TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0013484 CAF

RICHARD MCGEE,	**§**	**BEFORE THE OFFICE**
Complainant	**§**	
	§	
v.	**§**	**OF**
	§	
FOREST RIVER, INC.,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Richard McGee (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 recreational vehicle (RV) manufactured by Forest River, Inc., (Respondent). A preponderance of the evidence shows that the Complainant's RV qualifies for warranty repair only.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 10, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Warren Murphy, Assistant Director, Parts, Service, and Warranty, represented the Respondent.

[1] TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.[2] A vehicle qualifies for repurchase or replacement if the respondent cannot "conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts."[3] In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a "reasonable number of attempts" at repair.[4] In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines "serious safety hazard" as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person's ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.[5]

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers "whether a defect or nonconformity hampers the intended normal operation of the vehicle." For instance, "while a

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[2] TEX. OCC. CODE § 2301.603.

[3] TEX. OCC. CODE § 2301.604(a).

[4] TEX. OCC. CODE § 2301.604(a).

[5] TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard "does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value." Instead, under this standard, "factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle."[7]

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.[8]

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

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

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[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

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[9] TEX. OCC. CODE § 2301.605(a)(2).

[10] TEX. OCC. CODE § 2301.605(a)(3).

[11] TEX. OCC. CODE § 2301.605(c).

[12] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite 'reasonable number of attempts.'").

[13] *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include "those occasions when the fault for failing to repair the vehicle rests with the dealership." Conversely, "those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.").

[14] 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

nonconformity;[15] and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.[16]

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle" and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.[17] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[18]

3. Burden of Proof

The law places the burden of proof on the Complainant.[19] The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.[20] Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

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[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

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[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 May 27, 2019, the Complainant, purchased a new 2019 Sierra 372LOK from RV World, LLC d/b/a Gander RV Sales (Gander), an authorized dealer of the Respondent, in Spring, Texas. However, the Complainant actually took delivery of the RV on June 1, 2019.[29] The vehicle's limited warranty provides coverage for one year. On July 13, 2020, the Complainant filed a complaint with the Department alleging that: the bunk room had no ventilation or AC (air conditioning) flowing; the recliners fell forward; and the dealer never repaired the items listed on the "We Owe" statement.[30] On July 15, 2020, the Department sent a copy of the complaint to the Respondent. Heather McGee testified that the bent grill was replaced but not secured with a pin. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Issue
June 17, 2019	Carpet stain, gas grill missing stop pins, slide out bottom plastic cracked, slicker loose, entry door bent, exterior kitchen chemical burn, valance frayed, stain on bunk room couch/bed wall, bunk room couch broken, loft rail loose, scratches on counter, door to bunk room chipped, AC in bunk room has no air flow, recliners do not fit or work correctly - front legs fall off the slide out floor, bathroom fan rubbing, stain on dinette cushion, floor torn
October 12, 2019	Carpet stain, gas grill missing stop pins, slide out bottom plastic cracked, slicker loose, entry door bent, exterior kitchen chemical burn, valance frayed, stain on bunk room couch/bed wall, bunk room couch broken, loft rail loose, scratches on counter, door to bunk room chipped, AC in bunk room has no air flow, recliners do not fit or work correctly - front legs fall off the slide out floor, bathroom fan rubbing, stain on dinette cushion, floor torn

[27] 43 TEX. ADMIN. CODE § 215.209(a).

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

[29] The sale of a motor vehicle occurs upon payment to the dealer and delivery of the vehicle to the buyer. TEX. BUS. & COM. CODE §§ 2.106 and 2.401.

[30] Complainant's Ex. 4, "We Owe" (Carpet - master room, rear gas grill bent, D.S. main S/O bottom plastic cracked, adjust closet (water) door exterior, bedroom S/O slicker loose rearside, entry (main) door bent lower portion, switch plate in exterior kitchen chemical burn, recliner S/O valance above frayed, rear couch/bed has stain on bodywall, recliner in play room broken, play room door chipped, carpet in bedroom dirty, stain on dinette cushion right side, loft rail loose from wall, bathroom fan rubbing, scratches on counter below T.V., (screw tore through lanolin [sic] floor living room high traffic area.)).

The Complainant testified that that the bunk room had not air flowing through at all. He first noticed this on the first trip after purchase and last noticed the issue on their last trip. Mrs. McGee added that the issue occurred the week before the hearing. Regarding the recliners, the Complainant explained that the (slide out) floor was smaller than the recliner, so the recliner would fall when sitting up and when trying to sit. He first noticed this issue on the first trip and last noticed this issue the week before the hearing. He also confirmed that the stain on the master bedroom carpet still existed. The Complainant explained the bent gas grill was replaced but not secured with a pin. With respect to the cracked plastic on the slide out, the Complainant was not sure what part was cracked and did not know if it was repaired. The Complainant believed the "closet (water) door exterior" referred to outside compartment door latches that would not stay closed, which has not been fixed. He first noticed the latch issue during the walkthrough at purchase. Concerning the loose slide out slicker, the Complainant explained that a piece of seal around the slide out would stick out, which he first noticed during the initial walkthrough and last noticed the week before the hearing. The Complainant testified that during the walkthrough, he noticed the bottom-right of the entry door was bent looking from the outside. The damage still existed at the time of the hearing. In relation to the chemical burn at the exterior kitchen, the Complainant elaborated that the paneling had a white residue, a faded white. He noticed this during the walkthrough and it had not been fixed. He believed the residue may have been a chemical used for cleaning. The Complainant explained that the frayed valance had stitching coming loose. The dealer never addressed the issue so they trimmed the valance themselves. The Complainant testified that the dealer repaired the stain on the rear couch/bed, and the recliner in the playroom. The Complainant testified the playroom door still had chipped wood on two spots on the edge, which he noticed at the walk through. The Complainant clarified that the carpet in the bedroom was not dirty but stained. The stain could not be removed but the carpet was not replaced. The Complainant stated that they removed the stain on the dinette cushion themselves. The Complainant explained that the loose loft rail did not match up with the wall, leaving a gap with the screws visible. The gap continues to exist. The Complainant stated that the bathroom exhaust fan rubbed on the housing because it was mounted unevenly, which was never corrected. The Complainant testified that, before the walkthrough, they were notified a screw from a ceiling fan had fallen between the slide and floor, tearing the linoleum and something continues to tear at the

floor. The Complainant described the scratches on the counter top as narrow and a few inches long. He estimated the counter had four scratches, which were never fixed. Mrs. McGee explained that Gander never provided a work order (for the first repair visit) because the dealer repaired nothing. She stated that the RV was out of service for repair about 65 days the first time and 45 days the second time. On cross-examination, Mrs. McGee confirmed that they provided written notice in July when filing the complaint. Additionally, Gander called the Respondent. Mrs. McGee represented that she subsequently called the Respondent directly. She could not recall whom she spoke to but she called the hotline. When they still had not received the RV's plates by September, they contacted a lawyer. Then Tanya Raley was assigned to their case. Mrs. McGee explained that after calling the hotline, she received a call from Good Sam. She stated that a manager at Gander provided the hotline number. Mrs. McGee pointed out that the only communication she had with Mr. Murphy was an e-mail two days before the prehearing conference.[31] She explained that she did not respond to the e-mail because she did not know her rights. She noted that the parties could have probably worked something out (for a repair attempt) if the Respondent had reached out earlier.

C. Summary of Respondent's Evidence and Arguments

Mr. Murphy testified that the Respondent first received notice of this case in July when the Complainant filed his Lemon Law complaint. A review of the Respondent's records and discussions with the Respondent's representatives did not reveal any record (of prior contact). The correspondence from Evan Whitis (the Department's case advisor) was the only communication/notice the Respondent received. Upon clarifying questions, when asked if the Respondent attempted to contact the Complainant after the receiving notice from the Department, Mr. Murphy indicated that because the correspondence included any attorney letter, they were unsure if the Complainant had representation. Mr. Murphy could not recall when he tried to contact the Complainant after the notice of hearing in October (2020), but he had a warranty representative from the Respondent reach out to the Complainant, but she did not get a response. On cross-examination, Mr. Murphy testified that in July (2020), he sent an e-mail (to Mr. Whitis regarding possible repair) but did not know what became of this e-mail. He did ask a warranty representative

[31] The prehearing conference was held on January 7, 2021. Order No. 2, Memorializing Prehearing Conference (Jan. 7, 2021).

to reach out to the McGees (as previously mentioned). The Respondent did not have a record of the dates and times when the representative tried to contact the McGees.

D. Analysis

As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every Lemon Law element by a preponderance of the evidence, including an opportunity to cure by the Respondent. In this case, a preponderance of the evidence does not show that the subject RV qualifies for repurchase or replacement but the RV still qualifies for warranty repair.

1. Written Notice

As outlined in the discussion of applicable law, repurchase or replacement relief cannot be ordered unless "the owner, a person on behalf of the owner, or the department has provided written notice of the alleged defect or nonconformity to the manufacturer, converter, or distributor."[32] The record shows that the Complainant never provided written notice of the alleged defects to the Respondent. Though Mrs. McGee believed she called the Respondent, the evidence reflects that she actually contacted Good Sam, a third-party warranty provider. The record also includes e-mails between Mrs. McGee and Tanya Raley, the dealer's general manager, as well as an e-mail from Allan Wilson with Good Sam, but no correspondence with the Respondent. Nevertheless, the record shows that the Department sent a written notice to the Respondent after filing of the complaint, thereby satisfying the written notice requirement.[33]

2. Opportunity to Cure

A vehicle cannot qualify for repurchase or replacement unless "the manufacturer, converter, or distributor has been given an opportunity to cure the alleged defect or nonconformity." [34] Though an actual repair attempt clearly satisfies the opportunity to cure requirement, an opportunity to cure only requires extending a valid opportunity to cure. The Lemon Law does not define "opportunity to cure" but the Department's precedents provide some guidance. For instance, a respondent waives its opportunity to repair by replying to a written notice

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[32] TEX. OCC. CODE § 2301.606(c) (emphasis added).

[33] Mr. Whitis sent the letter on July 15, 2020, as shown in the Department's records.

[34] TEX. OCC. CODE § 2301.606(c).

of defect with a settlement offer instead of arranging a repair attempt.[35] In the present case, the Complainant never provided any written notice of the alleged defects to the Respondent. Instead, the Department provided the necessary notice of defect. However, the record contains no evidence of any settlement offers in response to the Department's notice. Also, 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.[36] In this case, the Respondent first received written notice of the defects on or after July 15, 2020, but the last repair visit occurred in October of 2019, so the repair attempt by the dealer did not constitute an opportunity to cure by the Respondent. The evidence does show that Mr. Murphy responded to the Department's notice of defects with an e-mail to the case advisor on July 17, 2020, addressing the possibility of repairing the RV locally. However, the record contains no evidence of what occurred with the Respondent's proposal. The evidence also shows that a warranty representative of the Respondent attempted, unsuccessfully, to contact the McGees. And finally, the evidence shows that on January 5, 2021, two days before the prehearing conference, Mr. Murphy sent an e-mail regarding an opportunity to cure, but Mrs. McGee chose not to respond because of the proximity of the prehearing conference. However, Order No. 1, issued on October 29, 2020, specifies that:

> If the Respondent has not had an opportunity to cure, the Respondent and Complainant may arrange a repair attempt for a date before the hearing. If the Respondent does not arrange for such repair, the Respondent will be deemed to have waived its opportunity to cure. If the Complainant does not extend a valid opportunity to cure, the subject vehicle will not qualify for repurchase or replacement (emphasis added).[37]

As explained in Order No. 1, the parties may arrange a repair attempt before the hearing. In this case, the Respondent most recently attempted to arrange a repair attempt in the January 5, 2021, e-mail, ostensibly allowing for repair before the February 10, 2021, hearing. Further, paragraph IX of Order No. 1 expressly provides a procedure for postponing the hearing, so the parties could have even accommodated a repair extending past the hearing date. The evidence shows that the Respondent attempted to arrange for repair at least three times after receiving written notice of the

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[35] 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).

[36] 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).

[37] Order No. 1, Notice of Hearing and Procedures (Oct. 29, 2020) (emphasis added).

alleged defects. On the other hand, though the Complainant may have intended to contact the Respondent, a preponderance of the evidence does not show that the Complainant extended a valid opportunity to repair to the Complainant. As a result, the Lemon Law prohibits granting repurchase or replacement relief and the subject RV can only qualify for warranty repair relief.[38]

3. Warrantable Defects

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.[39] Moreover, the Lemon Law only requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject RV's warranty states as follows:

> WARRANTY COVERAGE SUMMARY OF WARRANTY: Forest River Inc., 55470 CR 1, P.O. Box 3030, Elkhart, Indiana 46515-3030 (Warrantor) warrants to the ORIGINAL CONSUMER PURCHASER ONLY, when purchased from an authorized Forest River Inc. dealer, for a period of one (1) year from the date of purchase (Warranty Period), that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor.
>
> EXCLUSIONS FROM THIS WARRANTY: Warrantor expressly disclaims any responsibility for damage to the unit where damage is due to condensation, normal wear and tear or exposure to elements. Warrantor makes no warranty with regard to, but not limited to, the chassis including without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment. Their respective manufacturers and suppliers may warrant some of these items. Warranty information with respect to these items is available from your dealer.[40]

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects) attributable to the Respondent.[41] Further, the warranty expressly excludes certain items from coverage.

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[38] The Complainant introduced evidence of various issues not included in the Complaint. However, the Warranty Performance Law requires the issues to be specified in the complaint. Consequently, any issues not in the complaint will not be considered.

[39] TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

[40] Complainant's Ex. 1, Fifth Wheel Owner's Manual, Warranty.

[41] 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

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.[42] 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.[43] Accordingly, a design defect/characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.[44] Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or improper dealer repairs (which occur after manufacturing), are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

a. Still Existing Warrantable Defects

A preponderance of the evidence shows that the following warrantable defects continue to exist: no bunk room ventilation; exterior closet door failing to latch; loose bedroom slide out slicker; bent entry door; chemical burn/residue at exterior kitchen; loose loft rail; and bathroom fan rubbing.

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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.").

[42] *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.").

[43] *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.").

[44] *Harduvel v. General 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].").

b. Unwarranted Items

A preponderance of the evidence does not show that the warranty covers the items below. The concern about the recliner falling forward due to its size is not covered by warranty. The size of the recliner appears to be a design issue, i.e., the choice of the particular recliner underlies the problem with tipping over, as opposed to a flaw in the construction of the RV itself. The warranty appears to exclude the linoleum tear from coverage. The record reflects that a screw from a ceiling fan fell out and became wedged under a slide, tearing the floor. However, the warranty expressly excludes "equipment and appliances" such as the ceiling fan. Consequently, any damage due to a defect in the fan is not warrantable. Similarly, the "equipment and appliances" exclusion would appear to apply to the gas grill as well. Additionally, the evidence shows that bent gas grill was replaced by the dealer, but not secured with pins; however, the warranty only covers manufacturing defects attributable to the Respondent and not any nonconformities resulting from a dealer's repairs. The warranty specifies that it only covers substantial defects in workmanship or material attributable. However, a preponderance of the evidence does not show that the following issues are substantial: master bedroom carpet stain; chipped play room door; scratches on counter below TV. Instead, these issues appear to be cosmetic.

c. Successfully Repaired Items

The evidence shows that the dealer or the Complainant successfully repaired the following items: frayed valance; rear couch/bed stain; broken play room recliner; and dinette cushion stain.

III. Findings of Fact

1. On May 27, 2019, the Complainant, purchased a new 2019 Sierra 372LOK from RV World, LLC d/b/a Gander RV Sales, an authorized dealer of the Respondent, in Spring, Texas. The Complainant actually took delivery of the RV on June 1, 2019.

2. The vehicle's limited warranty provides coverage for one year.

3. In part, the subject RV's warranty states as follows:

> WARRANTY COVERAGE SUMMARY OF WARRANTY: Forest River Inc., 55470 CR 1, P.O. Box 3030, Elkhart, Indiana 46515-3030 (Warrantor) warrants to the ORIGINAL CONSUMER PURCHASER ONLY, when purchased from an authorized Forest River Inc. dealer, for a period of one (1) year from the date of purchase (Warranty Period), that the body structure

> of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor.
>
> EXCLUSIONS FROM THIS WARRANTY: Warrantor expressly disclaims any responsibility for damage to the unit where damage is due to condensation, normal wear and tear or exposure to elements. Warrantor makes no warranty with regard to, but not limited to, the chassis including without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment. Their respective manufacturers and suppliers may warrant some of these items. Warranty information with respect to these items is available from your dealer.

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

Date	Issue
June 17, 2019	Carpet stain, gas grill missing stop pins, slide out bottom plastic cracked, slicker loose, entry door bent, exterior kitchen chemical burn, valance frayed, stain on bunk room couch/bed wall, bunk room couch broken, loft rail loose, scratches on counter, door to bunk room chipped, AC in bunk room has no air flow, recliners do not fit or work correctly - front legs fall off the slide out floor, bathroom fan rubbing, stain on dinette cushion, floor torn
October 12, 2019	Carpet stain, gas grill missing stop pins, slide out bottom plastic cracked, slicker loose, entry door bent, exterior kitchen chemical burn, valance frayed, stain on bunk room couch/bed wall, bunk room couch broken, loft rail loose, scratches on counter, door to bunk room chipped, AC in bunk room has no air flow, recliners do not fit or work correctly - front legs fall off the slide out floor, bathroom fan rubbing, stain on dinette cushion, floor torn

5. On July 13, 2020, the Complainant filed a complaint with the Department alleging that: the bunk room had no ventilation or AC (air conditioning) flowing; the recliners fell forward; and the dealer never repaired the items listed on the "We Owe" statement.

6. On July 15, 2020, the Department sent a copy of the complaint to the Respondent.

7. On October 29, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.

8. The hearing in this case convened on February 19, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Warren Murphy, Assistant Director, Parts, Service, and Warranty, represented the Respondent.

9. The warranty expired on June 1, 2020.

10. The following substantial defects in workmanship or materials continue to exist: no bunk room ventilation; exterior closet door failing to latch; loose bedroom slide out slicker; bent entry door; chemical burn/residue at exterior kitchen; loose loft rail; and bathroom fan rubbing.

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 Respondent did not have an opportunity to cure the alleged defects. This Order may not require repurchase or replacement of the vehicle without an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c)(2).

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. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

9. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defects. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).

10. 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.

11. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the following issues: no bunk room ventilation; exterior closet door failing to latch; loose bedroom slide out slicker; bent entry door; chemical burn/residue at exterior kitchen; loose loft rail; and bathroom fan rubbing. Upon this Order becoming final under Texas Government Code § 2001.144:[45] (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and

[45] This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order

(2) the Respondent shall complete the repair of the vehicle within **60 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED April 14, 2021

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

overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.