

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0008476 CAF**

**DOROTHY UPPERMAN,
Complainant**

v.

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

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Dorothy Upperman (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2019 BMW X5. Complainant asserts that the vehicle’s panoramic sunroof will not operate at all, *i.e.*, it will not open or close. BMW of North America, LLC (Respondent) argued that the vehicle is repairable. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase relief.

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 telephonically on July 16, 2020, before Hearings Examiner Edward Sandoval. Dorothy Upperman, Complainant, appeared and represented herself at the hearing. Respondent was represented by James Aguilar, Technical Service Engineer. Also appearing for Respondent was Judy Marie Courtney, Center Assistance Manager. The hearing record closed on July 16, 2020.

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 manufacturer has been given a reasonable number of attempts to

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

repair or correct the defect or condition.³ Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to these conditions, a rebuttable presumption can be established 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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair 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.⁶

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has 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.⁷

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁸

Finally, a rebuttable presumption can be established 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 that substantially impairs the vehicle’s use or market value, the vehicle has been out of service for repair for a cumulative total of 30 or more days, and the repairs 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

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

The 30 day out of service requirement described in Section 2301.605(a)(3) does not include any period during which the manufacturer or distributor lends the vehicle owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.¹⁰

B. Complainant's Evidence and Arguments

Complainant purchased a new 2019 BMW X5 on March 16, 2019, from Advantage BMW (Advantage) located in Houston, Texas.¹¹ The vehicle's mileage at the time of delivery was 10.¹² Respondent provided a limited warranty for the vehicle which provides coverage for 48 months or 50,000 miles, whichever comes first.¹³ On the date of hearing the vehicle's mileage was 8,583 and the vehicle's warranty was still in effect.

Complainant testified that she purchased the vehicle in March of 2019, and took a test drive in it prior to the purchase. She used the vehicle's sunroof on occasion during the spring of 2019 and it worked correctly. However, she did not use it during the summer. In the fall of 2019, when Complainant attempted to open the sunroof, it did not open. The sunshade opened halfway and then stopped operating. The sunroof did not open at all.

Complainant took the vehicle to Advantage for repair for the sunroof issue on October 31, 2019. Advantage's technician performed a software update to the vehicle to resolve the issue.¹⁴ The vehicle's mileage on this occasion was 4,388.¹⁵ The vehicle was in Advantage's possession for one (1) day. Complainant was not provided a loaner vehicle while her vehicle was being repaired.

Complainant testified that she picked up the vehicle from Advantage on November 1, 2019, and that the sunroof was working at the time. On November 2, 2019, the sunroof did not work. As a result, she took the vehicle to Advantage for repair for the issue that same day, November 2, 2019. Advantage's service technician determined that the control unit of the roof function center (FZD unit) was faulty and replaced it.¹⁶ The vehicle's mileage at this time was 4,479.¹⁷ The vehicle was in Advantage's possession for three (3) days. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

¹⁰ Tex. Occ. Code § 2301.605(c).

¹¹ Complainant Ex. 2, Motor Vehicle Retail Installment Contract – Texas dated March 16, 2019.

¹² *Id.*

¹³ Complainant Ex. 10, Excerpts from BMW Warranty Manual, undated.

¹⁴ Complainant Ex. 3, Repair Order dated October 31, 2019.

¹⁵ *Id.*

¹⁶ Complainant Ex. 4, Repair Order dated November 2, 2019.

¹⁷ *Id.*

Complainant stated that the sunroof worked on the drive to her home after picking it up from the dealer. The sunroof continued to work correctly for a day or two, before it stopped working again. Complainant took the vehicle to Advantage for repair for to the sunroof on November 11, 2019. Advantage's technician determined that the sunroof's slide/tilt motor was faulty and replaced it.¹⁸ The vehicle's mileage at the time that Complainant picked up the vehicle was 4,569.¹⁹ The vehicle was in Advantage's possession for four (4) days during this repair. Complainant was provided a loaner vehicle while her vehicle was being repaired.

Complainant testified that the vehicle's sunroof worked for a couple of days before failing again. Complainant took the vehicle to Advantage for repair for the sunroof issue on November 25, 2019. Complainant testified that Advantage's service technician replaced the vehicle's sunroof cassette (the entire sunroof apparatus) in order to resolve the issue. The vehicle's mileage on this occasion was 4,709.²⁰ Complainant testified that the vehicle was in Advantage's possession for ten (10) days while the technician waited for a part. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Complainant stated that the sunroof worked properly when she picked it up from Advantage on December 5, 2019. However, the sunroof stopped working again a few days later. Complainant took the vehicle to Advantage for repair for the issue on January 8, 2020. During this repair visit, Advantage's service technician replaced the vehicle's panoramic roof frame.²¹ The sunroof worked for a couple of days while it was in the dealer's possession and after replacing the roof frame, but then stopped working.²² The technician then replaced the sunroof control unit to resolve the issue.²³ Again, the sunroof worked for a couple of days before it stopped working again.²⁴ The technician then replaced both of the sunroof's drive motors to resolve the issue with the sunroof.²⁵ The vehicle's mileage at this time was 5,807.²⁶ The vehicle was in Advantage's possession for two (2) weeks. Complainant was provided a loaner vehicle while her vehicle was being repaired.

Complainant testified that the sunroof worked for a couple of days and then stopped working after a few days. Complainant took the vehicle to Advantage for repair for the issue on February 10, 2020. Advantage's technician discovered a fault code on the vehicle's computers for the

¹⁸ Complainant Ex. 5, Repair Order dated November 11, 2019.

¹⁹ *Id.*

²⁰ Complainant Ex. 6, Repair Order dated November 25, 2019.

²¹ Complainant Ex. 7, Repair Order dated January 8, 2020.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

sunroof initialization.²⁷ However, the technician determined that the vehicle had been provided the latest software updates and that there was no remedy for the issue with the sunroof.²⁸ The vehicle's mileage on this occasion was 5,907.²⁹ The vehicle was in Advantage's possession for ten (10) days during this repair. Complainant received a loaner vehicle while her vehicle was being repaired.

On February 20, 2020, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.³⁰ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 28, 2020.³¹

Complainant testified that she was contacted by Respondent's representative about the sunroof issue after she wrote the letter to Respondent. However, she was never asked by anyone associated with Respondent for a final opportunity to inspect or repair the vehicle. The vehicle's sunroof has not worked since before the February 10, 2020 repair and is not currently working. Complainant stated that she has not had the vehicle appraised for its current market value.

C. Respondent's Evidence and Arguments

James Aguilar, Technical Service Engineer, testified for Respondent. Mr. Aguilar has worked in the automotive industry for 35 years. Prior to being hired by Respondent, Mr. Aguilar worked for several years for Ford Motor Company as a field technical support employee and for Delco Electronics designing electronic modules for navigation systems for General Motors vehicles. Mr. Aguilar has worked for Respondent for the past 24 years. Mr. Aguilar worked for 16 years for Respondent's Rolls Royce division. He has been in his current position for less than one (1) year. Mr. Aguilar does not have any current Automotive Service Excellence (ASE) certifications.

Mr. Aguilar testified that he has inspected Complainant's vehicle twice. The first time he saw the vehicle was on November 25, 2019, at which time he suggested replacing the vehicle's sunroof cassette in order to resolve the issue with the sunroof not working. He stated that the sunroof was not replaced at the time, but was placed on back order. The vehicle's sunroof was actually replaced on January 8, 2020. This was the second time that Mr. Aguilar saw the vehicle. Mr. Aguilar agreed that there were issues with keeping the sunroof operating, as the technician also had to replace the sunroof control unit and both of the sunroof's drive motors during this repair, as the sunroof would work for a few days and then stop working. Mr. Aguilar testified that he did

²⁷ Complainant Ex. 8, Work Order dated February 10, 2020.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Complainant Ex. 9, Letter to BMW of North America dated February 20, 2020.

³¹ Complainant Ex. 1, Lemon Law Complaint dated February 28, 2020.

not see the vehicle on February 10, 2020. However, he did testify that there was no fix for the issue.

D. Analysis

Under the Lemon Law, Complainant bears 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, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Complainant's concern with the vehicle is that the vehicle's panoramic sunroof will not work at all, *i.e.*, it will not open or close.

The evidence presented at the hearing established that the vehicle's sunroof will not work. The first hand testimony provided by Complainant indicates that the problem continues to occur despite several repair attempts by the dealer's service technicians. As such, the hearings examiner must hold that Complainant has met the burden of persuasion to establish the existence of a defect or nonconformity (the vehicle's sunroof not operating) in the subject vehicle. The defect or nonconformity with the vehicle substantially impairs the use or market value of the vehicle, as a potential buyer would not wish to pay full market price for a vehicle in which the sunroof will not work.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized dealer on six (6) separate occasions for repair for the complained of issue prior to the filing of the Lemon Law complaint: October 31, 2019; November 2, 2019; November 11, 2019; November 25, 2019; January 8, 2020; and February 10, 2020. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(1) provides 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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair 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. In the present case, despite the repair attempts, the problem continues to exist. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent and the vehicle has not been repaired.

In addition, the evidence presented at the hearing indicates that Complainant provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated February 20, 2020, of her concerns with the vehicle's sunroof and providing Respondent with an opportunity to cure. Respondent did not contact Complainant to request an opportunity to inspect or repair the vehicle.

Although Respondent has been provided adequate opportunity to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainant has met her burden of persuasion to establish that the vehicle has a warrantable and existing defect or condition which substantially impairs the use or market value of the vehicle. Therefore, the hearings examiner will order Respondent to repurchase the vehicle as requested by Complainant.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Dorothy Upperman (Complainant) purchased a new 2019 BMW X5 on March 16, 2019, from Advantage BMW (Advantage) located in Houston, Texas with mileage of 10 at the time of delivery.
2. The manufacturer or distributor of the vehicle, BMW of North America, LLC (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for the first 48 months or 50,000 miles after deliver, whichever comes first.
3. The vehicle's mileage on the date of hearing was 8,583.
4. At the time of hearing the vehicle's warranty was still in effect.

5. Complainant has experienced several situations where the vehicle's panoramic sunroof will not work.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Advantage, in order to address her concerns with the vehicle's sunroof on the following dates:
 - a. October 31, 2019, at 4,388 miles;
 - b. November 2, 2019, at 4,479 miles;
 - c. November 11, 2019, at 4,569 miles;
 - d. November 25, 2019, at 4,709 miles;
 - e. January 8, 2020, at 5,807 miles; and
 - f. February 20, 2020, at 5,907 miles.
7. On October 31, 2019, Advantage's service technician updated the vehicle's software in order to address the issue with the vehicle's sunroof.
8. On November 2, 2019, Advantage's service technician determined that the control unit of the roof function center (FZD unit) was faulty and replaced it in order to address the issue.
9. On November 11, 2019, Advantage's service technician determined that the slide/tilt motor for the sunroof was faulty and replaced it.
10. On November 25, 2019, Advantage's service technician and Respondent's technical service engineer (TSE) determined that the sunroof cassette needed replacement and back ordered the part.
11. On January 8, 2020, Advantage's service technician replaced the vehicle's sunroof cassette in order to resolve the issue.
12. During the repair visit described in Findings of Fact #11, the service technician found that two days after replacing the sunroof cassette, the sunroof stopped operating again.
13. During the repair visit described in Findings of Fact #11, after the sunroof failed to work again, Advantage's service technician replaced the sunroof's switch program and installed a new control unit. After two days the sunroof again failed to work.
14. During the repair visit described in Findings of Fact #11, Advantage's service technician replaced both of the sunroof's drive motors as the final repair to the vehicle.

15. On February 10, 2020, Advantage's service technician discovered a fault code for the sunroof initialization, but determined that the most recent software had been installed in the vehicle and that there was remedy available for the sunroof issue.
16. On February 20, 2020, Complainant mailed a letter to Respondent advising them of her dissatisfaction with the vehicle.
17. On February 28, 2020, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
18. Respondent did not contact Complainant to request a final opportunity to inspect or repair the vehicle.
19. The vehicle's sunroof still does not operate, *i.e.*, the sunroof will not open or close.
20. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$68,448.65
Delivery mileage	10
Mileage at first report of defective condition	4,388
Mileage on hearing date	8,583
Useful life determination	120,000

Purchase price, including tax, title, license and registration									
									\$68,448.65
Mileage at first report of defective condition									4,388
Less mileage at delivery									<u>-10</u>
Unimpaired miles									4,378
Mileage on hearing date									8,583
Less mileage at first report of defective condition									<u>-4,388</u>
Impaired miles									4,195
Reasonable Allowance for Use Calculations:									
Unimpaired miles									
									<u>4,378</u>
	120,000	X		\$68,448.65	=				\$2,497.23
Impaired miles									
									<u>4,195</u>
	120,000	X		\$68,448.65	X .5	=			<u>\$1,196.43</u>
Total reasonable allowance for use deduction:									\$3,693.66
Purchase price, including tax, title, license and registration									\$68,448.65
Less reasonable allowance for use deduction									<u>-\$3,693.66</u>
Plus filing fee refund									<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT									\$64,789.99

21. On May 11, 2020, 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.
22. The hearing in this case convened telephonically on July 16, 2020, before Hearings Examiner Edward Sandoval. Dorothy Upperman, Complainant, appeared and represented herself at the hearing. Respondent was represented by James Aguilar, Technical Service Engineer. Also appearing for Respondent was Judy Marie Courtney, Center Assistance Manager. The hearing record closed on July 16, 2020.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant 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. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing defect or condition (the sunroof does not operate) that substantially impairs Complainant's use or market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief and repurchase of the 2019 BMW X5 under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;

2. Respondent shall repurchase the subject vehicle in the amount of **\$64,789.99**. (This total includes the \$35.00 Lemon Law filing fee.) The total refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, BMW of North America, LLC, shall repair the warrantable defect (the vehicle's sunroof) in the reacquired vehicle identified in this Decision.

SIGNED July 20, 2020.



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