

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0206 CAF**

**ANDREW TRAYNHAM,
Complainant**

v.

**BMW NORTH AMERICA, LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Andrew Traynham (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in his 2014 BMW 335i. The Complainant argued that the vehicle was defective due to iDrive connectivity issues. BMW of North America, LLC (Respondent) countered that no defects existed. Instead, the complained of issue was an inherent technical limitation. The hearings examiner concludes that the Complainant did not prove that his vehicle has a warrantable defect. Therefore, the Complainant's vehicle does not qualify for repurchase or replacement 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 the record closed on July 15, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, Andrew Traynham, represented himself. Rebecca Traynham and Tiffany Pinson testified for the Complainant. Daniel Lubin, After Sales Manager represented the Respondent. Victor Cheung, Technical Support Engineer for the Respondent, testified for the Respondent, as did Tristan Owens, Shop Foreman at Classic BMW.

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

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).

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.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

On May 3, 2014, the Complainant purchased a new 2014 BMW 335i from Classic BMW of Plano, Texas.¹¹ The vehicle's odometer had 48 miles at purchase.¹² The vehicle's warranty covers the first 48 months or 50,000 miles, whichever comes first.¹³ The Complainant primarily drove the vehicle but his wife and sister also drove the vehicle approximately once per month.

After purchasing the vehicle, the Complainant began having issues connecting his mobile phone to the vehicle's iDrive system. The iDrive system handles navigation, entertainment, and hands-free communication. Two days after the vehicle's purchase, at 209 miles, the Complainant returned to Classic BMW and informed the service advisor that his iDrive screen cut in and out.

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. 1, Purchase Order.

¹² Complainant's Ex. 2, Odometer Disclosure Statement.

¹³ Complainant's Ex. 3, BMW Service and Warranty Information.

The service advisor confirmed the concern by attempting to pair his iPhone 5 with the vehicle to no avail. The head unit high (HUH) Bluetooth card stored an internal fault code. The Bluetooth remained inoperable after working through a test plan designed to address the stored fault code. After replacing the HUH, the service advisor could pair his phone with the vehicle.¹⁴

The Complainant returned to Classic BMW on May 29, 2014, at 1,750 miles. He reported that he could not connect Rhapsody (a music subscription service and music player) to the vehicle from his Verizon iPhone 5. The service advisor noted that he would need the Complainant's phone to verify the concern. The Complainant also explained that even after he connected and began streaming music through Bluetooth, the phone would disconnect after about 30 seconds. He would then have to push the "media" button to reconnect the phone to the vehicle.¹⁵

The Complainant returned to Classic BMW on July 9, 2014, at 2,588 miles. The Complainant continued to have trouble connecting his phone to the vehicle. Rhapsody, iTunes, and Podcast would not play on the vehicle's iDrive. Again, the service advisor noted that he could not replicate the concern without the Complainant's phone present. The Complainant also explained that the iDrive screen still randomly cut in and out.¹⁶

The problems persisted, so the Complainant brought the vehicle to Classic BMW for another repair on July 14, 2014, at 2,778 miles. On this visit, he once again described the problem with the iDrive shutting off intermittently. The technician at Classic BMW diagnosed the issue as being a central information display (CID) feature. When the CID detects excess temperature due to either high ambient temperatures or direct sunlight, it reduces its brightness. The Complainant was not satisfied with this explanation because the CID shut off as he left work and he parked in a parking garage when at work.¹⁷

On December 18, 2014, at 11,562 miles, the Complainant returned to Classic BMW because the iDrive issues continued to occur. Specifically, the iDrive would shut off and reset about twice a week. The Complainant would attempt to establish a connection between his pre-

¹⁴ Complainant's Ex. 11, Service Invoice 875344 dated May 7, 2014.

¹⁵ Complainant's Ex. 13, Service Invoice 878739 dated June 17, 2014.

¹⁶ Complainant's Ex. 15, Service Invoice 884341 dated July 11, 2014.

¹⁷ Complainant's Ex. 16, Service Invoice 884888 dated July 15, 2014.

paired phone and the vehicle, but even after pressing connect through the menu, it would not connect. No faults were stored, so no repairs were made.¹⁸

The Complainant took the vehicle back to Classic BMW on January 21, 2015, at 12,784 miles. The phone would sometimes connect but would not play music. The radio would work, but nothing from the phone would play. The vehicle would indicate the phone was not connected, even though the Complainant could still make and receive hands-free calls. The music would not play even when connecting the phone with a USB cable, indicating that Bluetooth connectivity was not the only issue. When the music did work, it would stop intermittently. The Complainant would then have to reselect the media and reconnect using Bluetooth. The iDrive would also drop calls two or three times per week. When dropping calls, the person on the other end of the call remained on the call until the iDrive reconnected after about ten seconds. The Complainant testified that he attempted to use four different phones, including one that was wiped completely, and the issue remained. Classic BMW connected the Complainant's phone to the vehicle and found no defects.¹⁹

The Complainant testified that the connectivity problems persisted so he returned to Classic BMW on February 3, 2015, at 12,833 miles. The technician did not find any faults, but reprogrammed the vehicle to address the issue.²⁰

On March 19, 2015, the Complainant mailed written notice of the defect to the Respondent. On March 24, 2015, the Complainant filed a Lemon Law complaint. The Respondent sent a representative to inspect the vehicle on May 6, 2015, at 16,409. The inspection occurred at Classic BMW. No faults were found and the vehicle connected with the technician's phone without issue.²¹

On the way to the hearing, the Complainant's phone would not connect to the iDrive. In a video taken by the Complainant's sister, Rhapsody played on the phone, but not on the car stereo. Then, when the iDrive finally connected to a phone, it connected to the Complainant's

¹⁸ Complainant's Ex. 17, Service Invoice 907547 dated December 19, 2014.

¹⁹ Complainant's Ex. 18, Service Invoice 912082 dated February 2, 2015.

²⁰ Complainant's Ex. 19, Service Invoice 913811 dated February 6, 2015.

²¹ Complainant's Ex. 20, Service Invoice 926776 dated May 8, 2015.

sister's phone, despite being number two on the priority list.²² The Complainant's sister testified that her phone never had an issue connecting to her BMW X3. The Complainant testified that he experienced problems like this at least once per day.

C. Respondent's Evidence and Arguments

Daniel Lubin, who has been 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's representative and witnesses testified that the connectivity problem stemmed from the Complainant's Verizon Apple iPhone, not the vehicle itself. A BMW web page showed in detail which functions of the Verizon Apple iPhone 6 were compatible with the 2014 BMW 335i. This page showed e-mail and text messaging (two of the items the Complainant identified as not working properly) as functions that "cannot be used." The Complainant also testified that he attempted to connect via a USB cable, but that the music still would not play. The BMW website explained that when using a USB connection to listen to music, one may experience "limited functionality." Playing music tracks via Bluetooth was also listed as a feature with limited functionality.²³ The website also contained a disclaimer stating, "BMW can assume no guarantee for the unlimited compatibility and functionality of your mobile device in conjunction with the vehicle interfaces."

Mr. Owens testified that the iDrive shutting off and resetting also resulted from the Complainant's phone. The Complainant's Verizon iPhone likely sent corrupted data, which caused the HUH to shut off and reboot. Mr. Owens also testified that he witnessed a new BMW 7 Series' iDrive not work properly due to the customer's Verizon iPhone. Mr. Owens noted that iDrive had more problems with Verizon phones than other carriers' phones.

During his inspection on May 6, 2015, Mr. Cheung found the Bluetooth and iDrive operating properly. His AT&T iPhone 6 could play iTunes through the iDrive. His iPhone 5 had very few apps. This was important since apps may hinder connectivity. The Respondent

²² Complainant's Ex. 26, Video dated July 15, 2015.

²³ Respondent's Ex. 3, Bluetooth Disclaimer.

contended that no fault codes were found during the inspection because the connectivity issue was not a defect with the vehicle.

During the test drive at the hearing, at 18,759 miles, the hearings examiner could connect both his personal phone, a Sprint Windows Phone, and work phone, an AT&T iPhone 4, to the iDrive. Mr. Lubin also could connect his work phone, an AT&T iPhone 5, to the iDrive.

D. Analysis

Repurchase/replacement and warranty repair relief do not apply to all types of problems but only apply to manufacturing defects in materials or workmanship (warrantable defects) such as the use of an out-of-specification part or incorrect assembly. In contrast, problems arising from inherent limitations in technology or conditions caused outside of manufacturing are not warrantable defects. To qualify for relief, a complainant must prove by a preponderance of the evidence that the vehicle has a warrantable defect.²⁴ Though the Complainant has shown that the Complainant's phone has problems interacting with the vehicle's iDrive, a preponderance of the evidence does not indicate that a manufacturing defect caused the issues. Rather, the issues appear to stem from limitations inherent to the technology, either of the phone or the vehicle. To use an analogy, an application may run perfectly on one Android phone but may crash on another Android phone without any manufacturing defects because of inherent technical limitations due to differences between the hardware and operating system versions of the various phones. Likewise, limitations due to differences between phones, operating systems, software/firmware and vehicles, even without any manufacturing defects, may affect iDrive connectivity. In the present case, the iDrive connectivity issues do not appear to result from a manufacturing defect. In fact, BMW's website expressly addresses connectivity limitations. The website also contains a disclaimer explaining that "compatibility between vehicle and mobile device is . . . largely dependent upon the software version of the mobile device" and other factors.²⁵ Although undesirable and even problematic, limitations in technology are not manufacturing defects subject to relief under the limited scope of the Lemon Law. Accordingly, the Complainant's vehicle does not qualify for repurchase or replacement relief.

²⁴ TEX. OCC. CODE § 2301.604(a).

²⁵ Respondent's Ex. 3, Bluetooth Disclaimer.

III. Findings of Fact

1. On May 3, 2014, the Complainant purchased a new 2014 BMW 335i from Classic BMW of Plano, Texas. The vehicle's mileage at purchase was 48.
2. The vehicle's warranty covers the first 48 months or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to Classic BMW for repairs regarding iDrive related connectivity issues on the following dates:
 - a. May 5, 2014, at 209 miles;
 - b. May 29, 2014, at 1,750 miles;
 - c. July 9, 2014, at 2,588 miles;
 - d. July 14, 2014, at 2,778 miles;
 - e. December 18, 2014, at 11,562 miles;
 - f. January 21, 2015, at 12,784 miles; and
 - g. February 3, 2015, at 12,833 miles.
4. On March 24, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
5. On May 6, 2015, at 16,410 miles, the Respondent's representative inspected the car for Bluetooth connectivity issues. No faults were presented and no issues were found.
6. 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.
7. The hearing in this case convened and the record closed on July 15, 2015, in Mesquite, Texas, before Hearings Examiner Andrew Kang. The Complainant, Andrew Traynham, represented himself. Rebecca Traynham and Tiffany Pinson testified for the Complainant. Daniel Lubin, After Sales Manager, represented the Respondent. Victor Cheung, Technical Support Engineer for the Respondent, testified for the Respondent, as did Tristan Owens, Shop Foreman at Classic BMW.

8. The vehicle's mileage at the time of the hearing was 18,759.
9. The vehicle operated normally during the test drive at the hearing. The hearings examiner and Mr. Lubin could both connect their phones to the iDrive system.
10. The vehicle's connectivity issues arise from limitations inherent to the technology of the vehicle and the connecting phones.
11. The vehicle's connectivity issues do not result from any manufacturing defects in materials or workmanship.

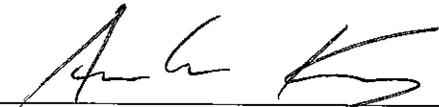
IV. Conclusions of Law

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 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 Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant did not prove by a preponderance of the evidence that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.
8. 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