

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 18-0185084 CAF**

**MICHELLE and DAVID ELLERBECK,  
Complainants**

v.

**BMW OF NORTH AMERICA LLC,  
Respondent**

and

**FSVT LESSOR,  
Intervenor**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Michelle and David Ellerbeck (Complainants) 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 their vehicle distributed by BMW of North America (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by a warranty. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

**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 on July 18, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on August 1, 2018, the deadline for the Respondent to file a response to the Complainant's documentation of attorney's fees. Christopher Limpus, attorney, represented the Complainants. Michelle Ellerbeck testified for herself and David Ellerbeck. Julie Schaffrick, Aftersales Area Manager, represented the Respondent. Bob Breznak, Technical Support BMW North America, and Oscar Solis, Team Leader – Momentum MINI, 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 Use or Value

##### i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<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).

**ii. Impairment of Value**

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, 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>6</sup>

**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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</sup>

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>8</sup>

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

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<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>9</sup>

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.<sup>10</sup>

The existence of a 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>11</sup> Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.<sup>12</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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</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>15</sup>

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

<sup>12</sup> *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

## 2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still 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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.<sup>16</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainants.<sup>18</sup> The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that every required fact is more likely than not true.<sup>19</sup> If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainants cannot prevail.

## 4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.<sup>20</sup> 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.”<sup>21</sup> However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

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<sup>16</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>19</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>20</sup> “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.”).

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>23</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

## 5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.<sup>24</sup> Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).<sup>25</sup>

### A. Summary of Complainants' Evidence and Arguments

On December 19, 2016, the Complainants, leased a new 2016 MINI Cooper S Countryman from Momentum BMW MINI, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 20 miles on the odometer at the time of purchase. The vehicle's New Vehicle Warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On April 29, 2017, the Complainants provided a written notice of defect to the Respondent. On March 24, 2018, the Complainants filed a complaint with the Department alleging that the radio (multimedia player) malfunctioned, specifically, the radio displayed error messages, froze/crashed, failed to recognize a connected iPhone, and did not respond to controls.

Mrs. Ellerbeck testified that after taking the vehicle home, she tried to plug in her iPhone. However, the vehicle came with a 30-pin connector cable (music adapter) but her phone required an 8-pin connector. She tried using an adapter (Lightning adapter) (with the 30-pin connector cable), which did not "quite" work, so the dealer provided an 8-pin connector cable. Using the new cable, Mrs. Ellerbeck had difficulty with the radio when playing from the phone: the system would shut down, or display a "loading" message or error message. The dealer provided a new cable. However, she still experienced problems, including "iPod" not showing on the vehicle's display,

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<sup>24</sup> TEX. OCC. CODE § 2301.604.

<sup>25</sup> 43 TEX. ADMIN. CODE § 215.209(a).

the radio freezing, and songs playing repeatedly. After replacing some of the vehicle's hardware, the dealer determined that the problem was an Apple issue or a limitation in the audio system as designed and that the same type of problem occurred in other vehicles. While the dealer serviced the subject vehicle, Mrs. Ellerbeck had a loaner vehicle and its radio worked perfectly with her phone. In her vehicle, sometimes the radio would stop half-way through a song without touching any controls. She noted that the radio, after stopping, did not always revert to operating normally when disconnecting and reconnecting the phone. To reset the radio, she would turn the vehicle off and on, which sometimes worked; sometimes the vehicle had to remain off a long time. Subsequently, the dealer replaced the radio completely but the vehicle still exhibited errors. At the May 18, 2017, service visit, two of the dealer's employees connected their phones to the vehicle and duplicated the freezing problem, which was believed to be an electrical issue. The dealer replaced some wires and the iPhone connected normally but the radio still locked up. The dealer also replaced the amplifier, steering wheel controls and radio but the issue continued. The technical support engineer, technicians, and shop foreman all concluded the problem was an Apple-MINI software issue but there currently were no software updates. At the November 9, 2017, service visit, the dealer diagnosed the malfunctioning forward and backward steering wheel buttons as a compatibility issue between Apple and MINI software but no updates were available. The dealer tested multiple vehicles and found the same radio freezing and steering wheel controls loss would occur when playing Apple Music. Mrs. Ellerbeck did not believe the problem was an issue with the phone because the loaner vehicles worked perfectly and she did not have the same issue with other vehicles she had owned. Moreover, she confirmed that documentation showed her phone as compatible. However, the phone was not actually compatible.

On cross-examination, Mrs. Ellerbeck confirmed that the radio worked without the iPhone connected. She answered that her current phone was an Apple iPhone 8 Plus. She affirmed that she leased the vehicle at the end of 2016, in December. Ms. Schaffrick noted that 2016 was the last year for the subject vehicle's model. On redirect-examination, Mrs. Ellerbeck elaborated that she had an iPhone 6 at the time she acquired the vehicle. She also testified that the Respondent did not indicate that the vehicle was only compatible with certain phones. She confirmed that her iPhone 6 did not work with the vehicle. Numerous other iPhone 6 and 6s phones tried with the vehicle likewise did not work.

Mr. Solis, the team leader at Momentum MINI, testified that he initially understood the issue as a problem with the cable (music adapter). He noted that the cable could get bent or cracked. He stated that they did not try changing tracks but just checked the cable's functionality, that is, they just ensured that the cable communicated between the phone and car. They checked for ground continuity but if they could not find a problem, they would seek help. Subsequently, they opened a PuMA case. Mr. Solis explained that PuMA has access to things that they did not. Mr. Solis was not aware of other MINI vehicles with the same problem as the subject vehicle.

### **B. Inspection**

Upon inspection at the hearing, the subject vehicle had 10,535 miles on the odometer. The "iPod" option initially appeared on the center display menu after connecting Mrs. Ellerbeck's iPhone 8 Plus to the vehicle. After the music from the phone began playing through the vehicle's speakers, Mrs. Ellerbeck pressed the forward button and the music stopped playing and the center display went blank.

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

Mr. Breznak testified that the subject vehicle originally came with a 30-pin connector. The thin 8-pin architecture will work but will not work 100% because of compatibility issues. The vehicle was built to be compatible with the iPhone 4 (which used the 30-pin architecture). No matter what may be done, the vehicle will not work (with 8-pin iPhones). The switchover to compatible hardware occurred right at the switchover to the next model year (2017). Mr. Breznak explained that the loaner vehicle was a newer model year vehicle with a communications box (Combox) that was designed for phones with the 8-pin connector. Mr. Breznak elaborated that the Combox acted as central gateway for radio, navigation, communication, and phones. Older cars did not have the Combox and instead used direct wire. Newer cars had Bluetooth and could use either wire or Bluetooth. One solution, some people have used was to buy an older phone and use it as an iPod. When asked if the vehicle's display showed "iPod" because that is what the vehicle was designed for, Mr. Breznak answered that phones were not (originally) intended to be used for music, which is why the iPod existed at the time. Referring to the iPod/iPhone music adapter instructions, Mr. Breznak stated that the manufacturer originally expected the use of an iPod. After the switch to the 8-pin connector and the Combox, all the functionalities became available directly

from the phone. He pointed out that in his own car, the music playback would sometimes function perfectly and sometimes would not. For example, when on the first track but skipping back to the last track, the system sees this as track one minus one track equals track zero, so the system searches for track zero, which it cannot find. Skipping forward from the last track, assuming a total of 26 tracks, the system searches for track 27, which does not exist.

On cross-examination, when asked about issues in the middle of songs or when using the vehicle's audio controls, Mr. Breznak expounded that the vehicle's audio system was never designed for the newer iPhones. The 8-pin system has different software and architecture. The 8-pin architecture uses different signals on different pins (as compared to the 30-pin connector). Using the adapter in the vehicle works but does not work 100%. He pointed out that the Respondent is at the mercy of Apple. The Respondent receives information about software and hardware changes from Apple the day after the phone's release to market. Mr. Breznak analogized the 30-pin and 8-pin architecture to cassettes and CDs: a car with a cassette player is only designed to use cassettes and not CDs. He stated that after consulting with the Respondent's engineers, they knew the 8-pin iPhones would never fully function with the subject vehicle (designed for the 30-pin iPhones). When asked whether the Respondent marketed a feature that did not work, Mr. Breznak pointed out that the 2016 worked for 30-pin iPhones, and the radio operates as designed. Regarding whether the radio was obsolete, he stated that the radio operated as designed and everything worked except the interface. On redirect-examination, Mr. Breznak confirmed that the Combox was essential for the functions of 8-pin iPhones.

#### **D. Analysis**

The evidence shows that the complained of conditions still exist in the subject vehicle. However, the warranty does not cover these conditions; therefore, the Lemon Law provides no relief. Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).<sup>26</sup> The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the warranty

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<sup>26</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204

generally provides that: “MINI USA, a division of BMW of North America, LLC (“MINI USA”) warrants during the Warranty Period the 2016 U.S.-specification MINI vehicles distributed by MINI USA against defects in materials or workmanship to the first retail purchaser, and each subsequent purchaser.” According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>27</sup> A manufacturing defect is usually an isolated 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 damaged part. As a result, manufacturing defects exist when the vehicle leaves the assembly line. Unlike manufacturing defects, issues that do not arise from the manufacturing process, such as characteristics of the vehicle’s design and dealer representations, are not warrantable defects. Design characteristics result from the vehicle’s specified design and not from any error during manufacturing.<sup>28</sup> In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to any problems regarding the design.

Although the vehicle’s audio system does not fully function with 8-pin iPhones, the subject vehicle does not have a manufacturing defect. Instead, the problem arises from the specified design of the vehicle, which the warranty does not cover. The vehicle was designed to work with iPhones using 30-pin connector architecture. Although an adapter allows the physical connection of 8-pin iPhones to the vehicle, the vehicle’s design predates 8-pin devices. As a result, the vehicle’s hardware, designed for 30-pin iPhones, will not fully function with iPhones that employ the 8-pin architecture. The record shows that MINI vehicles did not incorporate fully compatible 8-pin technology (i.e., the Combox) until after the production of the subject vehicle. However, the subject vehicle’s incompatibility with 8-pin architecture is not a manufacturing defect but a design issue. Even though the BMW/MINI music adapter documentation states that the “[m]usic adapter

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<sup>27</sup> Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues. *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.”).

<sup>28</sup> 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.” *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

for the Apple iPod/iPhone” is “[a]lso compatible with the 8-pin Lightning Adapter.” However, representations are not actionable under the Lemon Law, since the Lemon Law only applies to warrantable defects (i.e., manufacturing defects). The evidence shows that the vehicle was manufactured according to specifications for 30-pin architecture rather than 8-pin. Accordingly, the same incompatibility issue will occur with all 8-pin iPhones when connected to the subject vehicle or a similarly-equipped vehicle but the incompatibility issue will not occur with vehicles equipped with a Combox, which incorporates 8-pin technology. Because the problem relates to the phone’s incompatibility with the vehicle’s hardware design, a repair or change in firmware will not resolve any issues. In sum, the only resolution to the problem would be to: (1) use an older, compatible phone in the subject vehicle, or (2) use the Complainants’ current phone in a newer, Combox-equipped vehicle compatible with the phone. In any event, compatibility issue does not arise from a warranted manufacturing defect, but results from the vehicle’s design.

### **III. Findings of Fact**

1. On December 19, 2016, the Complainants, leased a new 2016 MINI Cooper S Countryman from Momentum BMW MINI, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 20 miles on the odometer at the time of purchase.
2. The vehicle’s New Vehicle Warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. On April 29, 2017, the Complainants provided a written notice of defect to the Respondent.
4. On March 24, 2018, the Complainants filed a complaint with the Department alleging that the radio malfunctioned. In particular, the radio: displayed error messages, froze/crashed, failed to recognize a connected iPhone, and did not respond to controls.
5. On June 1, 2018, the Department’s Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
6. The hearing in this case convened on July 18, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang. The record closed on August 1, 2018, the deadline for the

- Respondent to file a response to the Complainant's documentation of attorney's fees. Christopher Limpus, attorney, represented the Complainants. Michelle Ellerbeck testified for herself and David Ellerbeck. Julie Schaffrick, Aftersales Area Manager, represented the Respondent. Bob Breznak, Technical Support BMW North America, and Oscar Solis, Team Leader – Momentum MINI, testified for the Respondent.
7. The vehicle's odometer displayed 10,535 miles at the time of the hearing.
  8. The vehicle's warranty was in effect at the time of the hearing.
  9. The warranty covers defects in materials or workmanship (manufacturing defects) but does not apply to design issues.
  10. The subject vehicle's audio system was designed for iPods and iPhones with the older 30-pin connector architecture. Although iPhones with the newer 8-pin connector architecture can be connected to the vehicle's audio system, the 8-pin iPhones are not fully compatible with the vehicle. Because the 8-pin iPhones are not fully compatible, the vehicle's audio system will not fully function with 8-pin iPhones. The failure to fully function is not a manufacturing defect but instead is a design issue.

#### IV. Conclusions of Law

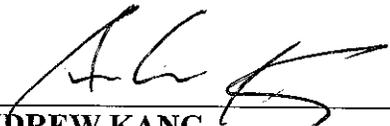
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 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 September 7, 2018**

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