

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0159162 CAF**

**MICHELLE E. PETERS and
ROBERT E. PETERS,
Complainants**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Michelle E. Peters and Robert E. Peters (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2016 BMW X5. Complainants assert that the vehicle's passenger seat extender intermittently pops out on its own and that the driver's seat will not retain preset settings. BMW of North America, LLC (Respondent) argued that the vehicle can be repaired to conform to their warranty. The hearings examiner concludes that although the vehicle does have a currently existing warrantable defect, Complainants are entitled only to repair relief, as the defect does not substantially impair the use or market value of the vehicle and it does not create a serious safety hazard as defined in the Occupations Code.

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 on September 7, 2017, in Carrollton, Texas before Hearings Examiner Edward Sandoval and the hearing record closed that same day. Complainants were represented by Stacy Dunlop, attorney with The Dunlop Law Firm PLLC. Complainants, Michelle and Robert Peters, both appeared and testified at the hearing. Respondent was represented by Daniel Lubin, After-Sales Area Manager. In addition, David Kaiser, Technical Support Engineer, testified for Respondent.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by

repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

A “serious safety hazard” is defined as a “life-threatening malfunction or nonconformity that: (A) substantially impedes a person’s ability to control or operate a motor vehicle for ordinary use or intended purposes; or (B) creates a substantial risk of fire or explosion.”⁵

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.⁶

B. Complainant’s Evidence and Arguments

Complainants purchased a new 2016 BMW X5 (the vehicle) from BMW of Austin, in Austin, Texas on May 28, 2016.⁷ The vehicle’s mileage was 9 at the time of delivery.⁸ The vehicle’s mileage on the date of hearing was 24,064.

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.601(4).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for 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.

⁷ Complainant Ex. 1, Motor Vehicle Purchase Contract dated May 28, 2016.

⁸ *Id.*

1. Michelle E. Peters' Testimony

Ms. Peters testified that she is the primary driver of the vehicle. She stated that within a few days after purchasing the vehicle, the passenger's seat leg extender popped out to its full extent on its own. She did not do anything that would have caused the extender to pop out. The noise of the extender popping out startled her. She felt that the noise was comparable to a vehicle's air bag deploying. Ms. Peters stated that the extender pops out about ½ inch when it's fully extended.

Ms. Peters took the vehicle to BMW of Austin for repair to the seat extender on June 22, 2016. The dealer's service technician replaced the vehicle's "thigh extender assembly" in order to address the issue.⁹ The vehicle's mileage on this occasion was 1,739.¹⁰ The vehicle was in the dealer's possession for one (1) day during this repair visit. Complainants were provided with a loaner vehicle while their vehicle was being repaired.

Ms. Peters stated that the vehicle's leg extender popped out again a few days later. She and her family were in the process of moving to Dallas and waited for a while before taking the vehicle for repair. Ms. Peters' father scheduled an appointment for her with BMW/Mini of Arlington for August 27, 2017. Ms. Peters took the vehicle to the dealer as scheduled. However, she did not leave the vehicle with the dealer for repair as the dealer's service advisor informed her that the part the vehicle was going to need was on back order and would take a while to get. Ms. Peters decided not to leave the vehicle for repair at the time.

Ms. Peters then took the vehicle for repair to BMW of Dallas on September 27, 2016. The dealer's service technician did not perform a repair, but special ordered a front thigh support motor for the vehicle.¹¹ Ms. Peters was informed that it would take several weeks for the part to arrive and that she would be given a phone call when to take the vehicle back for repair. The vehicle's mileage when it was taken to the dealership on this occasion was 5,394.¹² The vehicle was in the dealer's possession for three (3) days.¹³ Complainants were provided with a loaner vehicle while their vehicle was being repaired. One of the repairs performed on the vehicle during this visit was a repair to the vehicle's right rear wheel. Ms. Peters testified that the wheel in question was damaged when she was startled by the leg extender popping out while she was driving the vehicle.

⁹ Complainant Ex. 2, Repair Order dated June 22, 2016.

¹⁰ *Id.*

¹¹ Complainant Ex. 4, Repair Order dated September 27, 2016.

¹² *Id.*

¹³ *Id.*

Ms. Peters took the vehicle back to BMW of Dallas for repair on November 14, 2016. The dealer's service technician determined that the wrong replacement part had been ordered for the vehicle and had to order a new part.¹⁴ The mileage on the vehicle on this occasion was 8,483.¹⁵ The vehicle was in the dealer's possession for two (2) days. Complainants were provided with a loaner vehicle while their vehicle was being repaired.

Ms. Peters testified that she took the vehicle back to BMW of Dallas on December 22, 2016. She spoke to the dealer's service manager during this visit and asked that the passenger side front seat be replaced in order to resolve the issue with the leg extender. The manager refused to replace the seat as requested indicating that Respondent would not replace it. The vehicle's mileage on this occasion was 10,440.¹⁶ The vehicle was at the dealer's location for a couple of hours that day while an oil change was performed on it.

On January 3, 2017, Complainants mailed a letter to Respondent advising them of the problem with the vehicle's passenger's side seat's leg extension.¹⁷ Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 9, 2017.¹⁸

Ms. Peters testified that she started to have a problem with the driver's seat not reverting to saved settings. She took the vehicle to BMW of Dallas for repair sometime after January 9, 2017. She was informed by the dealer's representative that a computer chip in the vehicle was replaced in order to address this issue. Ms. Peters was also informed that the dealership's printer wasn't working, so they could not give her a copy of the repair invoice. Ms. Peters stated that the driver's seat is still not saving the settings as it is designed to do. As a result, Complainants filed an amended complaint to the Department on March 31, 2017, concerning this issue.¹⁹ The issue with the driver's seat not retaining settings does not affect the passenger's seat extender popping out.

Ms. Peters testified that she was never contacted by Respondent for a final repair attempt on the vehicle. She stated that the problems with the vehicle's seats have caused her anxiety and angst. She's had to take time off of work in order to deal with the issues and it has become an inconvenience. Ms. Peters also testified that she is startled oftentimes when the seat extender pops out. She feels that it affects her driving and can cause her to have an accident.

¹⁴ Complainant Ex. 7, Repair Order dated November 14, 2016.

¹⁵ *Id.*

¹⁶ Complainant Ex. 8, Repair Order dated December 22, 2016

¹⁷ Complainant Ex. 10, Letter to BMW of North America, LLC dated January 3, 2017.

¹⁸ Complainant Ex. 9, Lemon Law complaint dated January 9, 2017, pp. 1-3. Although the complaint was signed by Complainants on January 4, 2017, the complaint was actually received by the Texas Department of Motor Vehicles on January 9, 2017, which is the effective date of the complaint.

¹⁹ *Id.*, pp. 4-6.

Ms. Peters stated after the vehicle inspection which occurred on the date of hearing that it was apparent that the driver's seat settings were not being saved properly. She also observed that the passenger's seat extender was not operating properly.

During cross-examination, Ms. Peters testified that she has been in a vehicle when the air bag has deployed. She feels that the sound of the extender popping out is similar to an air bag deploying.

2. Robert E. Peters, Jr.'s Testimony

Mr. Peters testified that he drives the vehicle about once a month. He is usually a passenger in the vehicle and has observed the seat extender popping out. The first time he observed the issue, Mr. Peters was in the seat when the extender popped out and it startled him. The extender does not have much force and did not injure him. The noise was loud enough to startle him.

Mr. Peters feels that the extender popping out is a safety issue. He expects the vehicle to work as designed, since it is an expensive vehicle. He felt that the vehicle was safe when he purchased it, but is disappointed in the issues with the seat extender.

3. Stacy Dunlop's Testimony

Stacy Dunlop is an attorney representing Complainants. He testified as to his legal fees. He stated that he charges \$300 per hour for legal representation. He obtained a \$3,000 retainer from Complainants. He worked in excess of 10 hours for Complainants on their complaint, including representing them in a pre-hearing conference and in the actual hearing. However, he is not going to charge them more than their retainer of \$3,000.

C. Respondent's Evidence and Arguments

1. Daniel Lubin's Testimony

Daniel Lubin, After-Sales Area Manager, testified for and represented Respondent in the hearing. He has worked in the automotive industry since 2000. He became a Master Technician for BMW that same year. He's been working in his present position for the past four and a half (4 ½) years.

Mr. Lubin testified that he does not know whether Respondent's representatives requested a final repair attempt on Complainant's vehicle. He stated that the complaint was initially handled by Respondent's legal department, but then referred to him.

Mr. Lubin stated that BMW of Dallas' technicians had made some mistakes in ordering parts for the vehicle. On September 27, 2016, the technician ordered a thigh support motor which was an incorrect part, since the front passenger seat was not equipped with a motor. Then, on November 14, 2016, when it was discovered that the wrong part had been ordered, a new part was ordered. However, this special ordered part (a seat rail) was also not the correct part for the repair.

Mr. Lubin stated that he feels that the vehicle has been repaired. He indicated that a repair was performed on the vehicle on January 30, 2017, at BMW of Dallas. The dealer's service technician was able to duplicate the concern with the passenger seat leg extender and lubricated the guides for the extender in an effort to address the concern.²⁰ The vehicle's mileage on this occasion was 12,575.²¹ The vehicle was in the dealer's possession for a day.²² Complainants were provided with a loaner vehicle on this occasion.²³

Mr. Lubin also stated that the vehicle was at BMW of Dallas for repair on May 11, 2017. On this occasion the dealer's service technician determined that the passenger seat extender was working properly.²⁴ During this repair visit, the technician also determined that the driver's seat settings were not being stored consistently.²⁵ The technician found that the driver's seat switch block was shorted and replaced it.²⁶ The vehicle's mileage on this occasion was 18,041.²⁷ The vehicle was in the dealer's possession for a day.²⁸ Complainants were provided with a loaner vehicle while their vehicle was being repaired.²⁹

During cross-examination, Mr. Lubin testified that an issue with the seat extender was discovered by the dealer's service technician on January 30, 2017; hence, the repair that was performed. He also stated that it is possible that bad vehicle designs can be manufactured.

2. David Kaiser's Testimony

David Kaiser, Technical Support Engineer, testified for Respondent. Mr. Kaiser has been in the automotive industry for 24 years. He worked as a dealer technician for BMW dealerships for 12

²⁰ Respondent Ex. 1, Repair Order dated January 30, 2017.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Respondent Ex. 2, Repair Order dated May 11, 2017.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

years before being hired for his current position. Mr. Kaiser has been in his current position for 11 years. He is a BMW Certified Master Technician. He has been an Automotive Service Excellence (ASE) Certified Master Technician in the past, but has allowed his certification to lapse.

Mr. Kaiser testified that he had never seen Complainants' vehicle prior to the hearing date nor was he asked to perform a final repair attempt on it. He stated that the seat extender in Complainants' vehicle is operated manually. The extender allows for lateral support for an individual's knees. The extender can be placed in several positions. Mr. Kaiser stated that he has never seen an extender pop out before. He said it can make a moderately loud noise. It even could possibly startle someone who is driving and not expecting the noise. Mr. Kaiser testified that the extender extends the seat about 2 ½ to 3 inches.

Mr. Kaiser testified that during the inspection of the vehicle that occurred on the hearing date, he observed that the driver's side seat was not functioning properly in that it appeared that the settings were not being retained. He also stated that the passenger side seat extender needs to be loosened up and did not seem to be installed properly. He feels that the extender is not broken or defective, but installed improperly.

D. Analysis

Under the Lemon Law, Complainants bear the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainants must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainants are 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, Complainants are entitled to have the vehicle repurchased or replaced.

1. Passenger's Seat Extender Issue

The evidence provided by Complainants at the hearing established that the vehicle's passenger seat extender has intermittently popped out for no reason. In addition, Complainants have provided Respondent with a reasonable number of attempts to repair the issue (at least four [4] attempts), written notice of the nonconformity, and a final opportunity to cure, of which Respondent did not avail themselves. However, the issue regarding the seat extender does not

create a serious safety hazard as defined in Section 2301.601(4) of the Occupations Code. The issue does not *substantially* impede Complainants' ability to control or operate the motor vehicle nor does it create a risk of fire or explosion. In addition, the issue with the leg extender does not *substantially* impair the use or market value of the vehicle. The issue is annoying and probably can be disconcerting, but does not create sufficient grounds to order repurchase or replacement of the vehicle. Instead, the hearings examiner will order Respondent to repair the issue.

2. Driver's Seat Not Retaining Settings Issue

The evidence also established that there is a problem with the driver's seat not retaining settings as it is designed to do. This was confirmed by Respondent's witnesses at the hearing. This issue can substantially affect the vehicle's market value. However, there has been only one repair attempt by Respondent or its representatives for this issue. This occurred on May 11, 2017. Since Respondent has not been provided with a reasonable number of repair attempts for this issue, repurchase or replacement cannot be ordered by the hearings examiner. The hearings examiner will order Respondent to repair the issue.

3. Attorney Fees Issue

Complainants' also requested that the hearings examiner order that their attorney fees be reimbursed by Respondent. Complainants were the only party represented by an attorney in the hearing. Respondent did not retain an attorney to represent them in the Lemon Law complaint process. Attorney's fees are considered an incidental expense and are addressed in 43 Texas Administrative Code § 215.209. This section specifies that attorney fees are only considered as recoverable incidental expenses if Complainants retained counsel after being notified that Respondent had done so. In the present case, Respondent did not retain an attorney to address the complaint, so the hearings examiner will not order Respondent to reimburse Complainants' for the attorney fees.

Complainants' request for repurchase or replacement relief is denied. However, Respondent will be ordered to repair the defect in the vehicle's driver's seat which is preventing the seat settings from being saved and the defect in the passenger's seat leg extender which is causing it to intermittently pop out. Such repairs must be completed within 20 days of this order becoming final.

Complainants' are not entitled to have Respondent reimburse them for attorney fees.

III. FINDINGS OF FACT

1. Michelle E. Peters and Robert E. Peters (Complainants) purchased a new 2016 BMW X5 on May 28, 2016, from BMW of Austin in Austin, Texas, with mileage of 9 at the time of delivery.
2. BMW of North America, LLC (Respondent) is the manufacturer of the vehicle.
3. The vehicle's mileage on the date of hearing was 24,064.
4. Ms. Peters is the primary driver of the vehicle.
5. Within a month after purchasing the vehicle, Ms. Peters experienced a situation where the vehicle's passenger seat extender popped out on its own.
6. Complainants took the vehicle to Respondent's authorized dealers (BMW of Austin on the first occasion, then BMW of Dallas for the final three repairs) in order to address their concerns with the seat extender popping out, on the following dates:
 - a. June 22, 2016, at 1,739 miles;
 - b. September 27, 2016, at 5,394 miles;
 - c. November 14 2016, at 8,483 miles; and
 - d. December 22, 2016, at 10,440 miles.
7. On June 22, 2016, the dealer's service technician replaced the seat extender assembly in order to address Complainants' concerns with the leg extender.
8. On September 27, 2016, the dealer's service technician did not perform any repair for the issue, but did special order a front thigh support motor for the vehicle.
9. On November 14, 2016, the dealer's service technician determined that the wrong part had been previously ordered for the vehicle and special ordered a passenger side seat rail in an attempt to address Complainants' concerns with the vehicle.
10. On December 22, 2016, Ms. Peters took the vehicle to BMW of Dallas for an oil change and a vehicle inspection.

11. During the December 22 2016, repair visit, Ms. Peters spoke with the dealer's service manager about the problem with the seat extender popping out and was told by him that neither the dealer nor Respondent would replace the vehicle's passenger seat.
12. On January 3, 2017, Complainants mailed a letter to Respondent regarding the issue with the vehicle's passenger seat extender intermittently popping out on its own.
13. On January 9, 2017, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On January 30, 2017, BMW of Dallas' service technician inspected the vehicle, verified the problem with the passenger seat extender, and lubricated the guides for the extender in order to address Complainants' concerns.
15. On May 11, 2017, BMW of Dallas' service technician inspected the vehicle and determined that the passenger seat extender was working correctly and that no repairs were required for that issue.
16. On May 11, 2017, BMW of Dallas' service technician also inspected the driver's side seat controls and determined that the driver's side seat switch block had an internal short and replaced it.
17. Complainants' attorney, Stacy Dunlop, performed ten (10) hours work for Complainants in regard to their complaint at a rate of \$300 per hour which totals \$3,000 in attorney fees.
18. On April 3, 2017, 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.
19. The hearing in this case convened on September 7, 2017, in Carrollton, Texas before Hearings Examiner Edward Sandoval and the hearing record closed that same day. Complainants were represented by Stacy Dunlop, attorney with The Dunlop Law Firm PLLC. Complainants, Michelle and Robert Peters, both appeared and testified at the hearing. Respondent was represented by Daniel Lubin, After-Sales Area Manager. In addition, David Kaiser, Technical Support Engineer, testified for Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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. Complainants 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. Complainants bear the burden of proof in this matter.
6. Complainants proved by a preponderance of the evidence that the vehicle has a verifiable defect or nonconformity. However, that defect does not present a serious safety hazard or substantially impair the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainants' vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Respondent did not request a final opportunity to cure the defect. Tex. Occ. Code § 2301.606(c)(2).
9. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
10. Complainants' vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.
11. Complainants are entitled to repair relief under the terms of Respondent's warranty. Tex. Occ. Code § 2301.204.
12. Complainants are not entitled to have Respondent reimburse them for attorney fees. 43 Tex. Admin. Code § 215.209(a)(6).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**. However, Complainants are entitled to repair relief. Therefore, it is further **ORDERED** that within twenty (20) days of the issuance of this order Respondent shall repair the vehicle so that it conforms to Respondent's warranty. Complainants are not entitled to reimbursement for attorney fees.

SIGNED September 14, 2017



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