

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0199 CAF**

**CHERYL LA MASTRA,
Complainant**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Cheryl La Mastra (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2011 BMW 335i. The Complainant argued that the vehicle had an electrical defect preventing the vehicle from starting. BMW of North America, LLC (Respondent) contended that a dealer's faulty repair caused the starting problem and that the vehicle has since been successfully repaired. The Respondent also argued that the Complainant did not undertake a reasonable number of repair attempts. The hearings examiner concludes that the Complainant did not prove that the vehicle has a warrantable defect. The Complainant also did not undertake a reasonable number of repair attempts and did not timely file a Lemon Law complaint. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or 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 and the record closed on July 15, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, Cheryl La Mastra, represented herself. Salvator La Mastra also appeared and testified for the Complainant. Daniel Lubin, After Sales Manager, represented the Respondent. Victor Cheung, Technical Support Engineer, and Tristan Owens, Shop Foreman at Classic BMW, testified for the Respondent.

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.”¹ 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.”² 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). The Complainant must prove the existence of a warrantable defect by a preponderance, that is, the evidence must show that a warrantable defect more likely than not exists.³

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 Under the Lemon Law, a rebuttable presumption is established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

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

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁶

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.⁷

However, regardless of the existence of a warrantable defect, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;⁸ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;⁹ 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.¹⁰

B. Complainant's Evidence and Arguments

The Complainant ordered a new 2011 BMW 335i Convertible through Classic BMW of Plano, Texas, on October 21, 2010. The vehicle had five miles at the time of purchase.¹¹ The vehicle's limited warranty covered the first 48 months or 50,000 miles, whichever occurred first.¹² At the time of the hearing, the vehicle's limited warranty had expired.

The Complainant primarily drove the vehicle from her home in Plano to work, roughly a 10 to 15 mile round trip, and to her parents' home in East Texas. Mr. La Mastra drove the vehicle once or twice per month approximately 15 to 20 miles at a time.

⁶ 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.

⁷ “[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).

⁸ TEX. OCC. CODE § 2301.606(c)(1).

⁹ TEX. OCC. CODE § 2301.606(c)(2).

¹⁰ TEX. OCC. CODE § 2301.606(d)(2).

¹¹ Complainant's Ex. 3, Classic BMW sales order.

¹² Complainant's Ex. 4, BMW Maintenance Program Upgrade Agreement.

Mr. La Mastra testified that within 90 days of purchasing the vehicle, he began having issues starting the vehicle (he had to push the ignition button multiple times to make the vehicle start). He called Classic BMW and the dealer told him that he just needed to drive the vehicle more (ostensibly to allow the alternator to charge the battery). On January 13, 2012, at 6,351 miles, the Complainant brought the vehicle to Classic BMW because the vehicle displayed a battery discharge warning. The dealer found the battery to be faulty and replaced it. The dealer cleared the fault memory and the vehicle appeared to operate normally.¹³

On March 7, 2014, the Complainant attended a funeral in Kilgore, Texas. After the funeral, she stopped to use a restroom. However, when she tried to leave, the key remote would not unlock the doors or trunk. Moreover, the vehicle would not start. The vehicle did not display a battery discharge warning on this occasion. The Complainant called roadside assistance, but the roadside assistance service did not have battery cables when they arrived, so the vehicle was towed to Mike Pile Auto Group in Tyler, Texas. The Complainant had to rely on a friend to get to her parents' house where she used her mother's car to return to Plano. At 20,953 miles, Mike Pile performed a battery cable recall service. During the recall service, the technician found the negative battery cable to be loose and re-tightened it. The vehicle started without issue after this repair.¹⁴

The next starting problem occurred during a business trip in Austin, Texas. The Complainant arrived at her hotel and parked the vehicle in the hotel's parking garage on August 11, 2014. She walked across the street to a restaurant where she met a friend for lunch. When she tried to drive to a meeting later that day, she could not start the car. The Complainant called roadside assistance, but the truck they sent could not enter the hotel's parking garage. The vehicle was eventually towed to BMW of Austin. BMW of Austin concluded that the battery was defective because it did not hold a charge. Replacing the battery (at 24,337 miles) appeared to fix the problem, though only temporarily.¹⁵ By this time, the Complainant had lost faith in the vehicle because the vehicle stranded her away from home for a second time, necessitating the use of a taxi and spending an extra night in Austin.

¹³ Complainant's Ex. 8, Service Invoice 763038 dated January 13, 2012.

¹⁴ Complainant's Ex. 7, Service Invoice 178239 dated March 14, 2014.

¹⁵ Complainant's Ex. 6, Service Invoice 405001 dated August 11, 2014.

After returning from Austin, the Complainant brought the vehicle to Classic BMW at 24,560 miles because the vehicle would crank, but not start. She told the dealer that her son tried to start the vehicle, but he had to push the ignition button five times before it started. Classic BMW replaced the starter. The Complainant requested a representative from BMW but Classic BMW refused. The Complainant felt that the dealer had overlooked the real issue because of the seemingly low probability that two different batteries in her vehicle would be defective.¹⁶

On January 12, 2015, the vehicle was towed back to Classic BMW after it failed to start. The Complainant was concerned that the vehicle had an electrical draw. The car access system (CAS) was replaced and the vehicle reprogrammed. However, after holding the vehicle overnight, Classic BMW realized that this repair did not correct the issue since the battery still could not hold a charge overnight. The dealer replaced the battery for a third time at 26,971 miles.¹⁷

The Complainant returned to Classic BMW on January 26, 2015, at 27,036 miles, after the vehicle's engine would not start though the radio and the lights came on. The increased battery discharge indicator message did not activate on this occasion. Classic BMW diagnosed the problem as a faulty intelligent battery sensor (IBS). The repair order also indicated that problem included the negative battery cable. The dealer replaced the IBS and the vehicle started without fault.¹⁸

Shortly after this visit, around February 1, 2015, the Complainant contacted BMW and asked BMW to send a representative. Classic BMW refused to schedule a time for a BMW representative to inspect the vehicle. On February 26, 2015, at 27,141 miles, the Complainant took the vehicle to Classic BMW. The vehicle's engine did not start, but other electrical components turned on. The dealer tightened the loose starter cable on the front jumper post and replaced the heat damaged jumper post and nylon nuts.¹⁹

On March 10, 2015, the Complainant mailed written notice of the defect to the Respondent. The Complainant filed her Lemon Law complaint on March 17, 2015. The next issue with the vehicle occurred when Mr. La Mastra drove it to the inspection scheduled for July 8, 2015. An

¹⁶ Complainant's Ex. 10, Service Invoice 889530 dated August 20, 2014.

¹⁷ Complainant's Ex. 11, Service Invoice 910628 dated January 23, 2015.

¹⁸ Complainant's Ex. 12, Service Invoice 912641 dated January 31, 2015.

¹⁹ Complainant's Ex. 13, Service Invoice 916919 dated February 26, 2015.

error message reading “increased battery discharge!” appeared, but the vehicle started without issue.²⁰ At the hearing, the vehicle started without any complications and the vehicle did not exhibit any defects. The vehicle’s mileage at the time of the hearing was 27,277.

The Complainant testified that the vehicle had become a source of anxiety for her. She attempted to negotiate a resolution with the Respondent, but the Respondent’s representative in New Jersey did not respond after her initial inquiry. Classic BMW offered \$17,000 for the vehicle, but the Complainant deemed the offer too low. The Complainant wishes to have her purchase of a 2015 Mercedes-Benz C300 reimbursed.

C. Respondent’s Evidence and Arguments

Daniel Lubin, a BMW master technician since 1999, represented the Respondent. Victor Cheung, an automotive engineer who has been performing technical services for BMW for the past 29 years, testified for the Respondent. Tristan Owens, a shop foreman at Classic BMW who has worked at the dealership since 2008, also testified for the Respondent.

The Respondent posited that the Complainant did not qualify for repurchase or replacement relief because a reasonable number of repair attempts were not undertaken and the complaint was not timely filed. Moreover, the vehicle did not warrant repair relief because the vehicle did not have an existing warrantable defect.

The first repair visit, on January 13, 2012, addressed a battery discharge warning message. The vehicle was not towed in on this visit because the vehicle did not have a starting problem. In this instance, the battery voltage was low, preventing the vehicle from entering sleep mode. Replacing the battery at this visit apparently cured the defect since the vehicle did not have any other battery-related service until March 7, 2014.

Between the first and second visit, the vehicle was involved in a major accident. The collision required repairs totaling \$29,044.27. The front end suffered extensive damage. Classic BMW removed the engine and transmission assemblies to repair the engine bay frame. During the rebuilding process, the dealer likely did not properly tighten the starter cable on the front jumper

²⁰ Complainant’s Ex. 9, Photograph of “increased battery discharge!” message.

post. The loose starter cable at the jumper post would explain why the engine would not start but the lights would turn on.

A battery cable runs from the trunk battery to the front jumper post in the engine compartment and to another post in the body of the vehicle. If the starter cable attached to the front jumper post was loose, while the cable running through the body of the vehicle was connected properly, power would reach the dashboard lights, but not the starter. Because of the loose starter cable, electricity from the alternator in the front of the vehicle did not flow to the battery in the back of the vehicle. Consequently, the battery did not charge while driving the vehicle, which would explain why the vehicle drained multiple batteries after the collision repair.

The last repair attempt, addressing the starter cable and front jumper post, should have corrected the issue. The fact that the Complainant only drove the vehicle a handful of times over the prior six months explained why the "increased battery discharge!" error message appeared on July 8, 2015. Batteries drain over time and need recharging by regularly driving distances of fifteen or more miles at sufficient speeds. The Respondent concluded that the last repair attempt resolved the starting issue, which was not a warrantable defect to begin with since a dealer and not the manufacturer caused the defect.

D. Analysis

1. Reasonable Number of Repair Attempts for Repurchase/Replacement

The evidence shows that the first repair visit occurred on January 13, 2012. This first visit occurred more than 12 months after the date of delivery.²¹ Because no repair attempts occurred in the first 12 months of ownership, the Complainant has not met the statutory presumption for a reasonable number of repairs and therefore the vehicle does not qualify for repurchase or replacement relief.²²

²¹ TEX. OCC. CODE § 2301.605(a)(2).

²² 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.

2. Filing Deadline for Repurchase/Replacement

The Complainant did not meet the filing deadline in Texas Occupations Code § 2301.606(d)(2). The law requires filing the complaint within 30 months (six months after 24 months) of the delivery of the vehicle to the owner. The Complainant purchased the vehicle on October 21, 2010, but the Complainant did not file her complaint until March 17, 2015, over 48 months after delivery. Consequently, the law prohibits granting repurchase/replacement.

3. Warrantable Defect

Repurchase/replacement relief and warranty repair do not apply to all vehicle problems but only to manufacturing defects in materials or workmanship (warrantable defects). For instance, damage caused after manufacturing is not a warrantable defect. Although the vehicle had substantial starting problems, the evidence indicates that these problems resulted from a faulty repair by a dealer and not from a defective part or defective assembly in manufacturing. The record shows that a dealer, in relation to bodywork from a collision, had to remove and reinstall the entire engine and transmission and during that repair, the dealer apparently failed to properly tighten the starter cable at the jumper post. Mr. Owens explained that the same circuit responsible for charging the battery also starts the vehicle. Accordingly, a loose starter cable could cause the battery not to recharge and the engine not to start, consistent with the symptoms exhibited by the vehicle. The intermittent nature of the starting problem comports with the fact that the vehicle had a loose starter cable. Mr. Owens testified how temperature, vibration and other factors could affect starting, so that under certain conditions the starter cable would conduct electricity but would not under other conditions. The Complainant's concern that previous battery replacements did not actually address the underlying cause of the starting problems also comports with the Respondent's findings regarding the loose cable. The Respondent ultimately determined that the loose starter cable caused the battery's failure to recharge. Further, the evidence appears to indicate that the loose starter cable has now been successfully repaired. Given that a dealer's faulty repair caused the starting problem rather than a manufacturing defect, the Complainant's vehicle does not qualify for repurchase or replacement or warranty repair.

III. Findings of Fact

1. The Complainant purchased a new 2011 BMW 335i Convertible from Classic BMW of Plano, Texas, on October 17, 2010. The vehicle had five miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covered the first 48 months or 50,000 miles, whichever occurred first.
3. The vehicle's limited warranty expired on October 17, 2014.
4. The Complainant took the vehicle in for repairs regarding the starting problems on the following dates:
 - a. January 13, 2012, at 6,351 miles;
 - b. March 7, 2014, at 20,953 miles;
 - c. August 11, 2014, at 24,337 miles;
 - d. August 14, 2014, at 24,560 miles;
 - e. January 12, 2015, at 26,971 miles;
 - f. January 26, 2015, at 27,036 miles; and
 - g. February 26, 2015, at 27,141.
5. On March 17, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
6. The Complainant filed the complaint more than 30 months after the original delivery of the vehicle to the Complainant.
7. On May 8, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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.
8. The hearing in this case convened and the record closed on July 15, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, Cheryl La Mastra, represented herself. Salvator La Mastra testified on behalf of the Complainant. Daniel

Lubin, After Sales Manager, represented the Respondent. Victor Cheung, Technical Support Engineer for the Respondent, and Tristan Owens, Shop Foreman at Classic BMW, testified on behalf of the Respondent.

9. The vehicle's mileage at the time of the hearing was 27,277.
10. The vehicle operated normally during the test drive at the hearing.
11. A faulty repair by a dealer leaving a loose cable connection at the jumper post caused the vehicle's starting problems.
12. The starting problem did not result from a manufacturing defect in materials or workmanship.

IV. Conclusions of Law

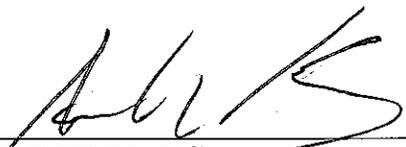
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 Complainant filed a sufficient 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a)(1).

8. The Complainant did not timely file the complaint for repurchase or replacement relief. TEX. OCC. CODE § 2301.606(d).
9. The Complainant's vehicle does not qualify for repair relief. TEX. OCC. CODE §§ 2301.204, 2301.603.
10. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

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**.

SIGNED September 11, 2015



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