and engine coverage for five years or 100,000 miles on the odometer, whichever occurs first.

On June 24, 2021, the Complainant filed a complaint with the Department alleging that the check engine light would come on and there was a loss of power in the vehicle; the vehicle will also jerk occasionally while driving. On or about June 24, 2021, the Department provided a written notice of the complaint to the Respondent.

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

Date	Miles	Issue
03/09/2021	32,858	Scheduled maintenance.
03/30/2021	40,960	Check engine light was on. Vehicle was losing power.
04/13/2021	47,073	Check engine light was on.
04/28/2021		Check engine light was on. Fuel injector needed service.
05/07/2021	43,595	Check engine light was on.
06/01/2021	51,762	Check engine light was on.
10/06/2021	66,587	Check engine light was on. Vehicle was losing power.

The Complainant testified that he was the primary and only driver of the vehicle. He recalled that he first noticed the check engine light approximately 7,000 miles after leaving the dealership for scheduled maintenance on March 9, 2021, at around 40,000 miles. He approximated that this occurred around the end of March 2021.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

Complainant described the issues with the vehicle as a loss of power, the check engine light, hesitation in the engine, and a kind of gurgling in the engine. He explained that the hesitation was a jerking. He further explained that the acceleration was not catching up to the amount the pedal was pressed. He identified that the most recent time this occurred was June 1, 2021. He noted that the issue occurred roughly every two weeks. He added that the vehicle was at the dealer for the loss of power issue but there was no check engine light on. The vehicle had been at the dealer since October 1, 2021.

Complainant identified that the issue occurred most often on the expressway. He stated that he drove the vehicle for about four days a week. He indicated that he drove around eight hours a day when driving and that those miles were mostly highway miles.

Complainant pointed out that his vehicle had been in for service for eight repair attempts and he was never given a loaner vehicle. He reported that the total days in the dealership was around 100 days at the time of the hearing.

Complainant clarified that the vehicle was not going into limp mode. He stated that the issues caused the vehicle to lose power but then it would return. He explained that he could always drive the vehicle to the dealership and he did not need a tow truck.

On cross-examination, Complainant explained that he replaced several filters and the fuel injector when he went to the dealership on April 28, 2021. He affirmed that he replaced every part that was recommended by the dealerships every time they recommended it. Complainant indicated that he first had the oil changed at 32,000 miles. He explained the dealer used a BG cleaner to clean his fuel injectors and the cleaner had a 15,000-mile warranty. Complainant testified that on the March 30, 2021, repair visit the dealership replaced the EGR valve. He continued by explaining that on April 13, 2021, the check engine light came back on and he took it to a dealership and the dealership flashed the computer system. He clarified that on the April 28, 2021, visit the vehicle had 43,497 miles. Complainant indicated he purchased an additional extended service contract after his original 36,000-mile warranty expired. He continued explaining that during his next service visit the dealership replaced the air filter. He stated that on the June 1, 2021, repair visit, the dealership told him that the air filter needed to be replaced.

At the post-hearing conference, Ms. Smith described that the recall notice was received after the hearing had begun. She argued that the recall notice showed the Respondent knew about

the defect for over 10 years. The Complainant recited that fuel pump failure may introduce debris into the fuel system and cause power loss and consequently, a crash. He further stated that the vehicle was still at dealer without a fix available. Also, he asserted that the prior replacement of the fuel pump indicated that the fuel pump was the problem.

C. Summary of Respondent's Evidence and Arguments

Steve Patrick testified for the respondent. Mr. Patrick stated that he was an area manager at Chrysler since 2009. Mr. Patrick personally inspected the vehicle along with a diesel technician. He explained that during the inspection, the air intake was dirty and showed signs of impact damage and debris. He established that the intake looked like it had not been maintained or had been in a very dirty environment. The technician performed a compression test and the vehicle barely passed indicating excessive wear on the engine. He also stated they pulled a fuel sample from the truck and noticed it had debris in it. He added that the fuel tank also had large amounts of debris. He opined that the vehicle was under-maintained.

On cross-examination, Mr. Patrick confirmed that he did not have technical maintenance experience and he explained that was why he brought a diesel technician with him for the inspection. He established that the vehicle, with 66,000 miles, should have had at least five air filters at a minimum. In extreme conditions, filters may need to be changed more often, for examples farmers may change air filters weekly.

Jeffery Cothran, Technical Advisor, testified for the Respondent. He established that he had been a tech advisor for FCA for five years and before that worked as a technical assistant for Cummins for two and a half years. He added that he is an ASC master technician. He explained that he directed Mr. Patrick during his inspection. He testified that the vehicle had debris inside of the air intake and fault codes for the fuel injectors. He pointed out that there was dirt and debris in the fuel. He commented that the low compression readings are often seen in vehicles with large amounts of debris.

Mr. Cothran confirmed that the air filter should be replaced every 12,000 miles. He explained that the vehicle should have had at least two air filters replaced before the first maintenance visit. He pointed out that the damage done from driving without changing the filter often causes the fault codes that the Complainant received. He noted that the fault code would

cause the engine to reduce power. He explained that the K&N filter the Complainant used was not as effective as the factory air filters.

Mr. Cothran opined that the vehicle appeared to be improperly maintained. He claimed that the contaminants in the system appear to be caused by improper changing of the air filter and the debris was likely to have caused the issues with the vehicle.

On cross-examination, Mr. Cothran stated that a properly maintained air filter would not let bugs and dirt past. He reiterated that there should have been at least two air filters replaced before the first maintenance visit. He expressed that he would have expected the dealership to replace the air filter when the Complainant first came in for maintenance. He stated that the air filter was something checked during a multipoint inspection.

Mr. Cothran explained that at 60,000 miles, low compression would be caused by contamination and not millage. He testified that the fuel that was inspected was pulled from the fuel injector line in the back of the engine so it showed all of the debris that was in the entire system.

At the post-hearing conference, upon clarification questions, Mr. Cothran explained that as far as he knew, the defect addressed by the recall was a design issue with that pump. He elaborated that the Respondent was switching to a completely different design for the pump. With respect to the recall, Mr. Cothran pointed out that a fuel pump failure occurs more immediately rather than gradually and creates a bright, straw-colored, metallic debris rather than dark, black, or rusty colored debris as found in the fuel samples in this case. On cross-examination, Mr. Cothran confirmed that the fuel pump malfunction was a design issue and required a different fuel pump. However, a repair (a redesigned fuel pump) was still under development. He also reiterated that the fuel samples were taken at the end of the system after it has gone through the entire fuel system. He pointed out that extracting fuel was a common procedure every technician did.

D. Analysis

The record does not show that the subject vehicle more likely than not has a defect covered under warranty. As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must prove every element under the Lemon Law, or Warranty Performance Law, by a preponderance. In other words, the Complainant

must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence does not show that the subject vehicle has a defect covered under warranty (warrantable defect).

Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. Rather, the Lemon Law requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty generally states that:

The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your truck when it left the manufacturing plant that is defective in material, workmanship or factory preparation. There is no list of covered parts since the only exceptions are tires and Unwired headphones. You pay nothing for these repairs. These warranty repairs or adjustments — including all parts and labor connected with them — will be made by your dealer at no charge, using new or remanufactured parts.³⁰

Regarding engine coverage, the warranty states in part: “The Cummins Diesel Engine Limited Warranty covers the cost of all parts and labor needed to repair a Cummins diesel engine component listed in section 2.2 B below that is defective in workmanship and materials.”³¹ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³² Additionally, the warranty expressly excludes “damage caused by poor or improper maintenance” and “damage or conditions caused by . . . abuse or negligence.”³³

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³⁰ Complainant's Ex. 3, Warranty Information - Diesel.

³¹ Complainant's Ex. 3, Warranty Information - Diesel.

³² 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.”).

³³ Complainant's Ex. 3, Warranty Information – Diesel.

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.³⁴ 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.³⁵ 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.³⁶ Stated another way, 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 manufacturer's design of the vehicle, even though manufactured without any flaws.³⁷ Design characteristics, including design defects, exist in the vehicle's specifications and do not arise from any error during manufacturing.³⁸ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁹ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics, dealer representations, or dealer negligence, are not

³⁴ *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.").

³⁵ *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.).

³⁶ *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].").

³⁷ *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.").

³⁸ 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).

³⁹ *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].").

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.

1. Fuel Contamination

The sum of the evidence reflects that the vehicle's performance issue does not result from a warrantable defect. Instead, debris entering the vehicle and contaminating the fuel due to insufficient air filter replacement appears more likely than not the cause of the complained of issues. Though the engine's compression still fell within minimum specifications, the loss of compression occurred abnormally fast and the evidence indicates that contamination caused this accelerated loss of compression. Moreover, the timing of the contamination is consistent with the loss of compression. In contrast, the symptoms for a fuel pump failure differ from the symptoms in this case. Further, the warranty excludes the failure to properly maintain the vehicle. Though the Complainant may have followed the dealer's maintenance recommendations, any misinformation from the dealer is not a warrantable (manufacturing) defect.

2. Fuel Pump

The fuel pump defect does not qualify for relief under the Lemon Law or Warranty Performance Law. The evidence reflects that the defect addressed in the recall is a design defect, not a manufacturing defect. In particular, the recall notice states that a remedy is not currently available but the Respondent is endeavoring to finalize the remedy, consistent with the need to design a remedy. Further, testimony shows that repairing the defect requires replacement of the current fuel pump with a re-designed fuel pump. In other words, the fuel pump defect is a design issue that requires a correction of the design. As previously explained, the warranty does not cover design issues. Consequently, if the vehicle's problems arose from the defectively designed fuel pump, the Lemon Law and Warranty Performance Law provide no relief, since the warranty only covers manufacturing defects.

III. Findings of Fact

1. On November 19, 2020, the Complainant, purchased a new 2020 Dodge Ram 3500 from Don Davis Dodge Chrysler, a franchised dealer of the Respondent, in Arlington, Texas. The vehicle had 61 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic "bumper to bumper" coverage for three years or 36,000 miles on the odometer, whichever occurs first, and engine coverage for five years or 100,000 miles on the odometer, whichever occurs first.

3. The subject vehicle's warranty generally states that:

The Basic Limited Warranty covers the cost of all parts and labor needed to repair any item on your truck when it left the manufacturing plant that is defective in material, workmanship or factory preparation. There is no list of covered parts since the only exceptions are tires and Unwired headphones. You pay nothing for these repairs. These warranty repairs or adjustments — including all parts and labor connected with them — will be made by your dealer at no charge, using new or remanufactured parts.

4. The warranty provides engine coverage as follows: "The Cummins Diesel Engine Limited Warranty covers the cost of all parts and labor needed to repair a Cummins diesel engine component listed in section 2.2 B below that is defective in workmanship and materials."
5. The warranty expressly excludes "damage caused by poor or improper maintenance" and "damage or conditions caused by . . . abuse or negligence."
6. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
03/09/2021	32,858	Scheduled maintenance.
03/30/2021	40,960	Check engine light was on. Vehicle was losing power.
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05/07/2021	43,595	Check engine light was on.
06/01/2021	51,762	Check engine light was on.
10/06/2021	66,587	Check engine light was on. Vehicle was losing power.

7. On June 24, 2021, the Complainant filed a complaint with the Department alleging that the check engine light would come on and there was a loss of power in the vehicle; the vehicle would also jerk occasionally while driving.

8. On or about June 24, 2021, the Department provided a written notice of the complaint to the Respondent.
9. On September 13, 2021, 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.
10. The hearing in this case convened telephonically on November 9, 2021, before Hearings Examiner Andrew Kang. A post-hearing conference was held on January 26, 2022, to address a fuel pump recall. The record was reopened to admit a previously omitted exhibit. The record closed on March 8, 2022. The Complainant, represented himself. Grace Smith, the Complainant's mother also appeared for the Complainant. Jan Kershaw, Early Resolution Case Manager, represented the Respondent. Geoffrey Cothran, Technical Advisor, and Stephen Patrick, Area Manager, also testified for the Respondent.
11. The vehicle's odometer displayed 66,587 miles at the time of the hearing.
12. The warranty's engine coverage was in effect at the time of the hearing. The warranty's basic coverage expired at 36,000 miles on the odometer.
13. Debris entered the vehicle and contaminated the fuel due to insufficient air filter replacement. Fuel contamination accelerated the loss of compression. The timing of the contamination is consistent with the loss of compression.
14. The symptoms of a fuel pump failure differ from the symptoms in this case. Fuel pump failure occurs more suddenly, not gradually. Fuel pump failure produces bright debris as opposed to the darker debris found in the vehicle's fuel sample.
15. The fuel pump issue is a design defect. Repairing the fuel pump defect requires replacement of the current fuel pump with a re-designed fuel pump.

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 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 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 May 10, 2022



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