

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0262 CAF**

**KYLE JOHNSTON,
Complainant**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Major Kyle Johnston (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured/distributed by BMW of North America, LLC (Respondent). The hearings examiner concludes that the Complainant's vehicle has an existing warrantable defect that substantially impairs its use. Consequently, the Complainant's vehicle qualifies for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 Thursday, January 21, 2016, at 1:00 p.m. in San Antonio, Texas, before Hearings Examiner Andrew Kang. The record closed on February 24, 2016, upon the filing of written submissions. The Complainant represented himself. Stephen Soncini, After Sales Area Manager, represented the Respondent. In addition, David Kaiser, Technical Support Engineer, and Jim (James) Braun, Service Manager of BMW San Antonio, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

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.⁴

b. Substantial Impairment

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders 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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ In this case, the general presumption applies. 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.¹⁰

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.¹¹ 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.¹²

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ 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.

¹¹ “[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).

¹² “[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).

d. Other Requirements

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;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ 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.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."¹⁶

3. Owner Entitled to Enforce Manufacturer's Warranty

The Lemon Law's definition of an "owner" than can enforce a manufacturer's warranty includes a person who "purchased or leased the vehicle at retail and is an active duty member of the United States armed forces stationed in this state at the time a proceeding is commenced under this subchapter."¹⁷

A. Complainant's Evidence and Arguments

The Complainant, Major Kyle Johnston, initially ordered a new BMW X3 on February 19, 2013, from Pentagon Car Sales while in Germany.¹⁸ The Complainant took delivery of the vehicle on April 19, 2013, from BMW of San Antonio, a franchised dealer of the Respondent, BMW of North America, LLC, in San Antonio, Texas. The vehicle had five miles on the odometer at the

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ TEX. OCC. CODE § 2301.601(2)(D).

¹⁸ Complainant's Ex. 1, Purchase Order; Complainant's Ex. 2, Amended Purchase Order.

time of delivery. The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.

The Complainant testified that the vehicle had issues with its central information display (CID), Bluetooth, leather leg connector, cargo net, map thermostat, leather on the headrest, passenger seat, left tire pressure sensor, center console, shifter, cables within the CID, rear hatch, and failed batteries. The Complainant identified the following issues as successfully resolved: driver headrest, passenger seat, cargo net, battery, shifter, leather extender, and map thermostat. The Complainant noted that his complaint did not include the tire pressure monitor and rear hatch. The Complainant estimated that the issues, and the CID problems, began occurring within six to eight months (after delivery). The Complainant explained that the CID would restart and that problems would occur with Bluetooth connectivity and would shut off and restart. The Complainant further explained that the malfunctioning CID affects the ability to listen to the radio and use the Bluetooth audio interface. In particular, as a medical professional, he noted that he frequently gets calls calling him in. The Complainant confirmed that the rear view camera used the CID, as did front/rear impact warnings. The Complainant added that the CID affected navigation (streamed from the phone) as well. The Complainant testified that the CID malfunctioned as recently as the day before the hearing when the Bluetooth would not connect to his phone. The last CID restart occurred about a month before the hearing. The Complainant explained that any CID malfunctions occurred independent of the Bluetooth function with the phone. For example, the CID may malfunction while listening to the radio.

In relevant part, the Complainant took the vehicle to a dealer on the following dates and miles as shown below:

Date	Miles	Issue
April 2, 2014	14,138	Front driver seat thigh support will not lock ¹⁹
June 21, 2014	17,491	CID reboots and radio cuts off ²⁰
July 24, 2014	18,785	CID keeps rebooting ²¹
July 26, 2014	18,830	Battery message coming on, cargo net not holding in clamp, driver leg extender cover is loose, marks on front passenger seat bottom leather ²²
September 13, 2014	21,997	Leather on front passenger seat damaged, ²³
December 31, 2014	26,626	CID screen freezes and reboots, leather on driver seat between leg extender coming apart ²⁴
February 24, 2015	28,079	Check engine light on, CID screen reboots itself ²⁵
March 16, 2015	28,565	CID screen rebooting, issues with Bluetooth connection ²⁶
August 15, 2015	34,824	Driver side seat extender inoperable, hatch intermittently inoperable, CID will shut off ²⁷

The Complainant confirmed that he was provided a loaner vehicle for each service visit. The Respondent's final opportunity for repair occurred on August 18, 2015.

On May 1, 2015, the Complainant mailed a written notice of defect to the Respondent.²⁸ On May 11, 2015, the Complainant filed a Lemon Law complaint (Complaint) alleging that the vehicle's radio/CID restarts, Bluetooth fails, leg connector, passenger seat leather, and a head rest had defects, cargo net was broken, and the map thermostat malfunctioned. Of the issues in the Complaint, the radio/CID and Bluetooth issues remained unresolved.

¹⁹ Complainant's Ex. 4, Invoice No. 560224.

²⁰ Complainant's Ex. 3, Repair Order History.

²¹ Complainant's Ex. 5, Invoice No. 570073.

²² Complainant's Ex. 6, Invoice No. 570277.

²³ Complainant's Ex. 7, Invoice No. 574610.

²⁴ Complainant's Ex. 8, Invoice No. 584393.

²⁵ Complainant's Ex. 9, Invoice No. 589410.

²⁶ Complainant's Ex. 10, Invoice No. 591143.

²⁷ Complainant's Ex. 11, Invoice No. 607510.

²⁸ Complainant's Ex. 12, Written Notice to Respondent

B. Respondent's Evidence and Arguments

Mr. Kaiser found that the vehicle had aftermarket equipment plugged into the vehicle (in the onboard diagnostic (OBD) plug) and that the vehicle had been in an accident crushing the back end. The Complainant could not recall the exact date of the accident. However, a CarFax report showed that the vehicle had a rear-end collision probably between July and September of 2013.²⁹ The Complainant explained that his vehicle was hit from the rear while at a stop sign. When asked if the vehicle was repaired by a BMW-certified body shop, the Complainant answered that he had the vehicle repaired at Caliber Collision but did not know if the facility was affiliated with BMW. Mr. Kaiser noted that he first found an account of the CID screen rebooting in June of 2014. The Respondent presented photos showing battery cables incorrectly installed, apparently from the body repair. Mr. Kaiser stated that he routed the battery cables correctly and replaced blown fuses (for the center console and rear console electrical socket outlets). Mr. Kaiser testified that he could not duplicate the CID issue during his inspection on August 18, 2015. He added that the vehicle did not have any faults and the components in question were replaced. Even after several days, he could not duplicate the issue. In closing, the Respondent argued that the vehicle was not registered in Texas, that the CID issue is not a safety issue but an entertainment issue, the vehicle was repaired at a third party facility, the vehicle had a third party accessory installed. The Respondent concluded that the accident and repair by a non-BMW certified facility caused the issues in this case.

C. Analysis

In this case, the vehicle qualifies for repurchase/replacement relief. The evidence shows that the subject vehicle continues to have problems with the CID and Bluetooth connectivity after a reasonable number of repair attempts. Although the Respondent provided evidence that the vehicle was in a collision that could have contributed to the complained of issues and that an aftermarket plug-in was installed in the vehicle, the record as a whole indicates that the issues more likely than not arise from a manufacturing defect. The testimony indicates that the vehicles CID problems existed prior to the installation of the after-market plug-in, so the plug-in appears to be a non-factor. On the other hand, the timing of the collision in 2013 indicates that the collision *could* have contributed to the CID malfunction. The accident apparently occurred before the first reported incidence of the CID malfunctioning. However, the Complainant first brought the vehicle

²⁹ Respondent's Ex. 5, CarFax Vehicle History Report.

to address the CID on June 21, 2014, roughly nine to eleven months after the collision estimated to have occurred between July and September of 2013. The relatively long span between the collision and the CID malfunction suggests that something other than the collision may have caused the CID malfunction. Moreover, the CID malfunctioned as recently as the day before the hearing, despite Mr. Kaiser's August 2015 correction of the improperly installed cabling and other repairs. The malfunction of the CID, and in particular, the hands-free Bluetooth connectivity for mobile phone calls, has substantially impaired the Complainant's use of the vehicle (testimony reflects his need to receive calls at all times in his position as a medical professional). Moreover, under the reasonable prospective purchaser standard, the nonconformity substantially impairs the market value of the vehicle, especially when considering that more and more jurisdictions prohibit the use of mobile devices unless hands-free. Accordingly, repurchase/replacement relief applies in this case.

III. Findings of Fact

1. The Complainant, Major Kyle Johnston, initially ordered a new BMW X3 on February 19, 2013, from Pentagon Car Sales while in Germany. The Complainant took delivery of the vehicle on April 19, 2013, from BMW of San Antonio, a franchised dealer of the Respondent, BMW of North America, LLC, in San Antonio, Texas. The vehicle had five miles on the odometer at the time of delivery.
2. The vehicle's limited warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer to address the complained of issues as follows:

Date	Miles	Issue
April 2, 2014	14,138	Front driver seat thigh support will not lock
June 21, 2014	17,491	Central Information Display (CID) reboots and radio cuts off
July 24, 2014	18,785	CID keeps rebooting
July 26, 2014	18,830	Battery message coming on, cargo net not holding in clamp, driver leg extender cover is loose, marks on front passenger seat bottom leather
September 13, 2014	21,997	Leather on front passenger seat damaged,
December 31, 2014	26,626	CID screen freezes and reboots, leather on driver seat between leg extender coming apart
February 24, 2015	28,079	Check engine light on, CID screen reboots itself
March 16, 2015	28,565	CID screen rebooting, issues with Bluetooth connection
August 15, 2015	34,824	Driver side seat extender inoperable, hatch intermittently inoperable, CID will shut off

5. The Respondent's final opportunity for repair occurred on August 18, 2015.
6. On May 1, 2015, the Complainant mailed a written notice of defect to the Respondent.
7. On May 11, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles alleging that the vehicle's radio/CID restarts, Bluetooth fails, leg connector, passenger seat leather, and a head rest had defects, cargo net was broken, and the map thermostat malfunctioned.
8. Of the issues in the Complaint, the radio/CID and Bluetooth issues remained unresolved.
9. On July 23, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant 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.
10. The hearing in this case convened on Thursday, January 21, 2016, at 1:00 p.m. in San Antonio, Texas, before Hearings Examiner Andrew Kang. The record closed on February 24, 2016, upon the filing of written submissions. The Complainant represented himself. Stephen Soncini, After Sales Area Manager, represented the Respondent. In addition,

David Kaiser, Technical Support Engineer, and Jim (James) Braun, Service Manager of BMW San Antonio, testified for the Respondent.

11. The Complainant is a member of the United States Air Force that has been stationed in the State of Texas during this proceeding.
12. The vehicle's odometer displayed 40,834 miles at the time of the hearing.
13. The vehicle's central information display functioned normally during the inspection and test drive at the hearing. However, a warning for an adaptive headlights malfunction came on during the test drive.
14. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$45,175.00
Delivery mileage	5
Mileage at first report of defective condition	14,138
Mileage on hearing date	40,834
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$45,175.00		
Mileage at first report of defective condition	14,138		
Less mileage at delivery	-5		
Unimpaired miles	14,133		
Mileage on hearing date	40,834		
Less mileage at first report of defective condition	-14,138		
Impaired miles	26,696		
<i>Reasonable Allowance for Use Calculations:</i>			
Unimpaired miles	14,133	÷ 120,000 × \$45,175.00	= \$5,320.49
Impaired miles	26,696	÷ 120,000 × \$45,175.00 × 50%	= \$5,024.97
Total reasonable allowance for use deduction			\$10,345.45
Purchase price, including tax, title, license and registration	\$45,175.00		
Less reasonable allowance for use deduction	-\$10,345.45		
Plus filing fee refund	\$35.00		
TOTAL REPURCHASE AMOUNT	\$34,864.55		

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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 or a person on behalf of the Complainant provided sufficient notice of the defects to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defects. TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. 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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the

- vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$34,864.55**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
 3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, the Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
 4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
 5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
 6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name,

address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

SIGNED March 3, 2016



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