

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0004905 CAF**

JUAN AVALOS CONTRERAS, Complainant	§ § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
BMW OF NORTH AMERICA, LLC, Respondent		

DECISION AND ORDER

Juan Avalos Contreras (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 his vehicle distributed by BMW North America, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a currently existing warrantable defect that qualifies for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 21, 2020, by video conference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Stephen Soncini, aftersales area manager, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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.”² 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 currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, 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.⁴

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.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *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.”⁶

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.⁷

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.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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:

[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.⁹

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.¹⁰

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.¹¹ 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.¹²

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, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 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 to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the

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.¹⁵

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 before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the

respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

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

²⁰ “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

nature of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ 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).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On April 29, 2019, the Complainant, purchased a new 2019 BMW X5 from Classic BMW, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 114 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides coverage for 48 months or 50,000 miles, whichever occurs first.

be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

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

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

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

On November 16, 2019, the Complainant filed a complaint with the Department alleging malfunctions with the proximity sensors, rear view camera, audio system, Bluetooth, automatic wipers, and touch screen. On November 20, 2019, the Department provided a copy of the complaint describing the alleged defects to the Respondent. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
08/07/19	3,619	Proximity sensors inoperable; rear view camera will not engage and display is black
08/09/19	4,311	Proximity sensors inoperable
09/06/19	4,496	Auto PDC (parking distance control) malfunction message; radio has no audio; rear view camera inoperative; automatic wipers not engaging
10/05/19	4,835	Rear view camera does not activate; PDC sensors do not activate; radio screen does not display time
12/18/19	6,747	Backup camera not engaging; back up sensors not operating

The Complainant testified that the rear proximity sensors did not function. Shifting into reverse, the sensors did not work, even with someone standing within three feet. The rear-view camera would not show on the screen and did not make any sounds. The Complainant stated that the vehicle did not have any problems since the December service visit. The Complainant explained that the rear-view camera intermittently malfunctioned, about once a week. He believed he last noticed the issue in December. The issues happened once and did not occur again. The Complainant averred that the vehicle started having problems with the audio system and Bluetooth the third time he took the vehicle for service. He elaborated that he could not hearing anything, receive calls or make calls. He estimated that the problems with making/receiving calls and connecting to Bluetooth would occur about three times a week. After the service visit in October, the problem did not occur again. The Complainant stated that the automatic wipers did not work, though they could be turned on manually. However, after (the service visit) in September, he did not notice the wipers not working. The Complainant described that the touch screen would not respond to touch about three times a week from September to October 2019. He did not notice the issue again after the October service visit. The Complainant stated that the vehicle had 7,987 miles on the odometer. The Complainant and Alejandro Leal, the Complainant's spouse, added that the brakes malfunctioned.²⁷

²⁷ The respondent objected to consideration of any issues outside of the complaint.

On cross-examination, the Complainant affirmed that the issues with the sensors, rear-view camera, wipers, and touch screen were repaired. The last time any of these issues occurred last year, about seven months ago. He agreed that the Respondent had fulfilled its warranty obligations.

Upon rebuttal, the Complainant acknowledged that the problems were fixed, but he lacked confidence in the vehicle. He expressed concern about the vehicle's value, given payments owed for the next four years.

C. Summary of Respondent's Evidence and Arguments

Victor Cheung, technical support engineer, testified that the complaint issues related to software errors, which was fixed late last year. He elaborated that when the vehicle came out in 2019, the software was not mature, which is the reason for the software updates. He confirmed that multiple updates were released the same issue occurred with other vehicles. He affirmed that the update finally fixed the issues and they did not happen anymore, not just with the subject vehicle, but with other X5s. Mr. Cheung explained that the brakes did not relate to the issues in the complaint. Additionally, he elaborated that the reduced function message regarding the front camera may normally occur in the sun or heavy rain and only indicates reduced function, though still working, and the vehicle could still be driven.

Julio Guerrero, shop foreman of Bert Ogden BMW, testified that most of the vehicle's issues involved software errors. He noted that the dealership tried reprogramming two different times, the last one in December, after which most issues went away. He saw the same problems occurring in other vehicles related to the same issue. He stated the June visit did not relate to any issues in this case.

D. Analysis

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)²⁸ that continues to exist, even after repair.²⁹ In part, the warranty generally states that: "BMW of North America, LLC (BMW NA) warrants during the Warranty

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁹ TEX. OCC. CODE § 2301.605.

Period the 2019 U.S.-specification BMW vehicles distributed by BMW NA or sold through the BMW NA European Delivery Program against defects in materials or workmanship to the first retail purchaser, and each subsequent purchaser.”³⁰ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹

In the present case, the evidence shows that all issues identified in the complaint have been successfully resolved. Moreover, these issues appear to arise from flaws in the vehicle’s programming, a design defect, which is not a warrantable defect, and not a manufacturing defect. Significantly, the Complainant confirmed that the issues in the complaint have not reoccurred after repairs. In sum, the record reflects that all the complained of defects were successfully repaired. Moreover, the alleged defects related to software design issues and not any warrantable manufacturing defects. Accordingly, the vehicle does not qualify for any relief.

III. Findings of Fact

1. On April 29, 2019, the Complainant, purchased a new 2019 BMW X5 from Classic BMW, a franchised dealer of the Respondent, in Plano, Texas. The vehicle had 114 miles on the odometer at the time of purchase.
2. The vehicle’s limited warranty provides coverage for 48 months or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

³⁰ Complainant’s Ex. 1, New Vehicle Limited Warranty.

³¹ 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.”).

Date	Miles	Issue
08/07/19	3,619	Proximity sensors inoperable; rear view camera will not engage and display is black
08/09/19	4,311	Proximity sensors inoperable
09/06/19	4,496	Auto PDC (parking distance control) malfunction message; radio has no audio; rear view camera inoperative; automatic wipers not engaging
10/05/19	4,835	Rear view camera does not activate; PDC sensors do not activate; radio screen does not display time
12/18/19	6,747	Backup camera not engaging; back up sensors not operating

4. On November 16, 2019, the Complainant filed a complaint with the Department alleging malfunctions with the proximity sensors, rear view camera, audio system, Bluetooth, automatic wipers, and touch screen.
5. On November 20, 2019, the Department provided a copy of the complaint describing the alleged defects to the Respondent.
6. On January 17, 2020, 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.
7. The hearing in this case convened on July 21, 2020, by video conference, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Stephen Soncini, aftersales area manager, represented the Respondent.
8. The vehicle's odometer displayed 7,987 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The warranty covers the vehicle against defects in materials or workmanship.
11. The defects alleged in the complaint arose from the vehicle's software design and not materials or workmanship.
12. Repairs successfully resolved all defects alleged in the complaint.

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 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 Complainant's vehicle does not qualify for replacement or repurchase. The Complainant 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 Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
9. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED September 21, 2020



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