

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 14-0193 CAF**

**STEPHEN G. POWELL,  
Complainant**

v.

**BMW OF NORTH AMERICA, LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Stephen G. Powell (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for an alleged defect in his 2012 BMW 550I. Complainant asserts that the vehicle's radio will intermittently default to a station that is not saved as a preset on his radio and also the navigation screen will default to the main menu from Complainant's setting. BMW of North America, LLC (Respondent) argued that there was no problem with the vehicle, and that if there is a problem, it may have been caused by an after-market item plugged in to the electrical/computer system. The hearings examiner concludes that the vehicle does not have an existing warrantable defect, and Complainant is not eligible for relief.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and closed on August 6, 2014 in Austin, Texas before Hearings Examiner Edward Sandoval. The Complainant represented himself at the hearing. Respondent was represented by Technical Support Engineer, David Kaiser. Also present at the hearing for Respondent was William Ghiatis, After Sales Area Manager.

**II. DISCUSSION**

**A. Applicable Law**

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.<sup>1</sup> Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the

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<sup>1</sup> Tex. Occ. Code § 2301.604(a)(1) and (2).

manufacturer.<sup>2</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>3</sup>

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.<sup>4</sup>

### **B. Complainant's Evidence and Arguments**

Complainant purchased a 2012 BMW 550I from BMW of Austin on September 25, 2012, with mileage of 462 at the time of delivery.<sup>5</sup> On the date of hearing the vehicle's mileage was 12,797. At this time, Respondent's warranty coverage for the vehicle remains in place, with "bumper to bumper" coverage for 48 months or 50,000 miles, whichever comes first.<sup>6</sup>

Complainant testified that he first noticed a problem with his new vehicle in April of 2013, approximately seven months after he purchased it. On May 8, 2013, the Complainant took the vehicle to the dealership (BMW of Austin) because it was not idling correctly. In addition, Complainant raised the issue that there might be software issues with the vehicle's navigation system. He informed the dealership's service adviser, Richard Ehlert, that he would ordinarily leave the navigation map open on the left side of the screen and the music information on the right side. Frequently, the screen would default to the main menu when he turned the vehicle off and then restarted it later. In addition, the navigation system would not clear itself after Complainant reached a designated destination. The navigation system would act as if Complainant was still driving to the location and display the navigation arrows at the bottom of the screen.<sup>7</sup> At this time, the vehicle's mileage was 5,239. The vehicle was kept at the dealership for six days and Complainant was provided with a loaner vehicle during this period of time. The

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<sup>2</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>3</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>4</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

<sup>5</sup> Complainant Ex. 1, Motor Vehicle Buyer's Order.

<sup>6</sup> Complainant Ex. 8, New Vehicle Limited Warranty.

<sup>7</sup> Complainant Ex. 3, Emails between Complainant and Richard Ehlert.

vehicle was inspected, no fault codes were found and it was determined that the vehicle was operating as designed. There was no indication that the issue with the navigation system was addressed.

On November 11, 2013, Complainant took the vehicle back to the dealership because he began experiencing problems with the car radio. On some occasions after turning off the vehicle, the radio would default to 87.7 on the FM band. This was not a preset station and, as a result, when Complainant reentered the vehicle on those occasions and started it, there would be static on the radio. Complainant voiced his concerns to the service advisor at the dealership when he took the vehicle for repairs on this occasion. The mileage at the time was 8,666. The vehicle was inspected by a technician at the dealership who was unable to replicate Complainant's concerns. Complainant was advised at the time that frequent short distance driving did not allow the vehicle's battery to sufficiently charge and could "result in the loss of radio stations and personal profiles."<sup>8</sup> Complainant was provided with a loaner vehicle during this visit. The vehicle was returned to Complainant on November 18, 2013. No repairs were done to the radio or navigation system, since the technician was unable to reproduce the problem.

On December 11, 2013, Complainant again returned to the dealership because he was still experiencing the same problem with the radio in the vehicle. The technician was able to replicate the concern during this visit. The computer software was updated; however, the problem still persisted. As a result, the technician replaced the Infotainment Computer (CIC) during this visit. The mileage on the vehicle on December 11, 2013, was 9,031. The vehicle was returned to Complainant on December 17, 2013. During this period of time, Complainant was provided with a rental vehicle.

In January of 2014, Complainant once more returned the vehicle to the dealership because the radio and navigation screen issues were occurring again. The vehicle was left with the dealer on January 23, 2014 and was returned to Complainant on January 28, 2014. The mileage on the vehicle on January 23, 2014 was 9,779. The technician indicated on the repair order that he could not replicate the issue on this visit. No fault codes could be found at the time.<sup>9</sup> However, on January 28, 2014, Mr. Ehlert indicated in an email to Complainant that the technician was able to verify the concern with Respondent's national staff and that engineers with BMWNA were working on a solution for the software. Mr. Ehlert also indicated in the email that there was no resolution date anticipated.<sup>10</sup> Complainant indicated that the problems with the navigation system were still occurring after this last visit to the dealership.

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<sup>8</sup> Complainant Ex. 4, Repair Order dated November 11, 2013.

<sup>9</sup> Complainant Ex. 6, Repair Order dated January 23, 2014.

<sup>10</sup> Complainant Ex. 3, Emails between Complainant and Richard Ehlert.

<sup>11</sup> Respondent Ex. 1, Service Information Bulletin, SI B65 11 12.

<sup>12</sup> Complainant Ex. 6, Repair Order dated January 23, 2014.

During cross examination, Complainant indicated that when the radio defaulted to 87.7 on the FM band, that he did not lose his preset radio stations. Complainant could still access the preset radio stations on I-Drive or by using the roll bar on the steering wheel.

While providing rebuttal testimony, Complainant indicated that the vehicle had lost value due to the problems with the navigation system and the radio. He attempted to trade in the vehicle in January of 2014, but he felt that the offer made to him by BMW of Austin (\$45,000) was \$3000 less than what the vehicle was worth, so he did not pursue that option. When Complainant questioned the dealer representative about why the offer was lower than expected, the representative indicated that they used a different valuation guide than the Kelly Blue Book and their valuation guide indicated that \$45,000 for the vehicle was an appropriate offer.

### **C. Respondent's Evidence and Arguments**

David Kaiser, Technical Support Engineer, has worked with BMW for 10 years. Prior to his employment with BMW, Mr. Kaiser worked for Jaguar Motor Company for 18 years and has extensive technical experience with automobiles.

Respondent testified that BMW has a Service Information bulletin on one of the issues Complainant was experiencing with his vehicle. The bulletin states that in certain circumstances the radio will default to 87.7 on the FM band during vehicle start-up. The bulletin specifies that there are three possible causes that may lead this to occur: when there is low battery voltage or voltage drop at the head (radio) unit, the radio station preset contains 87.7 as an option, or when the remote key memory is not set correctly or the setting is lost.<sup>11</sup> In order to repair, the remote key fob must be cleared and reset. This must be done on all remotes for the vehicle. During the repair visit to BMW of Austin on January 23, 2014, the technician verified the key settings on the remote. No repairs were done at the time, beyond verifying the settings.<sup>12</sup>

Respondent indicated that the controller on the console could have spillage or something touching the buttons causing the radio to go to different settings. In addition, Respondent stressed that all of the issues complained of with the vehicle had to do only with the entertainment system.

During the inspection of the vehicle at the time of hearing, Respondent pointed out that an after-market item was plugged into a USB port on the vehicle. The item in question was an Iphone charger. Respondent indicated that using the port ties the charger into the entertainment system and that it could affect the radio and navigation system adversely.

#### D. Analysis

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant testified that the primary issue with the vehicle complained of is that intermittently the radio and navigation system would default to settings that he did not have saved on the system. Complainant took the vehicle to a BMW dealership for repair of this issue. The vehicle was not repaired to his satisfaction and, as a result, Complainant filed a Lemon Law complaint.

The Complainant's vehicle was purchased on September 25, 2012 and was serviced by an authorized dealer of Respondent on the following dates: May 8, 2013, November 11, 2013, December 11, 2013, and January 23, 2014. Texas Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.604(a) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." However, Complainant did not establish that two repair attempts were made within the first year or 12,000 miles from the date of purchase of the vehicle. Only one repair attempt was made during the first year or 12,000 miles of ownership. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, even if Complainant had been able to establish that a reasonable number of attempts to repair the vehicle had been attempted by Respondent, the evidence still would not justify an order to repurchase Complainant's vehicle. The fact that the radio sometimes defaults to 87.7 upon start-up and that the navigation system will intermittently default to the main menu, does not impair the market value of the vehicle. Texas Occupations Code § 2301.601(1) provides that "Impairment of market value" means a substantial loss in market value caused by a defect specific to a motor vehicle." The issues complained of by Complainant have not resulted in a

**substantial** loss in market value of the vehicle, particularly in light of the fact that Complainant does not lose his settings on his radio or navigation system and the systems still work appropriately and are still under warranty. In addition, the fact that the dealer offered Complainant about \$3000 less than what he expected when he attempted to trade in the vehicle in January of 2014, does not establish a substantial loss in market value, since there was no evidence that the problems with the radio and navigation system were the cause of the difference in perceived value of the vehicle.

There does not appear to be any doubt that there is a problem with the vehicle's radio and navigation system. In fact, Respondent has issued a Service Information bulletin to its authorized dealers explaining how to address the issue. Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for 48 months or 50,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 12,797 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the system whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

### III. FINDINGS OF FACT

1. Stephen G. Powell (Complainant) purchased a new 2012 BMW 550I on September 25, 2012 from BMW of Austin, Texas, with mileage of 462 at the time of delivery.
2. The manufacturer of the vehicle, BMW of North America LLC (Respondent) issued a bumper to bumper warranty for 48 months or 50,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 12,797.
4. At the time of hearing the vehicle was still under warranty.

5. About seven months after purchase, Complainant noticed that the vehicle's navigation screen would default to the main menu intermittently and would not clear itself after reaching a designated destination.
6. In late 2013, Complainant also began experiencing problems with the vehicle's radio, in that the radio would default to 87.7 on the FM band upon start-up of the vehicle.
7. Complainant's vehicle was serviced for the radio and navigation system issues by BMW of Austin, one of Respondent's authorized dealers, on the following dates:
  - a. May 8, 2013 to May 14, 2013, at 5,239 miles;
  - b. November 11, 2013 to November 18, 2013, at 8,666 miles;
  - c. December 11, 2013 to December 17, 2013, at 9,031 miles; and
  - d. January 23, 2014 to January 28, 2014, at 13,501 miles.
8. Complainant was provided with a rental car during all four service visits at BMW of Austin.
8. Complainant is still experiencing problems with the vehicle's radio and navigation system.
9. Even though Complainant is still experiencing problems, the issues do not affect the presets for his radio stations. So, he can still access them by using the roll bar on the steering wheel.
10. Respondent is aware that there may be a problem with the vehicle's radio defaulting to 87.7 on the dial and has issued a Service Information bulletin to its employees advising them on how to repair the issue.
11. In January of 2014, Complainant attempted to trade in the vehicle for a new vehicle. However, Complainant felt that the offer by the dealership for the present vehicle was too low to justify the trade in.
12. On March 17, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On June 25, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.

14. The hearing convened on August 6, 2014, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself in the hearing. Respondent was represented by David Kaiser, Technical Support Engineer, and William Ghiatis, After Sales Manager. The hearing adjourned and the record closed that same day.

#### IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**..

**SIGNED August 21, 2014**



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**EDWARD SANDOVAL**  
**CHIEF HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**