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OPINION COMMITTEE

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January 8, 2018

Office of the Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711
Via Email: Opinion.Committee@texasattorneygeneral.gov

RQ-0206-KP

Re: Whether a motor vehicle manufacturer or distributor that performs warranty repair services under a manufacturer's warranty is in violation of Section 2301.476(c)(3), Occupations Code.

Dear General Paxton:

Pursuant to Section 402.042(b) (2), Texas Government Code, I write to request the written opinion of your office on the statutory interpretation question described below.

Background

Under Texas law, a motor vehicle manufacturer or distributor may not "act in the capacity of a motor vehicle dealer." TEX. OCC. CODE §2301.476(c)(3). A "motor vehicle" is defined under Texas law to include "an engine, transmission, or rear axle, regardless of whether attached to a vehicle chassis, manufactured for installation in a vehicle that has:

- (i) the transport of a person or persons, or property, on a public highway as its primary purpose; and
 - (ii) a gross vehicle weight rating of more than 16,000 pounds."
- TEX. OCC. CODE §2301.002(23)(C).

Cummins Southern Plains, LLC is a Texas licensed distributor of diesel engines for heavy trucks, and thus, Cummins and the diesel engines that it distributes for the purposes stated in §2301.002(23) of the Occupations Code are subject to the Texas motor vehicle licensing statute at issue. Cummins Southern Plains, LLC is also a subsidiary of the manufacturer of the diesel engines, Cummins, Inc., and that parent company provides a warranty for the engines they manufacture.

A complaint was filed with the Texas Department of Motor Vehicles (the department) on May 5, 2016 by the Texas Automobile Dealers Association (TADA) against Cummins Southern Plains, LLC. In its complaint TADA alleged that Cummins Southern Plains, LLC, a licensed distributor, was "acting in the capacity of a dealer" by performing warranty work at their eight Texas locations and was thus in violation of §2301.046. In response to the complaint, the

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department opened an investigation and determined that Cummins Southern Plains, LLC was indeed performing warranty repairs.

Question Presented

Is a manufacturer or distributor that performs warranty work or warranty repair services under a manufacturer's or distributor's warranty "acting in the capacity of a motor vehicle dealer" and thus, in violation of the Act?

Discussion

While the phrase "acting in the capacity of a motor vehicle dealer" is not defined in Occupations Code Chapter 2301, one federal appellate court has addressed the issue in two separate opinions. See, *Ford Motor Co. v. TXDOT*, 264 F.3D 493 (5TH Cir., 2001) ("Ford"); and *International Truck and Engine Corp. v. Bray*, 372 F. 3D 717(5TH Cir., 2004) ("Internat'l Truck"). In both cases, the manufacturers challenged the validity of the Texas statute prohibiting manufacturers and distributors of motor vehicles from acting as dealers by retailing motor vehicles within Texas. *Id.*

The Court, in both decisions, first considered the phrase "acting in the capacity of a dealer" by reviewing the statute, and then determining what types of activities are performed by a motor vehicle dealers. *Ford* at 721-722; *Internat'l Truck* at 721-722. The Court found that those activities typically performed by motor vehicle dealers involved the "buying, selling and exchanging" of motor vehicles. *Ford* at 510; *Internat'l Truck* at 722.

In response to both manufacturer's arguments that the Texas statute was unconstitutional, the Court held that the Texas statute prohibiting manufacturers of automobiles from "retailing" automobiles in Texas bore a reasonable relationship to the State's legitimate purpose in controlling the "retail automobile market." See, *Ford* at 503.¹

Therefore, the Court in *Ford Motor Co.* and *International Truck and Engine* concluded that manufacturers and distributors are prohibited from *retailing* automobiles in Texas for to do so would constitute "acting in the capacity of dealer" in violation of Section 2301.476(c)(3).

The question now before the staff of the department in the form of a complaint² is whether a manufacturer or distributor is "acting in the capacity of a dealer" and thus, in violation of §2301.476(c) (3), Texas Occupations Code, if a manufacturer or distributor performs warranty work or warranty repair services on a motor vehicle necessary under a manufacturer's or distributor's warranty. This specific question as it relates to Section 2301.476(c)(3) does not

¹ Texas' purpose for passing §2301.476(c)(3)'s predecessor was to "prevent vertically integrated companies from taking advantage of their superior market position, and to prevent frauds, unfair practices, discrimination, impositions, and other abuses of its citizens'--[all of which] are legitimate state interests." *Id.*

² Complaint of Texas Automobile Dealers Association, May 5, 2016 (attached as exhibit A).

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appear to have been addressed by any Texas court. Further, the Texas motor vehicle community has long taken the position that warranty work is the exclusive purview of licensed franchised dealers.

Under Texas law, a “person may not perform or offer to perform repair services under a franchise and a motor vehicle manufacturer’s warranty unless the person holds a license issued under this chapter.” TEX. OCC. CODE § 2301.251(a)(2). In addition to dealers, manufacturers and distributors are licensees under this section of statute as well. The Act does allow a manufacturer or distributor to contract with someone other than a franchised dealer to perform warranty repair services on a motor vehicle. TEX. OCC. CODE § 2301.251(c). Cummins Southern Plains is a Texas-licensed distributor of diesel engines and is thereby subject to Section 2301.260(a)(3), which requires that it note in its application for licensure “the persons in this state who will be responsible for compliance with the warranty covering the motor vehicles to be sold.”

The terms “warranty repair services,” “repair services,” and “warranty work” are found throughout the text of Chapter 2301, but only the term “warranty work” is defined. The statute defines “warranty work” to mean “parts, labor, and any other expense incurred by a *franchised dealer* in complying with the terms of a manufacturer’s or distributor’s warranty.” TEX. OCC. CODE § 2301.002(37) (emphasis added). The utilization of multiple terms around the word “warranty” in Chapter 2301 is the source of confusion within the department regarding the scope of the Code’s coverage of warranty repairs.

There is an obligation imposed on manufacturers and distributors by the statute to ensure that motor vehicle warranties are satisfied. OCC. CODE CHAPTER 2301, SUBCHAPTER M, *WARRANTIES: RIGHTS OF VEHICLE OWNERS* [aka “the Lemon Law”]. It is worth noting that the term “warranty repair services” is used in Subchapter M, and not “warranty work.”

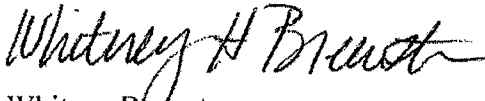
Additionally, Subchapter M specifically contemplates that a number of entities may perform “repairs” under a manufacturer’s or distributor’s warranty, including a manufacturer, converter, distributor or an authorized agent, or a franchised dealer of a manufacturer, converter, or distributor. TEX. OCC. CODE § 2301.605(a) (1). Moreover, Section 2301.603(a), Occupations Code, provides: “a manufacturer, converter, or distributor *shall make repairs* necessary to conform a new motor vehicle to an applicable manufacturer’s, converter’s, or distributor’s express warranty.” (Emphasis added.)

The source of the department’s confusion on this question arises from this statutory dichotomy – on the one hand Occupations Code Chapter 2301 lays out numerous sections where dealers’ “warranty work” rights are protected (primarily in Subchapters A- “General Provisions”, F – “License Requirements”, and I – “Warranties: Reimbursement of Dealer”), whereas on the other hand manufacturers are obligated by the same statute to ensure that their warranty is honored (Subchapter M).

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Thank you in advance for your consideration of this matter. Please do not hesitate to contact me at whitney.brewster@txdmv.gov or 512-465-3001 if you need additional information regarding this request.

Sincerely,



Whitney Brewster
Executive Director

Cc: Raymond Palacios, Chairman, Texas Department of Motor Vehicles
Karen Phillips, General Counsel, Texas Automobile Dealers Association
Jennifer Bush, President – Gulf Region, Cummins Southern Plains, LLC