

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0086 CAF**

**1 FOX 2 PRODUCTIONS,
Complainant**

v.

**MERCEDES-BENZ USA, LLC and
MERCEDES-BENZ FINANCIAL
SERVICES,**

Respondents

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

1 Fox 2 Productions (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in its vehicle distributed by the Respondent Mercedes-Benz USA, LLC (MBUSA) and leased from Mercedes-Benz Financial Services (MBFS).¹ A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for repair relief under Texas Occupations Code § 2301.204 (Warranty Performance).

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing² 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 May 25, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed upon filing of the limited warranty on May 26, 2017. Jacqueline Harrington represented and testified for the Complainant. Collin Kennedy, attorney, represented the Respondent MBUSA. Matthew Miller, Regional Field Technical Specialist, and Ed Hoefel, After Market Operations Manager, testified for the Respondent MBUSA.

¹ Although MBFS is designated as a respondent, no relief is sought from MBFS. MBFS is included as a party because it has an interest in this proceeding due to its ownership of the subject vehicle.

² TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Warranty Repair Relief

A vehicle may qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle.”³

2. Burden of Proof

The law places the burden of proof on the Complainant.⁴ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.⁵ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

3. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.⁶ The complaint should state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.”⁷ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.⁸ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.⁹

³ TEX. OCC. CODE § 2301.204.

⁴ 43 TEX. ADMIN. CODE § 215.66(d).

⁵ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

⁶ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

⁷ 43 TEX. ADMIN. CODE § 215.202(a)(2).

⁸ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

⁹ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

A. Complainant's Evidence and Arguments

On November 23, 2015, the Complainant, leased a pre-owned 2015 Mercedes-Benz C300W from Mercedes-Benz of Austin (MB Austin), a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 9,270 miles on the odometer at the time of lease. The vehicle's basic warranty covers the vehicle for four years or 50,000 miles, whichever occurs first. On October 21, 2016, the Complainant filed a complaint with the Department alleging problems with: engine noise; air conditioning (AC) blower speed; the computer, parking indicator, and air bag indicator; transmission; cigarette lighter (12 volt socket); blind spot warning; engine recall; air bag recall; right brake caliper sticking; collision prevention assist; and unknown fault codes stored in ESP (electronic stability program).

Ms. Harrington testified that none of the issues were successfully repaired. She noted that at the last repair visit, Mercedes-Benz of Georgetown (MB Georgetown) apparently identified the problem with the engine but subsequently refused to service the vehicle because the repairs had already been made. Ms. Harrington described the engine noise as varying at different times, sometimes louder, sometimes tapping, sometimes clatter. She could hear the noise shifting from park to reverse and while in park. She first noticed the noise within days of taking delivery. The first repair addressed the engine, which had oil leaking from the crankshaft. In describing the AC issue, Ms. Harrington stated that up to a point, she cannot feel the air, but can feel it at higher speed. She did not believe the AC operated normally. She had driven other vehicles and the subject vehicle's AC did not run like the other vehicles. Ms. Harrington elaborated that she had driven some other same model vehicles and also did a comparison sitting at a repair facility. She last noticed the AC issue on the day of the hearing. She confirmed that the parking indicator and air bag indicator related to the computer issue. She added that the parking brake would automatically apply itself without her touching anything. She first noticed an air bag light issue within about 30 to 60 days after delivery, which the dealer said related to seating. The vehicle also displayed a message regarding the seatbelt, referencing the owner's manual. However, Ms. Harrington had not returned to the dealership since October because of her treatment at the dealership. She last noticed an indicator light issue on the day of the hearing. Ms. Harrington believed the battery cable replacement occurred because of problems caused by the dealer's repair or possibly as a courtesy for the chiming. With regard to the transmission, she explained that the transmission jerked and the dealer replaced a crossbar that was damaged during a repair. She first noticed the jerking

immediately, as soon as she drove off with the vehicle. She last noticed this about a week before the hearing. Ms. Harrington testified that she has not had problems with the cigarette lighter/12 V socket, after replacement of a fuse and a second repair of the lighter/socket (for an object in the socket). However, she noted that the USB port did not work. Ms. Harrington indicated that the blind spot warning sometimes turns on with no other vehicles on the street. She explained that the vehicle's display shows various messages, some days it relates to the air bag, sometimes the seat belt, but the screen messages does not display all messages at the same time. Ms. Harrington affirmed that the engine had a recall but a repair was not performed because a remedy currently did not exist. The airbag was also subject to a recall but did not have a fix available. Ms. Harrington explained that a warning light, which remained on, reflected that a brake caliper on the right was sticking (the repair order from German Auto Center, an independent repair facility, also reflects the sticking caliper). In addition, the vehicle displayed a warning light for the collision prevention assist, which she first noticed about three to four weeks before the hearing. Ms. Harrington testified that she barely drives the vehicle and that it would not pass inspection, and she did not want to risk getting tickets because of the past-due inspection. She believed the vehicle's registration expired as of February. Ms. Harrington asserted her belief that the vehicle was designed with a bad engine.

B. Respondent's Evidence and Arguments

On cross-examination, Ms. Harrington affirmed that the Respondent reimbursed approximately three months of lease payments and she last paid on the lease in November, December, or possibly September (2016). She acknowledged that the repair order from German Auto Center showed about an additional 10,000 miles driven since the last repair visit to the dealer. She affirmed that she did not contact Mercedes-Benz about the airbag recall due to the way she was treated.

Mr. Miller, testified that a comparison with a like model 2016 loaner vehicle, showed that the subject vehicle's blower did not operate at the correct speed, but now operates identically to the comparison vehicle. He observed during the test drive that the blower stepped up gradually to level five or six, which he deemed normal compared to other C Class vehicles. He recommended using the auto mode because it adjusts in comparison to the coldness of the evaporator. The blower has a delay to avoid a burst of hot air, so the system takes time to reach the right temperature before blowing air. Sometimes, the system will go to max speed to get to a cool level. Mr. Miller explained

that the dealer performed a major repair, replacing wrist pins, part of the rods, pistons, and connecting rods. The dealer also identified noise with the high pressure pump along with a roller operating cam for a pump. During the test drive and inspection at the hearing, he did not observe any abnormal noise. Mr. Miller explained that the engine, which has direct injection engine with a very high pressure pump, exhibited normal sounds, the same as other like model cars. He confirmed that no Mercedes-Benz vehicle of the same class as the subject vehicle was completely quiet. He pointed out that when engines are cold, to warm up to operating temperatures, the vehicle may enrich the fuel mixture and adjust cam timing and the engine may ping (pre-detonate) at a certain point. But the noise is not abnormal. Mr. Miller testified that two different indicator lights were on, including the brake wear indicator, noting that the time was about right to replace the brake pads. Regarding the calipers, he could not offer an opinion on that. For the brake indicator light coming on and off, he explained that he would need to connect the vehicle to a diagnostic machine. In reviewing the German Auto Center repair order, Mr. Miller identified the unknown fault as a concern to follow up on but noted that this repair facility did not use Mercedes-Benz approved diagnostic equipment. Mr. Miller explained that the airbag recall was for older vehicles that had Takata airbags. He pointed out that they never had an injury in a Mercedes-Benz vehicle from this airbag and this recall was voluntary.

Mr. Hoefel explained the confusion at MB Georgetown occurring when the dealership identified repairs that the engine appeared to need. He testified that the engine repairs, the replacement of wrist pins in particular, performed at MB Austin were removed from the vehicle's history because of policy deviations. Because MB Georgetown could not see that the repair history showing that the wrist pins had already been replaced, the dealership mistakenly determined that the vehicle still needed replacement of the wrist pins.

C. Inspection and Test Drive

At the hearing, before the test drive, the vehicle's odometer displayed 29,900 miles. The vehicle's registration showed a December 2017 expiration. The vehicle was test driven on local roads as well as on the freeway. Ms. Harrington noted that the AC did not blow much air except at high blower settings (with seven being the maximum). She added that the AC blower was noisy at the highest settings. The vehicle displayed a message to check brake pad wear. During the test drive, Ms. Harrington read on the display, "Drive Assist has an ESP Collision Prevention Attention

Assist.” Mr. Miller explained that this was just a menu and that hitting OK would provide access to other screens. Ms. Harrington navigated through various screens per Mr. Miller. The engine did not exhibit any unusual noise during the test drive. The odometer displayed 29, 919 miles at the end of the test drive. Mr. Miller explained that the vehicle has a design feature that automatically engages the parking brake after stopping and opening the door to prevent the vehicle from moving. After stopping the vehicle and raising the hood, a clicking/rattling could be heard.

D. Analysis

As explained below, the vehicle does not qualify for repurchase or replacement but does qualify for repair relief.

1. Repurchase/Replacement Only Applies to New Vehicles

As an initial matter, repurchase/replacement relief under the Lemon Law only applies to new vehicles.¹⁰ Because the subject vehicle was used at the inception of the lease, it cannot qualify for repurchase or replacement. Nevertheless, a used vehicle may still qualify for Warranty Performance repair if the vehicle has a currently existing warrantable defect.

2. Warrantable Defects

Warranty Performance relief does not apply to all problem that may occur with a vehicle, but only to warrantable defects (defects covered by warranty).¹¹ The Warranty Performance law does not require the Respondent to provide any particular warranty coverage nor does Warranty Performance specify any standards for noise or other vehicle characteristics. Warranty Performance only requires the Respondent to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for warranty repair, the vehicle must have a defect covered by warranty.¹² In this case, the warranty specifies that “Mercedes-Benz USA, LLC (MBUSA) warrants to the original and each subsequent owner of a new Mercedes-Benz vehicle that any authorized Mercedes-Benz Center will make any repairs or replacements necessary to correct defects in material or workmanship arising during the warranty period.” Accordingly, the warranty applies to conditions resulting from a defect in materials or workmanship. On the other

¹⁰ TEX. OCC. CODE § 2301.603(a)

¹¹ TEX. OCC. CODE § 2301.204(a).

¹² TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

hand, the warranty does not cover conditions arising from the vehicle's design. Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design defects.¹³ That is, defects in materials or workmanship (manufacturing defects) differ from characteristics of the design. The courts have explained that a "manufacturing defect is one created by a manufacturer's failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer's design specifications."¹⁴ In other words, a manufacturing defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. As a result, a defective vehicle differs from a properly manufactured vehicle. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which occurs before manufacturing) and improper dealer repairs (which occur after manufacturing) are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer's specifications may ordinarily exhibit the same characteristics. In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves."¹⁵ A design defect would require a redesign to solve the problem, unlike a manufacturing defect. If the complained of condition constitutes a design characteristic or even a design defect, repair relief does not apply because the warranty only covers manufacturing defects.

In the present case, the record reflects that the sticking right brake caliper and nonfunctioning USB port are currently existing warrantable defects. With respect to the other

¹³ E.g., *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); see *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

¹⁴ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

¹⁵ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

issues, the record either affirmatively shows that the issues are not warrantable defects or a preponderance of the evidence does not show that the issues constitute existing warrantable defects. In particular, the following issues are not warrantable defects: the transmission/crossbar issue (caused by the dealer and not a manufacturing defect); the engine and airbag recalls (a design defect requiring a redesign to provide a remedy and not a manufacturing defect); the brake pad wear indicator (which only reflects the need for normal maintenance); and the parking brake engaging automatically (which is a design feature to prevent the vehicle from moving after stopping). Further, the engine noise appears to occur normally from the high-pressure fuel injectors and not from any defect. Likewise, the AC blower does not appear to have a manufacturing defect. The blower speed increased progressively with the higher settings. Though the AC blower may not have performed as desired, it does appear to function according to design. Moreover, the ambient heat also appears to have factored into the apparent ineffectiveness of the blower. With regard to the cigarette lighter/12 V socket, Ms. Harrington testified that it functioned properly after repairs, so it no longer has a defect.

III. Findings of Fact

1. On November 23, 2015, the Complainant, leased a pre-owned 2015 Mercedes-Benz C300W from Mercedes Benz of Austin, a franchised dealer of the Respondent, in Austin, Texas. The vehicle had 9,270 miles on the odometer at the time of lease.
2. The vehicle's basic warranty covers the vehicle for four years or 50,000 miles, whichever occurs first.
3. October 21, 2016, the Complainant filed a complaint with the Department alleging problems with: engine noise; air conditioning blower speed; the computer, parking indicator, and air bag indicator; transmission; cigarette lighter (12 volt socket); blind spot warning; engine recall; air bag recall; right brake caliper sticking; collision prevention assist; and unknown fault codes stored in ESP (electronic stability program).
4. On February 23, 2017, 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 factual matters asserted.

5. The hearing in this case convened on May 25, 2017, in Austin, Texas, before Hearings Examiner Andrew Kang. The record closed upon filing of the limited warranty on May 26, 2017. Jacqueline Harrington represented and testified for the Complainant. Collin Kennedy, attorney, represented the Respondent MBUSA. Matthew Miller, Regional Field Technical Specialist, and Ed Hoefel, After Market Operations Manager, testified for the Respondent MBUSA.
6. The vehicle's odometer displayed 29,900 miles at the time of the hearing.
7. The vehicle's warranty was in effect at the time of the hearing.
8. At the hearing, before the test drive, the vehicle's odometer displayed 29,900 miles. The vehicle was test driven on local roads as well as on the freeway. Ms. Harrington noted that the AC did not blow much air except at high blower settings (with seven being the maximum). She added that the AC blower was noisy at the highest settings. The vehicle displayed a message to check brake pad wear. During the test drive, Ms. Harrington read on the display, "Drive Assist has an ESP Collision Prevention Attention Assist." Mr. Miller explained that this was just a menu and that hitting OK would provide access to other screens. Ms. Harrington navigated through various screens per Mr. Miller. The engine did not exhibit any unusual noise during the test drive. The odometer displayed 29,919 miles at the end of the test drive. After stopping the vehicle and raising the hood, a clicking/rattling could be heard. Mr. Miller explained that the vehicle has a design feature that automatically engages the parking brake after stopping and opening the door to prevent the vehicle from moving.
9. An independent repair facility found a right brake caliper to be sticking, which has not been repaired.
10. The USB port is not functioning.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
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. 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 § 206.66(d).
6. The subject vehicle cannot qualify for replacement or repurchase. Replacement and repurchase relief only apply to new vehicles. TEX. OCC. CODE §§ 2301.603 and 2301.604.
7. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.204.
8. The Complainant's vehicle qualifies for warranty repair. TEX. OCC. CODE § 2301.204.

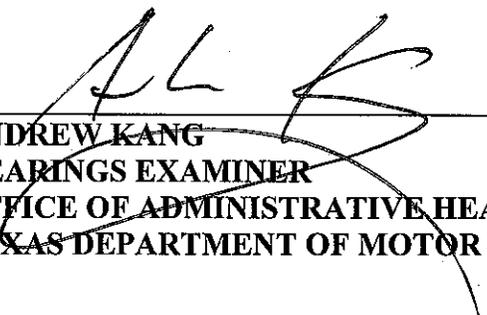
V. Order

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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the vehicle's sticking brake caliper and non-functioning USB port to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.¹⁶ Within 20 days

¹⁶ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED July 25, 2017



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