

[REDACTED]
West Boyford, Massachusetts

Telephone: [REDACTED]

*Also Admitted in Maine

August 7, 2020

Bernhard Kuhnt
CEO of North America
BMW of North America, LLC.
Customer Relations Department
300 Chestnut Ridge Road
Woodcliff, NJ 07677-7731

COPY

Re: 2014 BMW X5- X drive- Model 35d- N57 engine
VIN: 5UXKS4C58E [REDACTED]
Mileage 78,357
Issues: defect crack to the transmission housing/starter bolts
Subject: Written Demand M.G.L. c. 93A § 9(3)

Dear Mr. Kuhnt:

This letter is a written demand for relief in accordance with Massachusetts General Laws, Chapter 93A, §9(3) on behalf of the claimant, [REDACTED] *West Boyford, MA* in connection with manufacturing/design defects to the above referenced vehicle.

Unfair and Deceptive Act or Practice

Pursuant to M.G.L. c. 93A, 2(b) and Federal Trade Commission Act, 15 U.S.C., §§5, 45(a)(1), a failure to warn of a defective or dangerous condition that could cause personal injury constitutes an "unfair" trade practice. See Matter of International Harvester Co., 104 F.T.C. 949, 1064-1067 (1984). Also, under M.G.L. c. 93A, §2 and Massachusetts Attorney General regulation 940 Code of Massachusetts Regulations §3.08(2) (1986) "[I]t shall be an unfair and defective act or practice to fail to perform or fulfill any promises or obligations arising under a warranty" The regulations specifically include the implied warrant of merchantability under the definition of "warranty." 940 Code of Massachusetts Regulation §3.01 (1986). As set forth in John D. Maillet v. ATF-Davidson Co., Inc., 407 Mass. 185, 522 NE 2d 95 (1990) and cases cited therein, a breach of warranty constitutes a violation of M.G.L. c. 93A, §2.

One of the primary purposes of the demand letter prerequisite to a Chapter 93A suit is to encourage negotiation and settlement. Thorpe v. Mutual of Omaha Ins. Co., 984 F. 2d 541 (1st Cir 1993). It affords the defendant an opportunity to review the facts and the law involved to determine whether the requested relief should be granted or denied and to enable the defendant to make a reasonable tender of settlement in order to limit recoverable damages. Fredericks v. Rosenblatt, 40 Mass. App. Ct. 713 (1996).

Notice was previously provided by the claimant's notice letter under M.G.L. c. 106 §2-607(3)(a) to the Nation Highway Traffic Safety Administration dated July 21, 2020 (*enclosed*), to which your company have chosen not to timely respond.

The defect and breaches of warranties are as follows:

There are two defects:

- 1) A crack to the transmission housing; and
- 2) Sheered bolts to the starter motor.

I reference the photographs, repair invoices and analysis via emails to *Linda Vitale*, Team Manager- Eastern Region, herein incorporated by reference. Ms. Vitale by telephone on Monday, August 3, 2020 denied the claim asserting that the BMW technician could not tell who had worked on the automobile. This candidly was nonsense.

There is manufacturing defect to the transmission housing which has a crack in the above vehicle. It was not exposed to any type of trauma. There is also no worn or damaged driveshaft U-joint which would apply abnormal external torsional forces on the transmission case.

The vehicle was purchased by a dealer direct from BMW's sale at the termination of the lease. The vehicle had warranty repairs at the Peabody, MA dealership initially following my purchase. The only other issues were normal maintenance such as new tires, timely oil/filter changes and brakes. No other mechanical repairs were made to the vehicle and it has been only operated by myself.

The problems were ascertained by the BMW Service Center on 7 Centennial Drive, Peabody, MA 01960 on July 20, 2020 after the starter failed to engage the engine making the automobile inoperable. It had to be towed to the dealership on July 17, 2020. It is also undergoing repairs for the recall (*voluntary technical campaign*) for the ERG (*Exhaust Gas Recirculation module*) valve (*small quantities of the glycol coolant escape and build up in the EGR module which combined with carbon and oil sediments can become combustible and may cause melting of the intake manifold*) which was found to be defective.

I contacted first *Jasmine* at BMW 1-800-831-1117 customer relations, on July 20, 2020 per the email directive of Kay Reichard. I later in the evening of July 20, 2020 received a call from *Dennis* at the BMW warranty department, who was ineffective at resolving this issue. He merely referred me to the BMW service manager at the dealership and would not provide the name of the BMW representative who interfaced directly with the dealer. I am at a loss as to why the service manager did not make this inquiry initially with the BMW dealer representative.

Subsequent inspection by the Peabody dealer showed via the emailed photographs that the starter bolts had sheered. As there was no trauma to the vehicle such as scrapes or marks to the undercarriage, the fractured bolts and crack to the transmission housing could have only occurred at the time of original manufacture.

The bolts would have been defective and wreaked either by a porosity of carbides; or had too much torques applied by the pneumatic wrench by the manufacturing technician at the time of manufacturing assembly. An alternative is that the design of the bolts was insufficient to carry the static and dynamic loads.

It is clearly that BMW breached the warranty of merchantability.

These manufacturing defects were such that they could not be discovered with reasonable due care within the 4 year or 50,000 mile warranty. The current mileage on the automobile was 78,357. At the time of sale and at the time of the accident, there existed feasible design modifications to the product to prevent these types of defects.

Pursuant to the referenced email information, the **\$1,245.58** charge and future costs for transmission change - parts, labor and taxes should properly be borne by BMW.

Negligence

Under the laws of the Commonwealth of Massachusetts, "the basic elements for a products liability action founded on negligence are duty, breach of duty, cause in fact, and proximate cause. "Coulter v. Barber-Greene Co., 525 NE 2d 1305, 403 Mass. 50, 61 (1988). Pursuant to this maxim, the manufacturer will be held liable if it has 'failed to use reasonable care to eliminate foreseeable dangers which subject a user to an unreasonable risk of injury." Id. at 61 (emphasis added) (citing Correia v. Firestone Tire Rubber, Co., 388 Mass. 342, 354 (1986); Smith v. Ariens Co., 375 Mass. 620, 624 (1978); Uloth v. City Tank Corp., 376 Mass. 874, 878 (1978). In safeguarding against said foreseeable dangers, the manufacturer" ...is required to anticipate the environment in which its product will be used, and it must design against the reasonable foreseeable risks attending the products use in that setting." MacGuish v Volkswagenwerk A.G., 22 Mass. App. Ct., 380 494 N.E. 2d. 390, 394 (1986) (citing Back v Wicks), 375Mass. 633, 640-41 (1968). Liability may, therefore, be found if the product is "*unreasonably dangerous because of its design or because of its failure to be accompanied by an adequate warning or both.*" Hayes v Ariens Co., 391 Mass. 407, 410 (1984).

A manufacturer/distributor who advises prospective users concerning the use of its own product must provide complete and accurate warnings Fiorentino v A.E. Stanley, 416 N.E. 2d 998, 11 Mass. App. 428 (1981). Even if a product is properly designed, it is unreasonably dangerous, and therefore, it is not fit for the purposes for which such goods are used, if foreseeable users are not adequately warned of dangers associated with its use. Hayes v Ariens Co., 391 Mass. 473, 462 N.E. 2d 273 (Mass. 1974).

As stated in Hayes and Supreme Judicial Court in Florence Vassallo v. Baxter Healthcare Corporation (July 16, 1998), the rule of law in this jurisdiction relative to breach of warranty of merchantability for failure to warn or provide instructions is as follows:

"A manufacturer will be held to the standard of knowledge of an expert in the appropriate field and will remain subject to a continuing duty to warn (at least purchasers) of risks discovered following the sale of the product at issue." Id.

Breach of Warranties

Under the law of warranty, the manufacturer and/or the seller of a product warrants or guarantees that the product is fit for the ordinary purposes for which such goods are used. M.G.L. c. 106, §2-314(2). This includes the uses intended by the manufacturer and those, which are reasonably foreseeable. Back, 375 Mass. at 633. Unlike negligence liability, warranty liability "*focuses on whether the product was defective and reasonably dangerous and not on the conduct of the user of the seller.*" Coulter, 403 Mass. at 62 (citing Correia, 388 Mass. at 353;

Hayes, 391 Mass. at 413). A manufacturer may, therefore, be found liable even if it takes all reasonable measures to make its product safe. *Hayes*, 391 at 413. Similar to negligence liability "*a manufacturer of a product, which the manufacturer knows or should know is dangerous by nature or is in a dangerous condition, is under a duty to give warning of those dangers to persons who it is foreseeable will come in contact with, and consequently be endangered by that product.*" *Slate v Bethlehem Steel Corp.*, 400 Mass. 378 (1987).

As has been set forth by your company, it is a merchant who deals in goods of the kind and holds itself out as having knowledge or skill peculiar to good pursuant to M.G.L. c. 106, §2-104(1) and an expertise in these products. *Ferragamo v M.B.T.A.*, 395 Mass. 581, 481 N.E. 2d 477 (1985). As such, your company had a duty to anticipate the environment in which its product would be used and design/warn about said product against the reasonably foreseeable risks attending the product's use in that setting. (*Backs v Wicks Corp.*, 375 Mass. 633, 378 N.E. 2d 964 (1978).

The product as it existed certainly prior to sale and July 20, 2020 was defective in violation of M.G.L. c. 106, §2-314(2), (e), and (f). (*Backs v Wicks*, 375 Mass. 633, 378 N.E. 2d 964 (1978).

Accordingly, BMW is liable for the defectively packaged product because it was in the best position to recognize and eliminate these defects. *Coulter v Barber-Greene Co.*, 403 Mass. 50, 57 (1988) citing *Solimere v B. Grauel & Co.*, KG, 399 Mass. 790, 796 (1987).

Under M.G.L. c. 106, §2-315 there is an implied warranty of particular purpose. It is evident that your company was aware of consumer's particular purpose for the product and its implicit need for a safe automobile, and those consumers were relying on BMW's expertise and skill in the specialized field to furnish the appropriate goods and BMW's skill or judgment. *Fernandes v Union Bookkeeping Co.*, 400 Mass. 27, 507 NE 2d 728 (1987).

Clearly the claimant's damages resulted from this breach of the particular purpose warranty.

This also serves as a violation of the express warranty under M.G.L. c. 106, §2-313.

Demand

In view of the aforementioned BMW should reimburse the **\$1,245.58** charge and cover all future costs for transmission change - parts, labor and taxes.

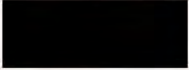
This written demand for relief/settlement will remain open only *30 days* from the date of this letter and/or delivery, after which time the offer is withdrawn and I will proceed to suit seeking the full measure of damages.

I look forward to your company's written tender of settlement within the *30 days* of mailing/delivery of this correspondence. If the relief tendered is not reasonable and hence not accepted by the claimant, a lawsuit will seek additional counts in accordance with the above-referenced statutes.

Fundamentally the real issue is if BMW intends to stand behind its products in the marketplace.

Very truly yours,

COPY


Cc:

U.S Department of Transportation
National Highway Traffic Safety Administration
Office of Defects Investigation (NVS-210)
1200 New Jersey Avenue SE
Washington, DC 20590

[REDACTED]
West Boyford, Massachusetts

Telephone: [REDACTED]

*Also Admitted in Maine

July 21, 2020

[REDACTED]
U.S Department of Transportation
National Highway Traffic Safety Administration
Office of Defects Investigation (NVS-210)
1200 New Jersey Avenue SE
Washington, DC 20590

COPY

Re: 2014 BMW X5- X drive- Model 35d- N57 engine
VIN: 5UXKS4C58E [REDACTED]
Mileage 78,357
Subject: defect crack to the transmission housing

Dear Sir or Madam:

Relative to the above vehicle I wanted to report a manufacturing defect to the transmission housing which has a crack in the above vehicle. It was not exposed to any type of trauma. There is also no worn or damaged driveshaft U-joint which would apply abnormal external torsional forces on the transmission case.

I have enclosed a photograph for your consumer complaint automated database.

The problem was ascertained by the BMW Service Center on 7 Centennial Drive, Peabody, MA 01960 on July 20, 2020 after the starter failed to engage the engine making the automobile inoperable. It had to be towed to the dealership on July 17, 2020. It is also undergoing repairs for the recall (*voluntary technical campaign*) for the ERG (*Exhaust Gas Recirculation module*) valve (*small quantities of the glycol coolant escape and build up in the EGR module which combined with carbon and oil sediments can become combustible and may cause melting of the intake manifold*) which was found to be defective.

I contacted first *Jasmine* at BMW 1-800-831-1117 customer relations, on July 20, 2020 per the email directive of Kay Reichard. I later in the evening of July 20, 2020 received a call from *Dennis* at the BMW warranty department, who was ineffective at resolving this issue. He merely referred me to the BMW service manager at the dealership and would not provide the name of the BMW representative who interfaced directly with the dealer. I am at a loss as to why the service manager did not make this inquiry initially with the BMW dealer representative.

The manufacturing defect was such that it could not be discovered with reasonable due care within the 4 year or 50,000 mile warranty. The current mileage on the automobile is 78,357. Thank you.

Very truly yours,

COPY
[REDACTED]

Cc:

Kay Reichard
BMW of Peabody
7 Centennial Drive
Peabody, MA 01960

Bernhard Kuhnt
CEO of North America
BMW of North America, LLC.
Customer Relations Department
300 Chestnut Ridge Road
Woodcliff, NJ 07677-7731



BOSTON MA 021
07 AUG 2020 PM 3 L



U.S Department of Transportation
National Highway Traffic Safety Administration
Office of Defects Investigation (NVS-210)
1200 New Jersey Avenue SE
Washington, DC 20590

20590-

