

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0116 CAF**

**LOYDY MARKIZER and  
AARON MARKIZER,  
Complainants**

**v.**

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

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Loydy Markizer and Aaron Markizer (Complainants) 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 their vehicle distributed by BMW of North America, LLC (Respondent). The hearings examiner concludes that the subject vehicle does not have a warrantable defect. Consequently, the Complainants' vehicle does not qualify for relief.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 May 13, 2016, in Bryan, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented, and testified for, themselves. Stephen Soncini, After Sales Area Manager, represented the Respondent. David Kaiser, Technical Support Engineer, and Joseph Gyug, Service Director for Garlyn Shelton Imports, testified for the Respondent.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### b. Substantial Impairment of Value

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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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**

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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

**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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>9</sup>

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<sup>6</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>7</sup> “[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).

<sup>8</sup> “[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).

<sup>9</sup> TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV’T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

(2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>10</sup> and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.<sup>11</sup>

## 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."<sup>12</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainants.<sup>13</sup> The Complainants must prove each fact required for relief by a preponderance, that is, the Complainants must present evidence showing that all of the required facts are more likely than not true.<sup>14</sup> 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 equally supports the Complainants and the Respondent, the Respondent will prevail. The Complainants prevail only if the evidence shows that all of the required facts are more likely than not true.

### A. Complainants' Evidence and Arguments

On April 9, 2015, the Complainants, leased a new 2015 BMW X1 from Bryan Imports, Inc. d/b/a Garlyn Shelton Imports, an authorized dealer of the Respondent, RP, in Bryan, Texas.<sup>15</sup>

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<sup>10</sup> TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>11</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>12</sup> TEX. OCC. CODE § 2301.204.

<sup>13</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>14</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>15</sup> Complainants' Ex. 1, Buyer's Order.

The vehicle had 3,327 miles on the odometer at the time of delivery.<sup>16</sup> The vehicle's new vehicle warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.<sup>17</sup>

The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
July 28, 2015	8,571	Rear tires are losing air <sup>18</sup>
September 15, 2015	9,092	Left rear tire is going flat <sup>19</sup>
October 6, 2015	10,485	Slashes in tires <sup>20</sup>
	12,546	New tire has gone down twice already <sup>21</sup>
March 24, 2016	16,772	Left rear tire setting off tire pressure monitor (TPM) and right rear tire has a hole <sup>22</sup>
April 7, 2016	16,890	Left rear tire having problem, causing TPM light to come on <sup>23</sup>

On December 2, 2015, the Complainants mailed a written notice of defect to the Respondent. On December 8, 2015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the tires lose air and in particular, the rear driver's side tire loses air constantly.

Mr. Markizer clarified that they alleged that a defect in the wheel itself, not the tire, caused the air loss. Mrs. Markizer testified that she first noticed low tire pressure by mid-May (of 2015) and put air in the tire. She initially attributed the low pressure to the temperature changing. She indicated that none of the repair attempts improved the problem and that she last experienced low tire pressure the day of the hearing. She explained that when turning the vehicle on, the vehicle (TPM) beeps and identifies the problem tire. She described the issue as occurring randomly. Initially, she indicated that only one tire had an issue. Mr. Markizer clarified that the other tires had a slow leak. Mrs. Markizer pointed out that the low pressure warning would go off every time she is in the car. After inflating the tire, the tire will have low pressure the next day. She confirmed

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<sup>16</sup> Complainants' Ex. 5, Odometer Disclosure Statement.

<sup>17</sup> Complainants' Ex. 2, Service and Warranty Information.

<sup>18</sup> Complainants' Ex. 8, Invoice BFCS128608.

<sup>19</sup> Complainants' Ex. 9, Invoice 421616.

<sup>20</sup> Complainants' Ex. 10, Invoice BFCS131284.

<sup>21</sup> Complainants' Ex. 13, RO 133038.

<sup>22</sup> Complainants' Ex. 11, Invoice 5447.

<sup>23</sup> Complainants' Ex. 12, Invoice 6039.

that one tire, the left rear, had the daily problems. Mr. Markizer noted that he would inflated the tires between 40 to 45 psi and the TPM warning goes off at 25 psi or below. He confirmed that the tire would lose between 15 to 20 psi per day.

On cross-examination when asked about how slashes could appear on the inner facing side of the replacement tire, Mr. Kaiser stated that cuts on the edge could occur from rolling over the edge of the highway, potholes, and tire fatigue from heat. When asked if the rim could be defective, he explained that the tire would be leaking immediately and not three weeks later.

Mrs. Markizer testified that they would air the tires when going to the dealer, so the tires would not be low at the dealer. She also stated that the replacement tire has slashes on the inner facing part of the tire and not on the bottom. Moreover, all of the tires have slashes, but the same back tire is being replaced. In conclusion, Mr. Markizer stated his belief that the rim had a defect. If slashes by themselves caused air loss, all four tires would be losing air.

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

On cross-examination, Mr. Markizer confirmed that their home had a gravel driveway. Later, he explained that the driveway was compacted with a 9,000 pound roller and that the drive consisted of rounded river rock. Mrs. Markizer did not believe that the gravel road caused the slits in the subject vehicle's tires because other vehicles with the same kind of tires did not have any problems. Mr. Markizer stated that his children's vehicles, a compact SUV and a pickup, did not have any problems. He added that he drove a pickup and pulled a trailer without any problems. Mrs. Markizer noted that she drove a Jaguar with run flat tires and never had a problem. Mr. Markizer testified that their driveway was a half-mile long. He did not know whether the tire was defective.

Mr. Gyug testified that he found the vehicle's tires had nicks, punctures and multiple slits and recommended replacement. During one service visit, the vehicle had one tire replaced though the remaining tires had slits. He explained that they scanned the vehicle for proper operation and found no problems. The low pressure warning occurred because of low tire pressure. Aside from the slashes, the tires also had chunks missing, and showed wear. Mr. Gyug confirmed that he believed the slits and slashes came from driving on gravel, explaining that the tires were soft, with a 220 treadwear rating. Mr., Gyug concluded that any problems they found related to the tires

themselves and not the tire pressure monitor. Mr. Gyug also confirmed that the wheels did not have any cracks or deformities.

Mr. Kaiser testified that he found the tires had slits on the outside circumference of tires (as shown in photos taken on the day of his inspection).<sup>24</sup> In one photo, the tire appeared to have a puncture that could cause leakage. He clarified that the puncture appeared to have resulted from an outside influence. Other photos variously showed tire wear and more slits on the rubber. Mr. Kaiser explained that the tire pressure monitoring system indicates when a tire loses pressure and will show the actual pressure of the tire. He believed that the TPM worked effectively. However, according to the National Highway Traffic Safety Administration, the customer must check the tire pressure and not rely solely on the TPM system. Mr. Kaiser noted that tire punctures may occur anytime when driving. Even rocks from a truck or any objects other than flat pavement can damage a tire. The owner's manual specifies that driving over rough or damaged surfaces as well as debris, curbs or other obstacles can cause serious damage to wheels, tires and suspension parts.<sup>25</sup> When a tire loses air, the vehicle will show two "messages": a yellow light that looks like a flat tire on the instrument panel and the actual tire pressure in the iDrive system. The key data from four repair orders only shows one check control message for a low left rear tire.<sup>26</sup> Mr. Kaiser explained that the vehicle's warranty did not cover the tires and only the tire manufacturer's warranty covered the tires. He surmised that a defect, if any, would be a tire manufacturer's defect. He did not believe that the subject vehicle itself had a defect.

### C. Inspection

At the inspection during the hearing, the vehicle's odometer displayed 17,593 miles. All four tires exhibited lacerations to some degree and the wheels had some abrasions.

### D. Analysis

This case hinges on whether the leak arises from a defect in the wheel or a defect in or damage to the tire. The vehicle's warranty excludes the tires from coverage. Under the heading "What is not covered", the warranty states that "[t]ires are warranted by their respective

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<sup>24</sup> Respondent's Ex. 1, photos of tires on January 5, 2016.

<sup>25</sup> Respondent's Ex. 3, Owner's Manual, Mobility - Wheels and tires.

<sup>26</sup> Respondent's Ex. 4, Key Data.

manufacturer.”<sup>27</sup> Therefore, if the leak arises from the tire itself, the vehicle does not have a defect that qualifies for relief. On the other hand, if the leak arises from a defect in the wheel, the vehicle would qualify for relief. As reflected in the evidence, cuts on a tire do not necessarily indicate the existence of a leak (a cut may not have penetrated deep enough to cause a leak). However, in the present case, Mr. Gyug testified that the tire bubbled during a soap water test, indicating a leak in the tire itself. Significantly, as Mr. Kaiser pointed out, if the wheel itself had a leak defect, air should have leaked from the beginning. Testimony showed that the tire needed air on a daily basis. However, the Complainants first noticed air leaking in mid-May, approximately a month and a half after taking delivery of their vehicle on April 9, 2015. Given that the tire itself exhibited leaking air in the soap water test and that the vehicle’s tire did not exhibit air loss until over a month after delivery, the leak appears more likely than not to arise from the tire itself and not the wheel. Therefore the air leak is not a warrantable defect that qualifies the vehicle for repurchase/replacement or repair relief.

### III. Findings of Fact

1. On April 9, 2015, the Complainants, leased a new 2015 BMW X1 from Bryan Imports, Inc. d/b/a Garlyn Shelton Imports, an authorized dealer of the Respondent, BMW of North America, LLC, in Bryan, Texas. The vehicle had 3,327 miles on the odometer at the time of delivery.
2. The vehicle’s new vehicle 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 Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
July 28, 2015	8,571	Rear tires are losing air
September 15, 2015	9,092	Left rear tire is going flat
October 6, 2015	10,485	Slashes in tires
	12,546	New tire has gone down twice already
March 24, 2016	16,772	Left rear tire setting off tire pressure monitor (TPM) and right rear tire has a hole
April 7, 2016	16,890	Left rear tire having problem, causing TPM light to come on

<sup>27</sup> Complainants’ Ex. 2, Service and Warranty Information at 20.

5. On December 2, 1015, the Complainants mailed a written notice of defect to the Respondent.
6. On December 8, 1015, the Complainants filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the tires lose air and in particular, the rear driver's side tire loses air constantly.
7. On February 12, 2016, 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.
8. The hearing in this case convened and the record closed on May 13, 2016, in Bryan, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented, and testified for, themselves. Stephen Soncini, After Sales Area Manager, represented the Respondent. David Kaiser, Technical Support Engineer, and Joseph Gyug, Service Director, testified for the Respondent.
9. The vehicle's odometer displayed 17,593 miles at the time of the hearing.
10. At inspection during the hearing, all four of the vehicle's tires exhibited some lacerations.
11. The air leak resulted from damage to the tire and not from a defect in the wheel.
12. The vehicle's warranty does not cover the tires.
13. The tires have a separate warranty provided by the tire manufacturer.

#### **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 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 § 206.66(d).
6. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. 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.

#### 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**.

**SIGNED July 7, 2016**

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