

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0288 CAF**

**RAMON RODRIGUEZ,  
Complainant**

v.

**BMW OF NORTH AMERICA LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Ramon Rodriguez (“Complainant”) seeks relief pursuant to Texas Occupations Code § 2301.601-2301.613 (Lemon Law) for alleged defects in his 2015 BMW 335I. Complainant asserts that the vehicle intermittently jolts and seems to lose power when he’s driving at 15 to 20 MPH. In addition, the cluster gauge blinks intermittently. BMW of North America (“Respondent”) argued that no defect exists in the vehicle. The hearings examiner concludes that the vehicle does not have a currently existing warrantable defect. As such, Complainant is not eligible 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 September 18, 2015, in Corpus Christi, Texas before Hearings Examiner Edward Sandoval. Complainant, Ramon Rodriguez, appeared and represented himself at the hearing. Respondent was represented by Randal Clay Ellis, Jr., After Sales Area Manager. Present as a witness for Respondent was Thomas Scott Clark, Technical Support Engineer.

**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 the following 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 above referenced 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 new 2015 BMW 335I from Advantage BMW Midtown (Advantage) in Houston, Texas on March 17, 2015. The vehicle's mileage was 4 at the time of purchase.<sup>5</sup> Respondent's original warranty provided bumper-to-bumper coverage for the vehicle for four (4) years or 50,000 miles, whichever comes first.<sup>6</sup> On the date of hearing the vehicle's mileage was 8,129.

Complainant testified that he first noticed an issue with the vehicle in April of 2015. He noticed that the vehicle seemed to intermittently jolt or kick when he was driving between 20 to 30 MPH. Complainant was told that if he had the vehicle's transmission in "sports" mode, the transmission would shift hard. He did not have a problem with the vehicle when he was driving in this mode. In addition, the vehicle's cluster gauge turned off and on. A couple of weeks after purchasing the vehicle, Complainant took it to a local dealer for repair.

On May 8, 2015, Complainant took the vehicle to BMW of Corpus Christi (BMW), Respondent's authorized dealer. Complainant testified that he mentioned two concerns with the vehicle to the dealer's service advisor. The issues were that the instrument cluster turned off and on for no reason and that the vehicle's transmission was shifting roughly. The dealer's service technician determined that the instrument cluster had an internal short and needed to be replaced.<sup>7</sup> The replacement part had to be special ordered.<sup>8</sup> Regarding the transmission issue,

<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 Retail Installment Contract - Texas dated March 17, 2015.

<sup>6</sup> Complainant Ex. 9, Monroney Sticker undated.

<sup>7</sup> Complainant Ex. 2, Repair Order dated May 8, 2015.

<sup>8</sup> *Id.*

the service technician indicated that the transmission was operating normally for the “sport set up.”<sup>9</sup> The vehicle’s mileage on this repair visit was 2,630.<sup>10</sup> The vehicle was in the dealer’s possession for one day during this repair visit. Complainant was provided with a rental vehicle while the vehicle was being repaired.

On May 19, 2015, Complainant took the vehicle to BMW for repair. The instrument cluster was replaced at this time.<sup>11</sup> Complainant also informed the dealer’s service advisor that when driving the vehicle at around 35 MPH, he felt that the engine seemed to “drop out, bump, kick.”<sup>12</sup> The service technician determined that the vehicle was performing to dealer specifications.<sup>13</sup> The vehicle’s mileage on this occasion was 2,962.<sup>14</sup> The vehicle was in the dealer’s possession for one day.<sup>15</sup> Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant took the vehicle to BMW on June 1, 2015, due to his concerns with the vehicle jolting when he drove it and because of concerns regarding the instrument cluster turning on and off. Complainant informed the service advisor that he felt the engine “surge between gear shifts.”<sup>16</sup> The dealer’s service technician was unable to duplicate any “hard downshifts or hard upshifts” when test driving the vehicle.<sup>17</sup> In addition, Complainant informed the service advisor that the vehicle’s service lights were indicating that maintenance was due for the vehicle before the actual due date.<sup>18</sup> The service technician indicated that an improper instrument cluster had been installed in the vehicle.<sup>19</sup> The technician indicated that the cluster needed to be replaced and that the cluster had to be ordered.<sup>20</sup> The vehicle’s mileage on this date was 3,844.<sup>21</sup> The vehicle was in the dealer’s possession for two days during this repair visit.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) regarding the vehicle effective June 5, 2015.<sup>22</sup> In addition, Complainant mailed a letter to Respondent on June 2, 2015, advising them of his dissatisfaction with the automobile.<sup>23</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Complainant Ex. 3, Repair Order dated May 19, 2015.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Complainant Ex. 4, Repair Order dated June 1, 2015.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Complainant Ex. 7, Lemon Law complaint dated June 5, 2015. Complainant actually signed the form on June 3, 2015. However, it was not received by Texas Department of Motor Vehicles until June 5, 2015, which is the effective date of the complaint.

<sup>23</sup> Complainant Ex. 8, Letter to Respondent dated June 2, 2015.

On July 10, 2015, Complainant took the vehicle to BMW for repair. He informed the dealer's service advisor that a trouble light was illuminated.<sup>24</sup> Complainant also testified that he informed the service advisor that the vehicle was jolting or kicking when he drove it. The service advisor informed Complainant that the vehicle was operating normally. The vehicle's mileage on this occasion was 5,292.<sup>25</sup>

A final repair attempt on the vehicle was performed on July 30, 2015, at BMW of Corpus Christi. The service technician, Thomas Scott Clark, determined that the vehicle was operating normally and that the concerns raised by Complainant were normal functions of an eight (8) speed transmission.<sup>26</sup> In addition, Mr. Clark indicated that the instrument cluster was not acting normally and that the issue was under investigation by Respondent.<sup>27</sup> The vehicle's mileage on the final repair attempt was 5,902.<sup>28</sup>

Complainant testified that the vehicle is still driving the same. He still feels that the vehicle seems to jolt and lose power intermittently. In addition, the instrument cluster is still turning on and off.

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

Thomas Scott Clark, Technical Support Engineer, has been in his present position since 1987. Prior to 1987, Mr. Clark had worked for ten (10) years as an automobile technician. Mr. Clark has been certified as a master technician for BMW vehicles.

Mr. Clark testified that he first became involved in the present case when he was contacted by Respondent's customer relations department. Mr. Clark was informed that he needed to schedule a final repair attempt for the vehicle. The final repair attempt was scheduled for July 30, 2015, at BMW of Corpus Christi.

On July 30, 2015, Mr. Clark performed the final repair attempt. He road tested the vehicle with one of the dealer's service technicians who had ridden in the vehicle with Complainant in the past. Mr. Clark test drove the vehicle on the highway, in the city, and in a parking lot. When driving the vehicle around 20 MPH, the transmission would sometimes downshift and sometimes not. Mr. Clark was informed by the dealer's technician that was the issue that Complainant was concerned about. Mr. Clark testified that was a normal characteristic of an eight (8) speed transmission and that the vehicle's transmission was operating normally. Mr. Clark also testified that the replacement instrument cluster placed in the vehicle on May 19, 2015, was defective. A

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<sup>24</sup> Complainant Ex. 5, Repair Order dated July 10, 2015.

<sup>25</sup> *Id.*

<sup>26</sup> Complainant Ex. 6, Repair Order dated July 30, 2015.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

new cluster has been ordered but has not been installed in the vehicle as of the date of hearing. Mr. Clark does not feel that the vehicle is malfunctioning.

#### **D. Analysis**

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that an existing 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 purchased the vehicle on March 17, 2015, and presented the vehicle to an authorized dealer of Respondent due to his concerns on the following dates: May 8, 2015; May 19, 2015; and June 1, 2015. 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 2301.605(a)(1) 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." Complainant has not met the requirements of this test.

Complainant presented the vehicle for repair only three times prior to filing the Lemon Law complaint. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. Therefore, the hearings examiner finds that repurchase or replacement relief for Complainant is not warranted.

In addition, the testimony presented in the hearing indicates that the vehicle's transmission is operating as designed. Thus, there is no defect with the vehicle's transmission. However, there does seem to be an issue with the vehicle's instrument cluster, since Respondent's witness testified that a defective instrument cluster was placed in the vehicle on May 19, 2015, and had not been replaced as of the date of hearing.

Respondent's express warranty applicable to Complainant's vehicle provides "bumper to bumper" coverage for four (4) years or 50,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 8,129. The vehicle's basic express warranty is still in effect. Respondent is hereby ordered to replace the vehicle's instrument cluster in order to conform the vehicle to Respondent's express warranty.

Complainant's request for repurchase or replacement relief is denied. Respondent will be ordered to repair the vehicle so that it conforms to its express warranty.

### III. FINDINGS OF FACT

1. Ramon Rodriguez (Complainant) purchased a new 2015 BMW 335I on March 17, 2015, with mileage of 4 from Advantage BMW Midtown (Advantage) in Houston, Texas.
2. The vehicle's mileage on the date of hearing was 8,129.
3. The manufacturer of the vehicle, BMW of North America LLC (Respondent), issued an express warranty for the vehicle for four (4) years or 50,000 miles.
4. At the time of hearing the vehicle's basic express warranty was still in effect.
5. Complainant noticed in April of 2015 that the vehicle seemed to intermittently jolt or kick when he was driving between 20 to 30 MPH and that the vehicle's cluster gauge turned off and on.
6. Complainant's vehicle was serviced by Respondent's authorized dealer, BMW of Corpus Christi, on the following dates:
  - a. May 8, 2015, at 2,630 miles;
  - b. May 19, 2015, at 2,962 miles; and
  - c. June 1, 2015, at 3,844 miles.
7. On May 8, 2015, the dealer's service technician determined that the vehicle's instrument cluster had an internal short and ordered a new instrument cluster to replace the cluster that was shorting out. In addition, the technician informed Complainant that the vehicle's transmission was operating normally.
8. On May 19, 2015, the dealer's service technician replaced the vehicle's instrument cluster. In addition, the technician investigated Complainant's concern regarding the manner in which the vehicle's transmission was shifting. The technician determined that the vehicle was performing within Respondent's specifications.
9. On June 1, 2015, the dealer's service technician investigated Complainant's concern regarding the engine surging between gear shifts. The technician was unable to duplicate hard downshifts or upshifts during a test drive of the vehicle.

10. Also, on June 1, 2015, the service technician determined that an improper instrument cluster had been installed in the vehicle and that a new cluster had to be ordered and installed.
11. On June 5, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On July 30, 2015, Respondent's technical support engineer, Thomas Scott Clark, performed a final repair attempt on the vehicle. Mr. Clark determined that the vehicle was operating as designed in regards to the jolting issue.
13. Mr. Clark determined that the instrument cluster was not operating normally. A replacement cluster has been ordered, but has not been installed.
14. On August 24, 2015, 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.
15. The hearing in this case convened and the record closed on September 18, 2015, in Corpus Christi, Texas before Hearings Examiner Edward Sandoval. Complainant, Ramon Rodriguez, appeared and represented himself at the hearing. Respondent was represented by Randal Clay Ellis, Jr., After Sales Area Manager. Present as a witness for Respondent was Thomas Scott Clark, Technical Support Engineer.

#### 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. 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 has not established by a preponderance of the evidence that the vehicle currently 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 §§ 2301.601-2301.613 is hereby **DISMISSED**. Respondent is hereby **ORDERED** to repair Complainant's vehicle so that it conforms to Respondent's express warranty. Texas Occupations Code § 2301.204.

**SIGNED October 26, 2015**



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