

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 22-0000547 CAF**

**SARA POTTER,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Sara Potter (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 vehicle manufactured by Forest River, Inc. (Respondent). A preponderance of the evidence does not show that the subject recreational vehicle (RV) has a warrantable defect. Consequently, the Complainant's RV does not qualify 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 on February 16, 2022, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant represented herself. Warren D. Murphy, Assistant Director for Customer Service, 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

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 December 9, 2020, the Complainant, purchased a new 2021 Forest River Puma 28B from Ron Hoover, an authorized dealer of the Respondent, in Katy, Texas. The vehicle's limited warranty provided coverage for one year from the date of purchase.

On September 15, 2021, the Complainant filed a complaint with the Department alleging that the frame was bent or broken. On or about September 17, 2021, the Department provided written notice of the complaint to the Respondent.

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

Date	Issue
01/11/2021	The compartment under the dinette leaked. The screen on the rear door is popping out. Hardly any heat comes out of the vents in the living area. There was a hanging wire where the brake controller was installed.
06/10/2021	There was a tear in the trim on the slideout. The trim around the couch and table were not attached properly. The hitch bars were difficult to get on and off. The rear door was difficult to close. Bedroom AC was not blowing cold air. The exterior kitchen lock was difficult to lock. The trailer was leaning slightly. The slide out top and left piece were coming off the wall. There was a leak under the faucet.
10/18/2021	The trailer was leaning.
10/25/2021	There was bubbling in the paint.
11/15/2021	The trailer was not level.

The Complainant testified that she initially notified the dealer that her trailer was unlevel and the dealer suggested that the trailer was on unlevel ground. She stated that she sent a form to the Respondent, but she did not receive a copy.

The Complainant confirmed that the issue is that the frame on the trailer is bent or broken. She claimed that the trailer is still leaning and that she is afraid to take the trailer out. She recalled that she first noticed the trailer leaning in February of 2021 after 70 days of ownership. She

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

described that the lean was visible and the trailer leaned to the left. She explained that there were other issues present, including the door not closing and water leaking under the sink, that she did not know at the time were related to the frame issue. She added that the lean prevented the trailer from being properly hitched for towing.

She stated that she did not know where the damage was on the frame. She continued that the dealer told her the frame was broken. She stated that she had not noticed any unusual characteristics while driving with the trailer, but she rarely pulled the trailer. She claimed that the lean was still visible.

She recalled that she dropped the trailer off for repairs in June and did not get it back until November except for a five day stretch in July. She stated that she was not given a new VIN when the frame was replaced, although she was told that replacing the frame would change the VIN. She also added that she was told that it was not possible to replace the frame on an RV without completely tearing apart the vehicle and that has not happened to her trailer. She pointed out that the separation was visible on the slide out. She noted that the dealer had taken measurements of the trailer since the repair attempt but they did not give the measurements to her.

The Complainant specified that she did not occupy the trailer and only used it on occasion. She expressed a preference for repurchase of the trailer.

On cross examination, the Complainant established that she had not taken the trailer anywhere after the last repair attempt. The complainant explained that she was notified that the trailer was ready in October of 2021, but the dealer told her it was still leaning and that they would work with the Respondent to get it fixed. She reiterated that she did not believe that the frame had been replaced because the VIN was still the same and because her personal research has shown that it was almost impossible to replace the frame on an RV. The Complainant added that she believed that the fact the frame was replaced affected the value of the trailer.

C. Inspection

During the inspection at the hearing, the hearings examiner checked the level at various points inside and outside the RV using a level application. The measurements showed the following: rear bumper: 0°; the “A-frame” near the hitch: -1°; floor by rear living area floor vent: 0°; kitchen area floor vent: 0°; roof at rear edge center: 0°; roof in front of rear AC unit (about the

roof's center): 0°; next to bath floor vent: -1°; bedroom floor vent: -1°; exterior driver's side wall by slideout: -1° to 0°; exterior door side wall by slideout: 0° to 1°. Overall, the RV exhibited no more than one degree of variance from level or plumb. The ground around the RV was level (0°).

D. Summary of Respondent's Evidence and Arguments

Warren D. Murphy, Assistant Director for Customer Service, testified for the Respondent. Mr. Murphy established that he has worked for the Respondent since 2014. He explained that it was possible to replace the frame on an RV and that the Respondent had equipment to lift the entire box of the RV and allow the frame to be replaced easily. He also explained that the VIN was stamped onto the frame by the Respondent and that the new frame was stamped with the same VIN as the old frame.

He stated that he personally inspected the vehicle before it left the shop and verified that the frame components were new and verified that the new frame was level. He noted that he did not see any signs of anything leaking or not working. He also claimed checked the seals on the slide out. He pointed out that there was a spot on the slide out where the seal had pulled away but he stated that it was normal wear that needs to be touched up every six months or so and was not a result of the frame issue. He testified that he did not see anything that impaired the use, value or safety of the trailer.

E. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every required fact by a preponderance of the evidence to qualify for relief. In part, the law requires that a warranted defect continues to exist. Although the complaint alleged that the frame was bent or broken, the evidence shows that the frame was replaced and inspection of the RV at the hearing shows that the RV was virtually level/plumb on every surfaced measure. In particular, the measurements all fell within one degree of level/plumb. Accordingly, the evidence does not show a defect more likely than not exists.

III. Findings of Fact

1. On December 9, 2020, the Complainant, purchased a new 2021 Forest River Puma 28B from Ron Hoover, an authorized dealer of the Respondent, in Katy, Texas. The vehicle had 0 miles on the odometer at the time of purchase.
2. The vehicle's limited towable warranty provides coverage for one year from the date of purchase.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Issue
01/11/2021	The compartment under the dinette leaked. The screen on the rear door is popping out. Hardly any heat comes out of the vents in the living area. There was a hanging wire where the brake controller was installed.
06/10/2021	There was a tear in the trim on the slideout. The trim around the couch and table were not attached properly. The hitch bars were difficult to get on and off. The rear door was difficult to close. Bedroom AC was not blowing cold air. The exterior kitchen lock was difficult to lock. The trailer was leaning slightly. The slide out top and left piece were coming off the wall. There was a leak under the faucet.
10/18/2021	The trailer was leaning.
10/25/2021	There was bubbling in the paint.
11/15/2021	The trailer was not level.

4. On or about September 17, 2021, the Department provided a written notice of defect to the Respondent.
5. On September 15, 2021, the Complainant filed a complaint with the Department alleging that the frame is bent or broken.
6. On November 16, 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.

7. The hearing in this case convened on February 16, 2022, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant represented herself. Warren D. Murphy, Assistant Director for Customer Service, represented the Respondent.
8. The warranty expired on December 9, 2021.
9. During the inspection at the hearing, the hearings examiner checked the level at various points inside and outside the RV using a level application. The measurements showed the following: rear bumper: 0°; the “A-frame” near the hitch: -1°; floor by rear living area floor vent: 0°; kitchen area floor vent: 0°; roof at rear edge center: 0°; roof in front of rear AC unit (about the roof’s center): 0°; next to bath floor vent: -1°; bedroom floor vent: -1°; exterior driver’s side wall by slideout: -1° to 0°; exterior door-side wall by slideout: 0° to 1°. Overall, the RV exhibited no more than one degree of variance from level or plumb. The ground around the RV was level (0°).
10. The RV’s frame was replaced and stamped with the same VIN as the original frame.

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. Reimbursement of incidental expenses does not apply 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 April 20, 2022



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