

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 23-0009620 CAF**

JOHN CLYNE,
Complainant

v.

FORD MOTOR COMPANY,
Respondent

and

CABT LLC,
Intervenor

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

John Clyne (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Ford Motor Company (Ford or Respondent). A preponderance of the evidence does not show that the vehicle has a current warrantable defect or had a reasonable number of repair attempts. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

Notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on October 26, 2023, by teleconference before Hearings Examiner Lindy Hendricks with the Department's Office of Administrative Hearings (OAH). Complainant appeared and represented himself. Respondent was represented by Anthony Gregory, Consumer Affairs Legal Analyst. CABT Inc (Intervenor) did not appear. The hearing concluded and the record closed the same day.

II. APPLICABLE LAW

The Texas Lemon Law and Warranty Performance Law require a manufacturer, converter, or distributor to make repairs necessary to conform a new motor vehicle to an applicable warranty.¹ If this cannot be accomplished, the owner of the vehicle may seek relief by filing a complaint with the Department.² The case may be referred to OAH for a hearing on the merits to determine which type of relief, if any, is warranted pursuant to statute.³ The complaint filed with the Department identifies the relevant issues to address at the hearing.⁴

A. Burden of Proof

Complainant has the burden of proof to prove, by a preponderance of the evidence, all facts required for relief.⁵ That is, Complainant must present sufficient evidence to show that it is more likely than not that every required fact for relief exists.⁶ Failure to prove even one required fact results in denial of relief. Complainant is seeking repurchase of the subject vehicle.

B. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.⁷ A new vehicle may qualify for repurchase or replacement of the vehicle, along with reimbursement of incidental expenses

¹ Tex. Occ. Code § 2301.603(a).

² Tex. Occ. Code § 2301.204(a); 43 Tex. Admin. Code § 215.202.

³ Tex. Occ. Code § 2301.204(d); 43 Tex. Admin. Code § 215.202(b)(4).

⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent. *See* Tex. Gov't Code §§ 2001.051-.052, .141(b)-(c); Tex. R. Civ. P. 301.

⁵ 43 Tex. Admin. Code § 206.66(d); *see Vance v. My Apartment Steak House, Inc.*, 677 S.W. 2d 480, 482 (Tex. 1984) (“[A] civil litigant who asserts an affirmative claim of relief has the burden to persuade the finder of fact of the existence of each element of his cause of action.”).

⁶ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

⁷ Tex. Occ. Code § 2301.603

resulting from the loss of use of the vehicle due to the defect(s).⁸ A vehicle qualifies for repurchase or replacement if all the following conditions are met:

- 1) the vehicle has a defect covered by an applicable warranty (applicable 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” to repair the vehicle.⁹

The above terms are further defined by the Lemon Law statute and case law.

1. Serious Safety Hazard

The Lemon Law statute defines “serious safety hazard” as a life-threatening malfunction or non-conformity 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.¹⁰

2. Substantial Impairment of Use or Value

a. Impairment of Use

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use of the vehicle. 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.¹¹ For example, “while a vehicle with a

⁸ Tex. Occ. Code § 2301.604.

⁹ Tex. Occ. Code § 2301.604(a).

¹⁰ Tex. Occ. Code § 2301.601(4).

¹¹ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App. – Austin 2012).

non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”¹²

b. 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.”¹³ 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.”¹⁴

3. 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.¹⁵

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

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Tex. Occ. Code § 2301.605(a)(1).

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.¹⁶

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.¹⁷

The 30 days described above do not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁸

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.¹⁹ 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.²⁰

¹⁶ Tex. Occ. Code § 2301.605(a)(2).

¹⁷ Tex. Occ. Code § 2301.605(a)(3).

¹⁸ Tex. Occ. Code § 2301.605(c).

¹⁹ *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.’”).

²⁰ *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.”).

4. Other Requirements for Repurchase/Replacement

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;²¹
- (2) the respondent was given an opportunity to cure the defect or nonconformity;²² and
- (3) the Lemon Law complaint was filed within 6 months after the earliest of:
 - (a) the warranty's expiration date; or
 - (b) 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.²³

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 due to the defect.²⁴ 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

²¹ Tex. Occ. Code § 2301.606(c)(1); 43 Tex. Admin. Code § 215.204.

²² 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, 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. 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.

²³ Tex. Occ. Code § 2301.606(d).

²⁴ Tex. Occ. Code § 2301.604(a).

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.²⁵ However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."²⁶

C. Warranty Repair Relief

If repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair relief.²⁷ A vehicle may qualify for warranty repair relief if all the following conditions are met:

- 1) the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's warranty agreement applicable to the vehicle;"
- 2) the vehicle owner, or the owner's designated agent, provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and
- 3) the vehicle owner filed a complaint with the Department specifying the defect.²⁸

The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty" if during the term of the warranty, the owner reported the nonconformity to the manufacturer, converter, or distributor, or to a designated agent or franchised dealer of the manufacturer, converter, or distributor.²⁹

²⁵ 43 Tex. Admin. Code § 215.209(a).

²⁶ 43 Tex. Admin. Code § 215.208(b)(1).

²⁷ 43 Tex. Admin. Code § 215.208(e).

²⁸ Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202(b)(3).

²⁹ Tex. Occ. Code § 2301.603.

III. DISCUSSION

A. Summary of Complainant's Evidence and Arguments

On July 9, 2022, Complainant leased a new 2022 Ford F-150 vehicle from Bob Tomes Ford Inc. (Bob Tomes), a franchised dealer of Respondent, in McKinney, Texas.³⁰ At the time of the lease agreement, the lease was assigned to Intervenor.³¹ The vehicle's limited warranty provides bumper to bumper coverage for 3 years or 36,000 miles, whichever occurs first, and the vehicle's powertrain warranty provides coverage for 5 years or 60,000 miles, whichever occurs first.³² The vehicle's mileage at the time of delivery was 7 miles.³³

On December 27, 2022, Complainant was in Michigan when he experienced a problem with the vehicle. As he approached a red light, Complainant applied the brakes. Complainant testified that the vehicle did not stop. It appeared instead to overpower as if it were power braking. Complainant was basically standing on top of the brakes, but the vehicle would not stop. As a result, Complainant made impact with the Cadillac in front of him. While Complainant was still standing on the brakes, the vehicle engaged again and pushed the Cadillac into the Subaru in front of it.³⁴ According to Complainant, none of the warning systems such as brake assist or crash avoidance came on after the impact. Complainant had to shift the vehicle into neutral to turn off the engine.

Adam Coulman testified on behalf of Complainant. He was with Complainant the day of the accident and described the incident. He observed Complainant trying to stop the vehicle, but the vehicle kept lunging forward as if it was being jerked forward by an invisible chain from the front. The vehicle continued to lunge a few more times until it made contact with the vehicle in

³⁰ Complainant Exhibit 1 Lease Agreement. The lessor is included as an intervenor because the lessor, as the owner of the subject vehicle, has an interest that may be affected by this case. However, no relief is sought from the lessor and the lessor is not required to be an active participant.

³¹ Complainant Exhibit 1 at 1.

³² Complainant Exhibit 8.

³³ Complainant Exhibit 1 at 1; Exhibit 2 Odometer Disclosure.

³⁴ Complainant Exhibit 6 Crash Report.

front and kept pushing. Mr. Coulman has never seen anything like this. He did some research and found other F-150 trucks with this similar experience.

Complainant took the vehicle to the local dealership in Traverse City, Michigan, where he just had the vehicle's oil changed the day before the accident. The mileage on the vehicle the day before the accident was 9,075.³⁵ Complainant wanted to make sure the vehicle was okay to drive back to Texas. The Traverse City dealership suggested Complainant contact Ford.

When Complainant returned to Texas, he made his first repair attempt at Bob Tomes on January 13, 2023. The mileage at the time of the first inspection was approximately 13,000 miles. According to Complainant, Bob Tomes would only repair the vehicle, but they would not do an inspection or run a diagnostic. Bob Tomes advised him to contact Ford Customer Service and his insurance company. When Complainant contacted his insurance company, they told him to pay the deductible and repair the vehicle. Complainant testified that the damage is just cosmetics, as depicted in the photographs.³⁶ Although he could pay the deductible and have the repairs done, Complainant was more concerned about the safety issue. He believes the vehicle did not disengage and kept accelerating until he put it in neutral and turned off the vehicle. Complainant wanted to find out what caused this to happen and if it could happen again. Complainant contacted Ford Customer Service who told him to bring the vehicle back to the dealership for inspection. The dealership sent him back to Ford. Complainant felt he was getting the runaround and filed a Lemon Law complaint alleging the throttle stayed engaged while braking and the vehicle would not stop.³⁷ On April 24, 2023, Complainant wrote a letter to Ford, advising them of the problem he experienced with the vehicle.³⁸ After Complainant filed the Lemon Law complaint, Respondent

³⁵ Complainant Exhibit 3 Mileage from Oil Change Day Before Accident.

³⁶ Complainant Exhibit 7 Photographs.

³⁷ The Hearings Examiner took official notice of the administrative record, including the Lemon Law complaint filed on April 17, 2023.

³⁸ Complainant Exhibit 4.

sent its representatives to conduct an inspection³⁹ of the vehicle. Complainant also filed a safety complaint with the National Highway Traffic Safety Administration.⁴⁰

The mileage at the time of the hearing was 20,025 miles. When asked if the defect still exists, Complainant testified that he has not had another occurrence since the accident. However, he pointed out that the circumstances are different in Texas in that there is no snow, salt, debris, or cold weather. Complainant believes Ford is unable to replicate the issue because of weather conditions. On the day of the accident, there was snow and salt on his vehicle.⁴¹ Since the accident, Complainant turned off all vehicle assistance options such as lane assist, early crash avoidance, autopilot, and hands-free.

Complainant is seeking repurchase or replacement because he does not feel safe in the vehicle. Complainant argues that this is a safety concern for him. The vehicle did not stop until he placed it in neutral and turned off the engine. Although the codes were pulled, the vehicle was below the speed or parameter for the system to register an impact. With a low impact, the vehicle's airbags did not deploy, and the Restraint Control Module (RCM) did not register the event. Complainant believes Ford did not check the powertrain control module (PCM) despite his description of the events that appears to show the throttle and brakes were both engaged. Complainant does not feel safe in the vehicle and wants to get out of the vehicle.

B. Summary of Respondent's Evidence and Arguments

Mr. Gregory testified that under the Lemon Law statute, a reasonable number of attempts to repair must have been undertaken to conform the vehicle to the applicable express warranty. However, this appears to be an automobile accident case and it does not appear that there were any defects in the vehicle at the time of the accident. Mr. Gregory pointed out that if a defect was found and Ford was at fault, the insurance company handling the accident would have sought a subrogation claim against Ford. Respondent has not received any subrogation attempts from any insurance carrier.

³⁹ Respondent Exhibit 2.

⁴⁰ Complainant Exhibit 5 NHTSA Safety Complaint.

⁴¹ Complainant Exhibit 7.

Automotive Technical Consultant Asad Bashir testified regarding the inspection and attempts to replicate the incident. On September 5, 2023, a Ford field service engineer conducted an inspection of the vehicle. The vehicle had 18,657 miles at the time. During the inspection, the field service engineer looked at the diagnostic trouble codes and found none related to the braking system or the accelerator pedal.

Mr. Bashir testified that the vehicle has an electronic throttle system, so there is no direct connection between the accelerator pedal and the electronic throttle control system. There is an accelerator pedal position sensor that inputs to the PCM. There is also a sensor for the throttle position on the electronic throttle control actuator. Both have redundant signals. The idea behind that is if there is a failure of one of the position sensors, there is another signal that can be used to determine what is going on. If there is any problem with any of those signals, the PCM will interpret that as a fault. It will set a wrench light and may take certain action, depending on what fault is present. Mr. Bashir testified that if the throttle position is not where the PCM is commanding it to be, it can set a diagnostic trouble code. And based on the issue, it could take certain corrective actions which would either reduce the throttle performance (so one may only have 25 or 50% throttle usage) or it may force it to idle only. There would be an indicator in the form of a wrench light, and a diagnostic trouble code would be stored on the vehicle which would have a snapshot of the event if there was a throttle control system fault.

Mr. Bashir testified that the field service engineer checked for any diagnostic trouble codes indicating fault with the accelerator pedal, the throttle control system, or the braking system and found none. He also conducted a multipoint inspection of the braking system. The tires were checked for fluid leaks and no items required service. They did a visual inspection of the driver's floormat area looking for any issues with either the floor mat not being secured or if there was any obstruction or anything that could entrap the accelerator pedal or brake pedals. They noted the floormat was properly secured, and there was nothing else in the footwell area. They conducted a test drive, drove the vehicle for miles, and performed multiple stops. They found that the vehicle stopped without hesitation or malfunctions. They also moved the shifter through all the different

gear ranges to make sure the shifter indicated the correct gear during each shift and found no abnormality.

Regarding the question of attempts to duplicate the issue with the functionality of the driver assist systems, Mr. Bashir testified that would require repairing any outstanding issues with the vehicle, which was outside the scope of what the field service engineer could do during the inspection. The same applied to driving conditions. Although the incident occurred in snow, the field service engineer could not duplicate those conditions.

As for the RCM, it has a cluster of sensors that measure G-forces. It is essentially an accelerometer that allows the vehicle to measure what the vehicle is doing. If the vehicle is sliding or has an impact, that data is interpreted by the RCM and can also be stored as a snapshot as well. Therefore, if there is an impact severe enough to trigger an event, the RCM has an event data recorder which records data from various modules at the time of the event as a snapshot. The RCM was pulled from Complainant's vehicle and sent to Design and Analysis engineering to pull any data from the RCM. It was determined that there was no recorded event. In other words, there was not a strong enough impact for any data to be captured and pulled from the RCM. There was no snapshot of the event from the module.

Mr. Bashir stated that, although the damage to the front bumper appears fairly substantial, it was probably not within the threshold of what would trigger the event data recorder to record. Since the RCM did not register any event, the field service engineer also inspected the PCM to see if it sensed any issue with the throttle control system. If there was a fault or a position error, even if just by two or three degrees difference in throttle angle of the throttle plate, the electronic throttle control system would detect that as a fault. It would store some type of powertrain diagnostic trouble code. While there is no way to go back to the date, if there was a wrench light set, there should be a freeze frame of that data in the PCM at the time of fault, and the code would be stored. According to Mr. Bashir, even if there was a temporary condition where the throttle got stuck momentarily and it triggered as a fault, then it would be saved and stored in the PCM until someone went in and physically cleared it. The PCM did not have any stored codes. If the battery was disconnected for a long period of time, it is a possibility that the PCM could lose the information.

However, Complainant confirmed that none of these scenarios occurred, and that the day before the accident there was no warning or issues with the vehicle.

As for the pre-collision assist system, it was designed to work at speeds above 3 miles per hour and may activate if it senses an impending impact. Mr. Bashir testified that the manual discloses conditions where the system may not work due to inclement weather. If there is rain, sleet, or snow, then the system may fail to operate *with* reduced function or may fail *or* operate with reduced function during cold and severe weather conditions. Snow, ice, rain, and fog can adversely affect the system. Owners must keep the front camera and radar free of snow and ice. One of the disclaimers of the system states that failure to take care may result in the loss of control of the vehicle and cause serious personal injury or death. Typically, the system will provide some kind of warning if it can detect an impending collision. There are three levels of indications provided by the vehicle. If the vehicle is rapidly approaching another vehicle or object, the first thing it would do would be to alert by flashing warning indicators which are visible on the front windshield. There is also an audible warning tone that sounds. The second part of the pre-collision is that it pre-charges the brakes. The system will use the anti-lock brake system to build brake pressure in anticipation that the driver is going to apply the brakes. At that point when the driver presses the brake pedal, it will provide maximum braking even if the driver just lightly touched the brake pedal. The third step is that it can provide automatic emergency braking which is designed to help reduce the severity of an impact or avoid the impact altogether. Mr. Bashir cautioned that the system is not a replacement for driving, as it is a driving assist.

The accelerator pedal has a feature called brake-over⁴² accelerator. It is designed so that in the event the accelerator pedal was stuck or entrapped, the steady, firm application of the brake pedal signals to the vehicle that both the brake pedal and the throttle are being pressed simultaneously, and it will override the accelerator pedal. It allows the driver to brake the vehicle without the engine providing any torque. It returns the throttle to idle, essentially reducing engine power, and allows the driver to stop the vehicle. This process happens seamlessly, and there is no warning indicator. Nothing would appear on the instrument cluster to inform the driver that this is

⁴² Respondent referred to the brake override as the 'brake-over.' For ease of understanding, this decision will use the term employed by the parties at the hearing.

taking place. If both the gas and brake pedals are pressed simultaneously, the PCM will record two parameters BOA (brake-over accelerator) and POSS (possible) when both pedals are pressed simultaneously. BOA Action is recorded if it took corrective action. That information is stored in the PCM, not the RCM. In mode data, there is counter that shows simultaneous pedal application. Mr. Bashir testified that the field service engineer inspected the powertrain module but cannot state whether he inspected for that particular data because it was not documented.

When asked what would have caused engine to lunge forward, Mr. Bashir testified that it was hard to determine, having not experienced it. Engines are controlled electronically and will command what it feels is necessary for the engine to run. For instance, when warming up the vehicle, the engine may idle higher than normal. He is not sure if the cold weather had some type of impact on the idle where it raised the idle more, which may have felt to Complainant like the accelerator was being applied. He surmised that this was a possibility, particularly given the absence of any throttle position error codes. As stated earlier, a difference of two or three degrees from where the engine commands the throttle position to be would fault, and the engine would respond in a noticeable fashion such as reducing power, not accelerating, or forced at idle. Without those conditions being present and without diagnostic codes, it leads him to believe that the vehicle was accelerating because it was being commanded to accelerate, but he cannot say why that is.

Assuming Complainant was standing on the brakes and his foot was not on the accelerator, but something was holding the throttle open, such as an obstruction, the engine control module or the PCM would realize the throttle position was not at the correct throttle angle. It would set a fault, and the vehicle would take action to disable power through different ways. The vehicle will regulate the engine power either through the throttle position or fuel delivery and timing to the engine so it can manage the torque to overcome a situation and take corrective action. This will cause a code to be stored in the PCM.

Mr. Bashir testified that if there was a defect, then there would be a diagnostic trouble code stored to show a problem with the throttle system, braking system, or accelerator pedal. In this case, no diagnostic trouble codes were found. If the field service engineer checked the counter data in the brake-over accelerator system, it was not documented, and Mr. Bashir was not present for

that inspection. Finally, although there were software updates, there were no updates to the PCM or RCM that would have overwritten any stored data.

Respondent argues that after two inspections of the vehicle, no defects were found, and the vehicle does not qualify for repurchase.

C. Summary of Inspections

Date	Repair Order	Issue
1/13/2023	None provided	
5/24/2023- 6/16/2023	370179 ⁴³	RCM was removed and shipped for examination. Rental vehicle was provided. No trouble codes found.
9/5/2023 ⁴⁴		RCM downloaded by Design Analysis Engineering but there is no recorded event because there was not a strong enough impact. No abnormal operation noted during the inspection.
9/14/2023- 9/15/2023		Installed new wiper motor per recall 22S71.

D. Analysis

The Lemon Law (and Warranty Performance Law) 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.⁴⁵ Complainant requested repurchase or replacement of the subject vehicle. In order to qualify for repurchase or replacement, the defect must currently exist. The evidence shows that in December 2022, Complainant was involved in an accident when the vehicle failed to stop with the application of the brakes. The vehicle was not shown to have another issue with the brakes since the accident. Although different weather conditions in Texas and turning off certain driver assistance systems could affect the reoccurrence of the issue, it could not be shown that a

⁴³ No repair order was offered into evidence.

⁴⁴ Respondent Exhibit 1.

⁴⁵ Tex. Occ. Code §§ 2301.603(A), 2301.604(A); Tex. Occ. Code § 2301.204.

warrantable defect currently exists. Respondent was unable to replicate the issue or find any diagnostic trouble codes related to the incident. Additionally, the vehicle must have a reasonable number of repair attempts. Generally, the statutory presumption for reasonable repairs requires four repair attempts in the first 24,000 miles or 24 months, whichever occurs first, after delivery of the vehicle. The repair history only shows two repair attempts (if counting the removal of the RCM and Respondent's inspection). Because the evidence was insufficient to show that a warrantable defect continues to exist after a reasonable number of repair attempts, the Hearings Examiner finds the vehicle does not qualify for repurchase or replacement relief.

Respondent's warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles, whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 60,000 miles. On the date of the hearing, the vehicle's mileage was 20,025, and it remains covered under warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

IV. FINDINGS OF FACT

1. On July 9, 2022, John Clyne (Complainant) leased a new 2022 Ford F-150 from Bob Tomes Ford Inc., a franchised dealer of Ford Motor Company (Respondent), in McKinney, Texas. The lease was assigned to CABT LLC (Intervenor).
2. The vehicle's limited warranty provides bumper to bumper coverage for 3 years or 36,000 miles, whichever occurs first, and the vehicle's powertrain warranty provides coverage for 5 years or 60,000 miles, whichever occurs first.
3. The vehicle's mileage at the time of delivery was 7 miles.
4. On December 27, 2022, Complainant was involved in an accident when the vehicle failed to stop with the application of the brakes.
5. Respondent inspected the vehicle on May 24, 2023, and September 9, 2023, and could not replicate the issue or find any diagnostic trouble codes related to the December incident.
6. The repair history shows two repair attempts (if counting the removal of the RCM and Respondent's inspection).
7. Respondent was unable to replicate the issue or find any diagnostic trouble codes related to the incident.

8. The vehicle did not have another issue with the brakes since the accident.
9. A warrantable defect does not currently exist.
10. On April 17, 2023, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging the throttle stayed engaged while braking and the vehicle would not stop.
11. On September 28, 2023, the Department's Office of Administrative Hearings (OAH) issued a Notice of Hearing directed to all parties, providing not less than 10 days' notice of the hearing date and advising the parties of their rights under the applicable rules and statutes.
12. The Notice of Hearing advised the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the Department.
13. On October 26, 2023, a hearing on the merits convened by teleconference before OAH Hearings Examiner Lindy Hendricks. Complainant appeared and represented himself. Respondent appeared through its representative Greg Anthony. Intervenor did not appear. The hearing concluded and the record closed the same day.

V. CONCLUSIONS OF LAW

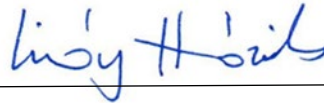
1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.204, 601-.613.
2. A Hearings Examiner with the Department's OAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant filed a sufficient complaint with the Department. 43 Tex. Admin. Code § 215.202.
4. Proper and timely notice of the hearing was provided. Tex. Gov't Code ch. 2001.051-.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this proceeding. 43 Tex. Admin. Code § 206.66(d).
6. Complainant, or a person on behalf of Complainant, or the Department provided sufficient notice of the alleged defect(s) to Respondent. Tex. Occ. Code § 2301.606(c)(1).

7. Complainant's vehicle does not qualify for replacement or repurchase as a warrantable defect does not currently exist. Tex. Occ. Code §§ 2301.606(d).
8. If Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with Respondent's warranty. Tex. Occ. Code §§ 2301.204,.603; 43 Tex. Admin. Code § 215.208(e).
9. Respondent remains responsible for addressing and repairing or correcting any defects that are covered by Respondent's warranty. Tex. Occ. Code § 2301.603.

VI. 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 December 5, 2023.



LINDY HENDRICKS
Hearings Examiner
Office of Administrative Hearings
Texas Department of Motor Vehicles