

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0001794 CAF**

GINA and KRISTINE AMBROSINO, Complainants	§ § § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
FOREST RIVER, INC., Respondents		

DECISION AND ORDER

Gina and Kristine Ambrosino (Complainants) 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 their recreational vehicle (RV) manufactured by Forest River, Inc., (Respondent). A preponderance of the evidence does not show that the subject vehicle has a currently existing warrantable defect. Consequently, the Complainants' vehicle 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 March 9, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on March 25, 2021. Katherine Flores, attorney, represented the Complainants. Michael Locke, Warranty Relations Manager, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

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

a. Serious Safety Hazard

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

b. Substantial Impairment of Use or Value

i. Impairment of Use

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

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

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

c. Reasonable Number of Repair Attempts

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

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

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

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

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

⁷ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

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

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

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.¹⁰

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹¹

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹² Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹³

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹⁴ (2) the respondent was given an opportunity to cure the defect or

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

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

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

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

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

2. Warranty Repair Relief

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

3. Burden of Proof

The law places the burden of proof on the Complainants.¹⁹ The Complainants must prove all facts required for relief by a preponderance of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.²⁰ Accordingly, the Complainants 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 allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2. 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 Complainants 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 Complainants' Evidence and Arguments

On July 25, 2020, the Complainants, purchased a new 2020 Coachmen Mirada from Motor Home Specialist, an authorized dealer of the Respondent, in Alvarado, Texas. The vehicle had 1,138 miles on the odometer at the time of purchase. The vehicle's limited warranty provides coverage for one year or 12,000 miles, whichever occurs first. On September 29, 2020, the Complainants provided a written notice of defect to the Respondent. On October 6, 2020, the Complainants filed a complaint with the Department alleging the following nonconformities:

[M]issing screw going down the liner of the slide by entry door to the left, Rip in rain guard-awning, Driver side fan rotates and starts detaching when in transit, outside storage bays under kitchen are [scraping] and making contact on the bottom of the frame causing damage, Jacks vibrate rapidly and rough, Steering wheel is not in alignment, Dinette table will not stay locked in place, cables do not connect in living room, Entry door bent at bottom left corner, Entry screen door bottom disconnected and broken on the left top corner, Black tank [valve] detached and order in RV, Master bedroom A/C makes a roaring noise, Shower leak on left corner and Kitchen Slide -when you retract the slide the slide goes in but the bottom left end stays out 4 feet. Motor Home Specialist has had our RV since July 30th working on mainly just the slide. The service tech tried taking out the slide and realign, they claim the columns for slimrack system are too close, Roller slides have been repositioned, rollers were shimmed and reinstalled to correct the weight distribution.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

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

Date	Miles	Issue
August 1, 2020		Missing screw going down liner, rip in rain guard-awning, driver side fan rotates and starts detaching, the kitchen slide goes in but the bottom left rear end stays out four feet, storage bays under kitchen scraping, steering wheel not in alignment, dinette table will not stay locked in place, cables do not connect in living room, entry door bent, screen door disconnected and broken, blank tank valve detached, AC roaring noise
September 29, 2020	2,692	Rip in awning, fan swivels, storage bays scraping, alignment, dinette table will not stay locked in place, entry door not closing, AC roaring noise, black tank odor, slimrack slide

Gina Ambrosino testified that the Complainants decided to purchase an RV about June 2020. In preparation, the Complainants canceled building a home, sold Kristine Ambrosino's vehicle, and moved into a smaller home. They purchased the subject RV from Motor Home Specialist on Saturday, July 25th (2020). The Complainants spent the night at the dealership on the recommendation of the dealer to learn about and familiarize themselves with the RV. The Complainants first noticed issues when the technician closed the RV to take to storage. On the following Monday, the slide was out and the Complainants took the RV to the dealer on Friday. The RV could not be repaired quickly, so the Complainants had to stay at the dealership and the RV has remained there. Upon clarification questions, Gina Ambrosino answered that the Complainants had not inspected the RV after repairs.

Kristine Ambrosino testified that she was the main contact for the dealer's representative, Abby. On Saturday, the dealer tried another quick fix but the RV had to stay. The dealer contacted the Respondent for a resolution but the Respondent did not have an answer. The Complainants put together a list of work order issues with Abby. Kristine Ambrosino contacted Tim Buss at the Respondent because the dealer did not do so. Mr. Buss indicated that the RV could be taken to Indiana for repair. The Complainants did not want to drive the RV with the slide out. The Respondent offered to transport the RV, but not for another six weeks. The Complainants did not receive notice that the RV had been picked up. The Respondent notified the Complainants that the RV was ready to be picked up. However, the Complainants did not pick up the RV. Kristine

Ambrosino explained that she had lost trust in the Respondent and did not want to drive the RV not knowing whether it was fixed or not.

C. Summary of Respondent's Evidence and Arguments

Mr. Locke concurred with the Complainants' timeline of events. The Respondent's first contact regarding the subject RV occurred when the Complainants contacted the Respondent, which was why the Respondent offered to bring the RV to the factory. Mr. Locke noted that he COVID-19 pandemic slowed operations, but the RV was fixed and safe. He added that the Respondent would transport the RV to the Complainants at the Respondent's cost. On cross-examination, Mr. Locke testified that they became directly involved with the RV about September 29, 2020, and the RV was ready on January 13, 2021. Upon clarification questions, Mr. Locke confirmed that repairs were complete

D. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law (or Warranty Performance Law for repair relief) by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. To qualify for Lemon Law relief, a complainant must prove that "a nonconformity still exists that substantially impairs the vehicle's use or market value."²⁹ In other words, a preponderance of the evidence must show that an alleged defect continues to exist at the time of the hearing. In the present case, the evidence shows that the RV has had a variety of nonconformities in the past. However, the record contains no evidence that a nonconformity still exists after the Respondent repaired the RV. In particular, Gina Ambrosino testified that the Complainants have not inspected the RV after repair and Kristine Ambrosino testified that she did not know whether the RV was actually fixed. However, the Lemon Law requires the Complainants to affirmatively prove the current existence of a defect. Accordingly, a preponderance of the evidence does not show that a nonconformity still exists as required for Lemon Law relief.

²⁹ TEX. OCC. CODE § 2301.605(a)(3) (emphasis added).

III. Findings of Fact

1. On July 25, 2020, the Complainants, purchased a new 2020 Coachmen Mirada from Motor Home Specialist, an authorized dealer of the Respondent, in Alvarado, Texas. The vehicle had 1,138 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides coverage for one year or 12,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
August 1, 2020		Missing screw going down liner, rip in rain guard-awning, driver side fan rotates and starts detaching, the kitchen slide goes in but the bottom left rear end stays out four feet, storage bays under kitchen scraping, steering wheel not in alignment, dinette table will not stay locked in place, cables do not connect in living room, entry door bent, screen door disconnected and broken, black tank valve detached, AC roaring noise
September 29, 2020	2,692	Rip in awning, fan swivels, storage bays scraping, alignment, dinette table will not stay locked in place, entry door not closing, AC roaring noise, black tank odor, slimrack slide

4. On September 29, 2020, the Complainants provided a written notice of defect to the Respondent.
5. On October 6, 2020, the Complainants filed a complaint with the Department alleging the following nonconformities:

[M]issing screw going down the liner of the slide by entry door to the left, Rip in rain guard-awning, Driver side fan rotates and starts detaching when in transit, outside storage bays under kitchen are [scraping] and making contact on the bottom of the frame causing damage, Jacks vibrate rapidly and rough, Steering wheel is not in alignment, Dinette table will not stay locked in place, cables do not connect in living room, Entry door bent at bottom left corner, Entry screen door bottom disconnected and broken on the left top corner, Black tank [valve] detached and order in RV, Master bedroom A/C makes a roaring noise, Shower leak on left corner and Kitchen Slide -when you retract the slide the slide goes in but the bottom left end stays out 4 feet. Motor Home Specialist has had our RV since July 30th working on mainly just the slide. The service tech tried taking out the slide and realign, they claim the columns for slimrack system are too close, Roller slides have been repositioned, rollers were shimmed and reinstalled to correct the weight distribution.

6. On December 23, 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.
7. The hearing in this case convened on March 9, 2021, by videoconference, before Hearings Examiner Andrew Kang, and the record closed on March 25, 2021. Katherine Flores, attorney, represented the Complainants. Michael Locke, Warranty Relations Manager, represented the Respondent.
8. The vehicle's odometer displayed 2,713 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The Complainants did not pick up the RV after repair by the Respondent.
11. The Complainants did not inspect the RV after repair by the Respondent.
12. The Complainants have not confirmed that any nonconformities still exist.

IV. Conclusions of Law

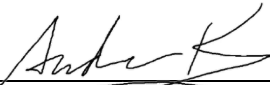
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not prove that the vehicle continues to have a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Complainants do not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. The Complainants' vehicle does not qualify for warranty repair. The Complainants 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED April 7, 2021



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