

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0184 CAF**

ZACK ELBAYTAM and SOOJIN LEE,
Complainant

v.

BMW OF NORTH AMERICA LLC,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Zack Elbaytam and Soojin Lee (Complainants) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in their 2011 BMW 535i. The Complainants filed a Lemon Law complaint (Complaint)¹ alleging that the vehicle idled rough at up to 2000 rpm; the vehicle would lose power and make a noise in the front end; water would enter the vehicle in the rear; engine warning light comes on; and the vehicle spontaneously lost power and the engine shut down while driving. BMW of North America LLC (Respondent) contended that the vehicle's issues have been successfully repaired. The hearing examiner concludes that the vehicle continues to have a warrantable defect, but the Complainants' vehicle does not qualify for repurchase/replacement but does qualify for warranty repair.

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 on September 23, 2015, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainants represented themselves. Scott Clark, Dealer Support Engineer, represented the Respondent.

¹ The complaint identifies the issues to be addressed at the hearing. See TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

II. Discussion

A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer is “unable to conform a motor vehicle to an applicable express warranty.”² Additionally, warranty repair under Section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”³ Accordingly, for a vehicle to be eligible for repurchase or replacement, or even warranty repair, the vehicle must have a defect under an applicable warranty (warrantable defect).

Further, for a vehicle to qualify for replacement or repurchase, a warrantable defect must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle despite a “reasonable number of attempts” at repair.⁴ 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 The Department applies a reasonable purchaser standard for determining whether the defect substantially impairs the value of the vehicle.⁶ The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁷ The first applies generally,⁸ the second applies to serious safety hazards,⁹ and the third applies to vehicles out of service for repair for at least 30 days.¹⁰

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.204.

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

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

⁷ TEX. OCC. CODE § 2301.605(a).

⁸ TEX. OCC. CODE § 2301.605(a)(1).

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

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: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.¹¹

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: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.¹²

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹³ Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.¹⁴

¹¹ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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.

¹² TEX. OCC. CODE § 2301.605(a)(2).

¹³ “[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.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

¹⁴ “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹⁵ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁶ and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.¹⁷

The law places the burden of proof on the Complainants.¹⁸ The Complainants must prove each fact required for relief by a preponderance, that is, the Complainants must present enough evidence to show that all of the required facts are more likely than not true.¹⁹ For example, the Complainants must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainants and the Respondent equally, the Respondent will prevail. The Complainants prevail only if the evidence shows that all of the required facts are more likely than not true.

B. Complainants' Evidence and Arguments

On June 15, 2011, the Complainants, Zack Elbaytam and Soojin Lee, purchased a new BMW 525i from Momentum BMW Mini, a franchised dealer of the Respondent, BMW of North America LLC, in Houston, Texas. The vehicle had 51 miles on the odometer at the time of purchase.²⁰ The vehicle's limited warranty covered the vehicle for four years or 50,000 miles, whichever occurred first.²¹

The Complainants took the vehicle to a dealer to address the issues as reflected in invoices as shown below:

¹⁵ TEX. OCC. CODE § 2301.606(c)(1).

¹⁶ TEX. OCC. CODE § 2301.606(c)(2).

¹⁷ TEX. OCC. CODE § 2301.606(d)(2).

¹⁸ 43 TEX. ADMIN. CODE § 215.206.66(d).

¹⁹ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ Complainants' Ex. 2, Motor Vehicle Retail Installment Contract.

²¹ Complainants' Ex. 7, Warranty Vehicle Inquiry.

Date	Miles	Issue
February 13, 2013	22,517	Rear shifts to the right going over a bump ²²
July 11, 2013	27,431	Check engine light ²³
October 31, 2013	31,365	Water coming into the vehicle – replaced leaking vapor barriers ²⁴
March 19, 2014	36,574	Brakes squealing – deglazed brake pads; vibration between 60-75 mph – customer declined repairs; idle too high – updated vehicle software; trunk opens too fast – replacing tension springs; whizzing sound – replaced crankshaft seal ²⁵
October 20, 2014	45,114	Drivetrain malfunction light on, loss of power – VANOS units fault corrected under recall ²⁶
January 3, 2015	47,820	Drivetrain malfunction light on, fuel rail pressure sensor malfunction – replaced rail pressure sensor; check engine light on; vehicle makes a squeaking noise going over a hump ²⁷
February 2, 2015	48,474	Drivetrain malfunction light came on, electric fuel pump failure – replaced fuel pump ²⁸
March 31, 2015	49,720	Drivetrain malfunction warning, vehicle shakes and loses power; rattle noise right front ²⁹

Mr. Elbaytam testified that he first experienced problems with the vehicle at about 6,000 miles. The Complainants repeatedly brought the vehicle to a dealer because of a check engine light, but the check engine light turned off before going to the dealer and the dealership could do nothing because the check engine light was not on. Mr. Elbaytam stated that he did not experience further water leaking after the October 31, 2013, repair. Mr. Elbaytam also testified that the repair at the March 19, 2014, visit resolved the noise issues underlying that visit. Mr. Elbaytam recounted that the vehicle displayed a drivetrain malfunction message and the vehicle lost power steering, brake boost, and engine power. He tried to restart the vehicle without success. The dealer addressed the incident by performing the VANOS recall repair. After this repair, the vehicle lost power on another occasion. Mr. Elbaytam noted that the roadside assistance service tried to, but could not,

²² Complainants' Ex. 8, Invoice No. 581174.

²³ Complainants' Ex. 9, Invoice No. 579506.

²⁴ Complainants' Ex. 10, Invoice No. 605812.

²⁵ Complainants' Ex. 11, Invoice No. 618726; Complainants' Ex. 12, Invoice No. 618726.

²⁶ Complainants' Ex. 13 Invoice No. 639438.

²⁷ Complainants' Ex. 14, Invoice No. 646868.

²⁸ Complainants' Ex. 15, Invoice No. 649623.

²⁹ Complainants' Ex. 16, Invoice No. 655073.

drive the vehicle onto the wrecker's bed. On January 3, 2015, the Complainants took the vehicle to a dealer to address the stalling and a squeaking noise. The dealer replaced the fuel pressure sensor and performed an alignment. This repair visit did not resolve the squeaking noise and the vehicle subsequently stalled a third time. The drivetrain malfunction light came on when the vehicle stalled. At the February 2, 2015, visit, the dealer replaced the fuel pump. Mr. Elbaytam testified that the vehicle has not stalled since the fuel pump replacement. However, Mr. Elbaytam stated that the vehicle still has signs of misfiring and high, rough idling. Mr. Elbaytam also noted that the clicking/rattling noise started after the filing of the present Lemon Law complaint. When asked if the suspension noises affected performance, Mr. Elbaytam answered that the suspension issue affected the powertrain.

C. Respondent's Evidence and Arguments

Mr. Clark testified that the stalling had two causes. The first involved broken VANOS bolts, for which a recall applied. The second involved fuel rail pressure. The vehicle had a defective fuel pump replaced in February of 2015 and the vehicle did not have any further stalls. Mr. Clark stated that he was confident the cause of the stalling has been fixed. Testing of the vehicle showed that everything operated as designed. Specifically, during the final repair attempt on April 1, 2015, Mr. Clark test drove the vehicle for 20 miles under varying conditions and the vehicle operated normally. Further, the vehicle met specifications for a transmission stall test and the vehicle had no faults related to engine performance.³⁰ Mr. Elbaytam confirmed that the vehicle has not stalled since the fuel pump replacement. During the test drive, the vehicle exhibited some squeaking, which Mr. Clark believed sounded like trunk springs.

D. Analysis

1. Repurchase/Replacement Relief

Mr. Elbaytam testified that the Complainants emailed, instead of mailing, their notice of defect to the Respondent. However, the law specifically requires that the notice to the Respondent be mailed. As a result, even if the Complainants satisfy all other requirements for

³⁰ Respondent's Ex. 1, BMW of North America Technical Inspection.

repurchase/replacement relief, TEX. OCC. CODE § 2301.606(c)(1) prohibits granting repurchase or replacement relief in this case.

2. Reasonable Repair Attempts

The evidence does not show a reasonable number of repair attempts for any issue except the stalling issue. However, as explained below, the stalling issue appears to have been successfully resolved. The record reflects four repair attempts for the stalling issue but no more than one attempt for the other issues. Consequently, the vehicle does not qualify for repurchase/replacement relief.

3. Stalling Issue

The evidence indicates that the stalling issue has been successfully repaired. The vehicle's stalling apparently resulted from two underlying problems, the defective VANOS bolts, repaired at the October 20, 2014, visit, and the defective fuel pump, replaced at the February 2, 2015, visit. Mr. Elbaytam confirmed that the vehicle has not stalled since the last repair addressing the stalling issue. The record shows that the vehicle stalled three times within a roughly 3,300 mile span (or about once every 1,100 miles). However, the vehicle has not stalled after the fuel pump replacement and up to the hearing date, an approximately 2,500 mile interval. Accordingly the stalling issue does not appear to be an existing defect that may serve as a basis for repurchase or replacement or warranty repair relief.

4. Noise Driving over Bumps

A preponderance of the evidence does not show that this noise constitutes an actual warrantable defect or a noise that may normally occur when jarred by driving over a bump, particularly given the vehicle's age and mileage. Though the vehicle did exhibit a noise over a bump during the test drive, the source of the noise was unclear, though Mr. Clark heard the noise coming from the trunk.

5. Respondent's Continuing Obligation to Repair

Although the warranty expired at the earlier of four years or 50,000 miles, TEX. OCC. CODE §§ 2301.204, 2301.603 imposes a continuing obligation on the Respondent to repair any warrantable defects reported to the Respondent or the Respondent's dealer before the warranty

expired, even if the defect recurs after the warranty's expiration. This provision would apply to the clicking noise from the steering.

III. Findings of Fact

1. On June 15, 2011, the Complainants, Zack Elbaytam and Soojin Lee, purchased a new BMW 525i from Momentum BMW Mini, a franchised dealer of the Respondent, BMW of North America LLC, in Houston, Texas. The vehicle had 51 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covered the vehicle for four years or 50,000 miles, whichever occurred first.
3. The warranty expired by June 15, 2015.
4. The Complainants took the vehicle to a dealer to address issues as shown below:

Date	Miles	Issue
February 13, 2013	22,517	Rear shifts to the right going over a bump
July 11, 2013	27,431	Check engine light
October 31, 2013	31,365	Water coming into the vehicle – replaced leaking vapor barriers
March 19, 2014	36,574	Brakes squealing – deglazed brake pads; vibration between 60-75 mph – customer declined repairs; idle too high – updated vehicle software; trunk opens too fast – replacing tension springs; whizzing sound – replaced crankshaft seal
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February 2, 2015	48,474	Drivetrain malfunction light came on, electric fuel pump failure – replaced fuel pump
March 31, 2015	49,720	Drivetrain malfunction warning, vehicle shakes and loses power; rattle noise right front

5. The Complainants emailed, but did not mail, a notice of defect to the Respondent.
6. On March 6, 2015, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) alleging that: the vehicle idled rough at

up to 2000 rpm; the vehicle would lose power and make a noise in the front end; water would enter the vehicle in the rear; engine warning light comes on; and the vehicle spontaneously lost power and the engine shut down while driving. The Complaint did not include the other issues identified at the hearing. The water leak issue was resolved prior to the hearing.

7. The vehicle has not stalled since the fuel pump replacement.
8. On July 10, 2015 the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, BMW of North America LLC, 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.
9. The hearing in this case convened on September 23, 2015, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on the same day. The Complainants represented themselves. Scott Clark, Dealer Support Engineer, represented the Respondent.
10. The vehicle's odometer showed 50,953 miles at the time of the hearing.
11. The vehicle's steering exhibited a clicking noise during the inspection at the hearing and the vehicle exhibited some noise driving over a bump during the test drive. The source of the noise driving over the bump was unclear. The vehicle otherwise performed normally.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (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. The Complainants timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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 § 215.206.66(d).
6. The Complainants did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a)(1).
7. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.204, 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**. It is **FURTHER ORDERED** that the Respondent shall repair the clicking associated with the vehicle's steering. Within 30 days after the date this Order becomes final under Texas Government Code § 2001.144, the parties shall complete the delivery and repair of the subject vehicle. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED November 20, 2015



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