

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0007556 CAF**

**ROBERT CARRUTHERS,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Robert Carruthers (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the shows that the subject vehicle has warrantable defects that qualify for 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 August 4, 2021, in Victoria, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Anthony Gregory, Consumer Affairs Legal Analyst, 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 Complainant.¹⁹ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.²⁰ Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent authorizes a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ The complaint must state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁶ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

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

B. Summary of Complainant’s Evidence and Arguments

On January 21, 2020, the Complainant, purchased a new 2019 Ford F150 Supercrew from Alexander Ford, a franchised dealer of the Respondent, in Kenedy, Texas. The vehicle had 123 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever occurs first. The Complainant also purchased an Extended Warranty that provides coverage for seven (7) years or 150,000 miles, whichever occurs first.

On or about March 11, 2021, the Department provided a written notice of defect to the Respondent. On March 4, 2021, the Complainant filed a complaint with the Department alleging that the glovebox had issues, the transmission was clunking (driveline noise), the rear window had a leak (rear window seal gap), and the bed illumination light was melting (cargo lamp damage).

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

Date	Miles	Issue
01/23/2020	149	Glove box was difficult to close.
02/20/2020	2,212	Headlights are too dim. Vibrates at 70 MPH
04/20/2020	4,578	Glove box was difficult to close. Had to add more oil at only 4,000 miles. Abnormal clunking noise when shifting into reverse.
08/06/2020	10,111	Vibrates at 70 MPH. Clunking noise when shifting into reverse.
01/26/2021		Rear sliding glass window leak/gasket seal problem. Rear cab mounted bed illumination lights melting. Clunking in transmission or rear end.
02/01/2021		Rear sliding glass window leak/gasket seal problem. Rear cab mounted bed illumination lights melting. Clunking in transmission or rear end.

The glove box had been successfully repaired before the date of the hearing. At the time of the hearing, the only issues that remained from the complaint were the issues with the transmission

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

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

clunking, the rear window leaking, and the bed light melting. The parties arranged for an inspection by the Respondent's field service engineer (FSE) on April 21, 2021; however, the Complainant left with the vehicle before the Respondent's FSE arrived.

The Complainant recounted that he had taken the car in for service five times for the clunking sound, three times for the rear window seal, and three times for the bed light. He added that the truck never stayed overnight at the dealership for repairs. He indicated that he brought the truck in for seven total service visits. He could not remember the exact date that he took possession of the truck, but he noted that he took the truck in for the glovebox issues on January 23, 2020.

The Complainant described the clunking issue as an occasional clunk in the rear end when shifting into reverse. He claimed that the issue was hard to reproduce but was worse when the bed was weighed down. He also claimed that he could reproduce the clunking sound by standing outside of the truck and shaking it. He reported that if he put the truck in neutral and moved the drive shaft manually he could hear the clunking sound. He stated that the noise occurred more on a slightly bumpy driveway at very slow speeds. He continued that the noise occurred more often in reverse and a little bit of weight seemed to make the noise occur more. He described that the one-inch bump into and out of his garage could make the truck clunk.

The Complainant confirmed that he was the only driver of the vehicle. He also confirmed that the car was his daily driver. He elaborated that he would hear the clunk around every 10 to 15 days. He added that he would hear a less loud clunk every time he pulled in and out of his garage. He further clarified that the sound could be heard on rough roads as while driving four to five mph. He testified that the U-joints seemed to be normal and that he did not notice any slack in the drive train that he would consider unusual. The Complainant stated that he last heard the clunking the morning of the hearing. He mentioned that there were never any repairs attempted to fix the clunking sounds.

Next, the Complainant described the issues with the cargo lamp. He described the lamp as burnt and melted. He expressed a concern that water could get in or that it might catch fire if it overheated. He reported that he first noticed a problem with the lamp shortly before January 26, 2021. He confirmed that the damage was still visible.

Then, the Complainant described the issue with the rear sliding glass window. He explained that the gasket on the window did not fit correctly. He approximated that the issue was discovered

within four to five days from when it was taken into the shop. He affirmed that the issue was still visible and he added tape on the window to prevent it from leaking. He believed that the rear window had actually leaked because he found moisture on the carpet once. He noted that the tape on the window prevented him from opening the window.

The Complainant added that he contacted the Respondent for repairs and they required him to sign a waiver of liability before they would conduct any repairs. He testified that he called the Respondent and they set up a meeting at the dealership on April 21, 2021, to repair the truck, however they did not provide a loaner car as agreed so he was forced to take the truck back. He also pointed out that he took the truck to the Mac Haik dealership and they also refused to work on the truck.

On cross-examination, the Complainant admitted that the Respondent offered to have a field service engineer look at the vehicle. The Complainant elaborated that he was busy on the date the field service engineer could come to look at the truck, April 21, 2021. The Complainant explained that he expressed a need for a loaner vehicle for the day and the Respondent agreed. Mr. Gregory clarified that he did not promise a loaner vehicle but instead stated that he would advise the dealer of the need for a loaner vehicle. The Complainant stated that he attempted to wait for the engineer to arrive for the inspection but since there was no loaner vehicle available, he had to take the truck without it being inspected.

The Complainant did not remember the mileage on the vehicle when he last took it for service. He expressed that three repair visits occurred after the last documented repair visit. He testified that the visits were on January 26, 2021, February 1, 2021, and April 21, 2021

C. Inspection

The vehicle's odometer displayed 29,561 miles at the time of the hearing. During the inspection, reflectors in the cargo lamp were visibly warped and cracked. The rear window seal was loose with a visible gap between the glass and the seal on the upper half of the left side. During the test drive, the vehicle made a slight clicking noise. The Complainant stated that he had not had an opportunity to drive similar vehicles to compare the sound.

D. Summary of Respondent's Evidence and Arguments

Anthony Gregory, Consumer Affairs Legal Analyst for the Respondent, testified about the service history of the vehicle. He cited the January 2020, visit for the glove box, the February 2020, visit for dim headlights and vibration, the April 2020, visit for the glove box, and the August 2020, visit for vibration. He further cited the April 21, 2021, visit that was scheduled but did not take place. He claimed that the vehicle did not meet the presumption under the Texas Lemon Law.

On cross-examination, Mr. Gregory elaborated that the April 21, 2021, inspection did not take place because the vehicle was not present when the FSE arrived. Mr. Gregory confirmed that the FSE did show up for the inspection that day.

E. Analysis

As explained below, the subject vehicle qualifies for repair of the rear window seal and cargo lamp issues but does not qualify for repurchase or replacement.

1. Respondent's Opportunity to Repair

As specified in the discussion of applicable law, the Lemon Law prohibits granting repurchase or replacement relief unless the respondent had an opportunity to cure the alleged defects. In this case, the parties arranged for an inspection by the Respondent's FSE on April 21, 2020, at Weber Motor Company. However, due to an apparent misunderstanding, the Complainant left the dealership before the FSE arrived and the opportunity to cure did not occur.

2. Reasonable Repair Attempts

With respect to rear window seal gap and the cargo lamp damage, the record shows that the vehicle did not have sufficient repair attempts as required for repurchase or replacement. The relevant presumption for reasonable repair attempts requires four repair attempts within the first 24 months or 24,000 miles. In contrast the evidence only shows two repair attempts for the rear window seal and the cargo lamp.²⁹ Accordingly, neither the rear window seal nor the cargo lamp can support repurchase or replacement relief.

²⁹ The Complainant appears to assert that the Respondent's scheduled inspection on April 21, 2021, constitutes a third repair attempt. However, this visit does not qualify as a repair attempt under the Department's precedents as outlined in the discussion of applicable law.

3. Warrantable Defect

To qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)³⁰ that continues to exist, even after repair.³¹ In part, the warranty generally states that:

Under your New Vehicle Limited Warranty if:

- your Ford vehicle is properly operated and maintained, and
- was taken to a Ford dealership for a warranted repair during the warranty period,

then authorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship.³²

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³³

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.³⁴ A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.³⁵ In contrast, design issues

³⁰ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³¹ TEX. OCC. CODE § 2301.605.

³² Complainant's Ex. 1, 2019 Model Year Ford Warranty Guide.

³³ Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

³⁴ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd* in part on other grounds, *rev'd* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

³⁵ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) ("A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.).

result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁶ Design characteristics, including design defects, exist in the vehicle's specifications, before the vehicle is even manufactured, and do not arise from any error during manufacturing.³⁷ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁸ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics, 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.

a. Driveline Noise

The evidence indicates that the driveline noise is not a warrantable defect but rather a normal design characteristic. At the August 6, 2020, repair visit, the dealership technician compared the subject vehicle to like vehicles and found the noise to be a normal design characteristic of the vehicle. As explained above, design characteristics shared by vehicles of the same design are not warranted defects that can support any relief.

b. Rear Window Seal

The inspection at the hearing showed that the vehicles rear window seal had a significant gap running along the upper left side. Although this nonconformity cannot qualify for repurchase/replacement relief as explained previously, the rear window seal nevertheless qualifies for warranty repair relief as outlined in the discussion of applicable law.

³⁶ *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.").

³⁷ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

³⁸ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) ("This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].").

c. Cargo Lamp

The inspection at the hearing revealed that the reflectors within the cargo lamp had melted and/or cracked. Although this nonconformity cannot qualify for repurchase/replacement relief as explained previously, the cargo lamp nevertheless qualifies for warranty repair relief as outlined in the discussion of applicable law.

III. Findings of Fact

1. On January 21, 2020, the Complainant, purchased a new 2019 Ford F150 Supercrew from Alexander Ford, a franchised dealer of the Respondent, in Kenedy, Texas. The vehicle had 123 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for 3 years or 36,000 miles, whichever occurs first. The Complainant also purchased an extended warranty that provides coverage for 7 years or 150,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
01/23/2020	149	Glove box was difficult to close.
02/20/2020	2,212	Headlights are too dim. Vibrates at 70 MPH
04/20/2020	4,578	Glove box was difficult to close. Had to add more oil at only 4,000 miles. Abnormal clunking noise when shifting into reverse.
08/06/2020	10,111	Vibrates at 70 MPH. Clunking noise when shifting into reverse.
01/26/2021		Rear sliding glass window leak/gasket seal problem. Rear cab mounted bed illumination lights melting. Clunking in transmission or rear end.
02/01/2021		Rear sliding glass window leak/gasket seal problem. Rear cab mounted bed illumination lights melting. Clunking in transmission or rear end.

4. The Respondent did not have an opportunity to cure. The parties arranged for an inspection by the Respondent's field service engineer (FSE) on April 21, 2020, at Weber Motor Company. However, due to an apparent misunderstanding, the Complainant left the dealership before the FSE arrived and the opportunity to cure did not occur.

5. The vehicle only had two repair attempts for the rear window seal and the cargo lamp. The Complainant appears to assert that the inspection scheduled for April 21, 2021, constitutes a third repair attempt. However, this visit does not qualify as a repair attempt.
6. On or about March 11, 2021, the Department provided a written notice of defect to the Respondent.
7. On March 4, 2021, the Complainant filed a complaint with the Department alleging that the glovebox had issues, the transmission was clunking, the rear window had a leak, and the bed illumination light was melting.
8. On April 30, 2021, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.
9. The hearing in this case convened on August 4, 2021, in Victoria, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Anthony Gregory, Consumer Affairs Legal Analyst, represented the Respondent.
10. The vehicle's odometer displayed 29,561 miles at the time of the hearing.
11. The vehicle's warranty was in effect at the time of the hearing.
12. During the inspection at the hearing, reflectors in the cargo lamp were visibly warped and cracked. The rear window seal was loose with a visible gap between the glass and the seal on the upper half of the left side. During the test drive, the vehicle made a slight clicking noise. The Complainant stated that he had not had an opportunity to drive similar vehicles to compare the sound.
13. At the August 6, 2020, repair visit, the dealership technician compared the subject vehicle to like vehicles and found the noise to be a normal design characteristic of the vehicle.

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 driveline noise issue does not support replacement or repurchase. The Complainant did not prove that the driveline noise was a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The rear window seal and cargo lamp issues do not support replacement or repurchase. The vehicle did not have a reasonable number of repair attempts for these issues. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. The Complainant's vehicle does not qualify for replacement or repurchase. The Respondent did not have an opportunity to cure the alleged defect(s). 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).
9. 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.
10. 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).

11. The driveline noise issue does not support warranty repair. The Complainant did not prove that the driveline noise was a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
12. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has defects (the rear window seal gap and the cracked/warped cargo lamp) 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 defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
13. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. 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 repair the rear window seal gap and the cracked/warped cargo lamp. Upon this Order becoming final under Texas Government Code § 2001.144:³⁹ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 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).

³⁹ 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 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.

SIGNED September 28, 2021

A handwritten signature in black ink, appearing to read "Andrew Kang", written over a horizontal line.

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