

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0289 CAF**

<b>EDWARD OBIAS,</b>	§	<b>BEFORE THE OFFICE</b>
<b>Complainant</b>	§	
<b>v.</b>	§	
	§	<b>OF</b>
<b>BMW OF NORTH AMERICA LLC,</b>	§	
<b>Respondent</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Edward Obias (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 BMW K1600 GTL. Complainant asserts that the vehicle loses coolant when he rides it and that there is sand in the engine. BMW of North America LLC (Respondent) argued that the vehicle has been repaired, is operating as designed, and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect. However, Complainant is not eligible for repurchase or replacement relief since he did not meet all of the statutory requirements for such relief under the Lemon Law. Complainant is eligible for repair 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 on September 8, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself in the hearing. Respondent was represented by Marty Roach, After-Sales Area Manager. The hearing was continued to allow Respondent an opportunity to repair the vehicle to Complainant's satisfaction. A continuance in the hearing was conducted on February 1, 2017, in Houston, Texas. Complainant represented himself in the continuance. Mr. Roach represented Respondent in the continued hearing. The hearing record was closed on February 1, 2017.

**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.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

value of the vehicle.<sup>2</sup> Third, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.<sup>3</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>4</sup>

In addition to the four conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.<sup>5</sup>

A rebuttable presumption that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty can also be established if the same nonconformity that substantially impairs the vehicle's use or market value continues to exist and: (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (2) at least two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner.<sup>6</sup>

The 30 day period described above 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.<sup>7</sup>

Occupations Code § 2301.204(a) provides that “[t]he owner of a motor vehicle or the owner’s designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer’s, converter’s, or distributor’s warranty agreement applicable to the vehicle.” The relief available under this section of the Code is repair of the vehicle in question.

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<sup>2</sup> *Id.*

<sup>3</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>5</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) provides an alternative method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard.

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

<sup>7</sup> Tex. Occ. Code § 2301.605(c).

**B. Complainant's Evidence and Arguments**

Complainant purchased a 2014 BMW K1600 GTL from Wild West Motoplex (Motoplex), in Katy, Texas on November 15, 2014.<sup>8</sup> The vehicle's mileage was 10 at the time of delivery.<sup>9</sup> Respondent provided a new vehicle limited warranty for the vehicle, which provides coverage for three (3) years or 36,000 miles from the date of delivery, whichever comes first.<sup>10</sup> On the date of hearing the vehicle's mileage was 26,540. At this time, the vehicle's warranty is still in effect.

Complainant testified that he did not have any problems with the vehicle until he performed the 18,000 mile maintenance on it. This was done on December 17, 2015, at Team Mancuso. After getting the vehicle back from the dealer, Complainant noticed that the vehicle was losing coolant. It seemed that he was losing half a tank a day of coolant.

Complainant took the vehicle to Gulf Coast BMW (Gulf Coast) in South Houston to address the issue of the coolant loss on January 12, 2016. The technician inspected the vehicle and could not find a reason as to why it would be losing coolant. He determined that the radiator cap might be leaking, so he ordered a new cap. The vehicle's mileage at the time was over 18,000. Complainant took the vehicle home that same day. Complainant was not provided a loaner vehicle.

Complainant returned to Gulf Coast on January 22, 2016, in order to have the radiator cap changed. He does not know if any other work or if an inspection of the entire vehicle was done at the time. This repair was performed in one day. Complainant was not provided a loaner vehicle.

Complainant noticed that the vehicle continued to lose coolant. He took the vehicle to BMW Motorcycles The Woodlands (Woodlands) on April 2, 2016, to address the issue. On this occasion the technician bled the vehicle's cooling system. In addition, he performed a pressure test on the vehicle. The technician also checked the vehicle's oil to see if there was coolant in it. He could not find a coolant leak and determined that everything was okay. Complainant got the vehicle back the same day. He was not provided an invoice for the visit nor was he provided a loaner vehicle.

Complainant observed that the coolant was still disappearing. On April 4, 2016, he noticed that the coolant level had dropped two (2) inches. Complainant took the vehicle to Woodlands and

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<sup>8</sup> Complainant Ex. 3, Bill of Sale dated November 15, 2014.

<sup>9</sup> Complainant Ex. 4, Texas Certificate of Title dated November 26, 2014.

<sup>10</sup> Respondent Ex. 2, Honda Warranty Manual, p. 9.

showed the technician the coolant level. The technician agreed there was a problem, so Complainant scheduled an appointment to repair the vehicle for April 11, 2016.

Complainant took the vehicle to Woodlands as scheduled on April 11, 2016. The technician decided that the water pump needed to be replaced and ordered a replacement part. It took a month for the part to arrive at Woodlands. On May 9, 2016, the technician took the vehicle's engine apart to install the water pump. At that time, the technician discovered sand in the vehicle's engine. As a result of the sand, the vehicle's head gasket had failed and also needed to be replaced. Complainant contacted Respondent to see if the head gasket repair would be covered under warranty. In the meantime, a new head gasket had to be ordered by Woodlands.

Complainant testified that he inspected the vehicle on May 26, 2016 to see if he could determine how sand was able to get in to the vehicle's engine. He found a gap at the bottom of the vehicle's intake manifold where it was not flush. He felt that this may have been a design issue.

Respondent informed Complainant that the vehicle's warranty did not cover the sand intrusion into the engine. As a result, Complainant had to pay \$1,123.04 for the repairs.<sup>11</sup> Complainant was not able to pick up the vehicle until June 25, 2016.<sup>12</sup> The vehicle's mileage on this occasion was 24,202.<sup>13</sup> The vehicle was in the dealer's possession for over two (2) months during this repair visit. Complainant was not provided with a rental or loaner vehicle while his vehicle was being repaired.

Complainant testified that he maintained the vehicle properly according to the maintenance schedule. He had not had any issues with coolant loss until the 18,000 miles service was performed.

During cross-examination, Complainant testified that he performed the 12,000 mile maintenance on the vehicle himself. He did not see any debris or sand in the engine during the maintenance repair. Since then, he has had to add coolant to the vehicle every other day as a result of the coolant loss. He hasn't seen any stains or smelled any coolant where the vehicle is parked. He has not observed any issues with the vehicle's oil.

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<sup>11</sup> Complainant Ex. 5, Repair Order dated April 11, 2016.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

On May 18, 2016, Complainant wrote a letter to Respondent advising them of the problems with the vehicle.<sup>14</sup> Complainant filed a Lemon Law complaint to the Texas Department of Motor Vehicles (Department) on May 23, 2016.<sup>15</sup>

Complainant allowed Respondent a final opportunity to repair the vehicle on October 26, 2016. Respondent's dealer had possession of the vehicle until December 2, 2016. Complainant drove the vehicle about 400 miles after having the vehicle returned to him on December 2, 2016. He noticed that the loss of coolant was still occurring, as the cooling tank was almost empty after his use of the vehicle.

The vehicle only loses coolant when Complainant is riding it. If the vehicle is parked, there is no coolant loss. Complainant testified that if he wants to use the vehicle, he has to periodically put coolant in it which is not normal for the vehicle.

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

Marty Roach, After-Sales Area Manager, testified for Respondent. Mr. Roach has worked for Respondent for 18 years. He was a Master Certified Technician for Respondent for the first 15 years of his employment. Prior to beginning employment with Respondent, Mr. Roach worked for independent repair shops as a technician.

Mr. Roach testified that he was contacted by Complainant directly in late April of 2016. Complainant informed Mr. Roach of his problems with the vehicle and that the vehicle was losing engine coolant, and that there was sand in the vehicle's engine. Mr. Roach felt that the coolant issue was warrantable, although the sand issue was not. The engine and the cooling system are compartmentalized, so the issues should not have been caused by one another. Mr. Roach also testified that the cooling system is a sealed system and should not have been losing coolant. He does not know why the vehicle would be suffering from a loss of engine coolant.

Mr. Roach also testified that Respondent reimbursed Complainant for the cost of the replacement of the vehicle's head gasket which was initially determined not to be covered under warranty because of the sand in the engine.

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<sup>14</sup> Complainant Ex. 2, Letter to BMW of North America L.L.C. dated May 18, 2016.

<sup>15</sup> Complainant Ex. 1, Lemon Law complaint dated May 23, 2016. Although the complaint was signed by Complainant on May 18, 2016, the complaint was actually received by the Texas Department of Motor Vehicles on May 23, 2016, which is the effective date of the complaint.

Respondent performed a final repair attempt on Complainant's vehicle on October 26, 2016. The repair attempt was performed at Motoplex. The technician performed an inspection and performed several tests on the vehicle, but was not able to discover the cause of the coolant leak.<sup>16</sup> The vehicle's mileage at the time of the final repair was 25,921.<sup>17</sup> Complainant was not provided with a rental or loaner vehicle while the final inspection attempt was performed.

#### **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 a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant indicated on his complaint that he had two issues: the vehicle losing coolant and sand in the vehicle's engine. The issue regarding sand in the engine has been resolved. The only issue remaining has to do with the vehicle losing coolant.

The first issue to be addressed is whether Complainant's vehicle has a defect or nonconformity which substantially impairs its use and market value. Although Respondent has indicated that the vehicle was repaired and operating normally, Complainant testified that the vehicle continues to lose coolant even after Respondent's final repair attempt in November and December of 2016. It is apparent given the evidence that the vehicle has not been repaired. The vehicle's loss of coolant makes it less desirable to drive than comparable vehicles. In addition, it's reasonable to assume that the vehicle would suffer from a loss of value if it were to be sold by Complainant. As such, the hearings examiner holds that Complainant has established the existence of a defect or nonconformity which substantially impairs the use and market value of the vehicle.

Complainant purchased the vehicle on November 15, 2014, and presented the vehicle to Respondent's authorized dealers due to his concerns with the engine coolant issue on the following dates: January 12, 2016; January 22, 2016; April 2, 2016; and April 11, 2016. 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

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<sup>16</sup> Respondent Ex. 1, Repair Order dated October 26, 2016.

<sup>17</sup> *Id.*

2301.605(a)(1) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if “two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.” In addition, Section 2301.605(a)(3) provides an alternative method to establish a rebuttable presumption that a reasonable number of attempts to repair have been made if “the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner and at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.” Unfortunately, the problem with the vehicle losing coolant did not manifest until December 17, 2015 more than a year after the date on which Complainant purchased the vehicle, November 15, 2014. In addition, the vehicle had already amassed 18,000 miles at the time when the problem first arose. The evidence presented at the hearing establishes that Complainant has not met the requirements of either test. Therefore, Complainant has not established that a reasonable number of attempts to repair the vehicle were made by Respondent.

However, repair relief is still available for Complainant under Occupations Code § 2301.204. Respondent’s express warranty applicable to Complainant’s vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle’s mileage was 26,450 and the basic warranty coverage is still in effect. In addition, the first hand testimony presented by Complainant indicates that the vehicle is still losing coolant. As such, Respondent is hereby ordered to perform any necessary repairs to conform Complainant’s vehicle to the warranty.

Complainant’s request for repurchase or replacement relief is denied. Respondent will be ordered to repair the vehicle so that it conforms to its express warranty.

### III. FINDINGS OF FACT

1. Edward Obias (Complainant) purchased a new 2014 BMW K1600 GTL motorcycle on November 15, 2014, from Wild West Motoplex, in Katy, Texas, with mileage of 10 at the time of delivery.
2. The manufacturer of the vehicle, BMW of North America LLC (Respondent) issued a new vehicle limited warranty for three (3) years or 36,000 miles from the date of delivery to the owner, whichever occurs first.

3. The vehicle's mileage on the date of hearing was 26,450.
4. At the time of hearing the vehicle's basic warranty was still in effect.
5. After having Respondent's authorized dealer perform the 18,000 mile service on the vehicle, Complainant began experiencing a problem where the vehicle began losing coolant from its engine.
6. Complainant took the vehicle to Respondent's authorized dealers in order to address his concerns with the vehicle losing engine coolant, on the following dates:
  - a. January 12, 2016, at approximately 18,000 miles;
  - b. January 22, 2016, at unknown mileage;
  - c. April 2, 2016, at unknown mileage; and
  - d. April 11, 2016, at 24,202 miles.
7. On January 12, 2016, Gulf Coast BMW's service technician could not find a leak, but thought that the radiator cap may have been causing the loss of coolant, so a new radiator cap was ordered for the vehicle
8. On January 22, 2016, Gulf Coast BMW's technician installed the new radiator cap on the vehicle.
9. On April 2, 2016, BMW Motorcycles The Woodlands' service technician bled the vehicle's cooling system, performed a pressure test, and checked the vehicle's oil for coolant intrusion. The technician indicated that the vehicle was working properly.
10. On April 11, 2016, BMW Motorcycles The Woodlands' technician decided to replace the vehicle's water pump, so a new water pump was ordered.
11. The new water pump described in Findings of Fact 10 was installed in the vehicle in May of 2016. The vehicle was retained by the dealer until June 25, 2016, for additional repairs to the vehicle's engine.
12. Complainant provided written notice of the defect to Respondent on May 18, 2016, and Respondent was given the opportunity to perform a final repair to the vehicle on October 26, 2016.

13. On May 23, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On June 28, 2016, 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.
15. The hearing in this case convened on September 8, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Marty Roach, After-Sales Area Manager. The hearing was continued to allow Respondent an opportunity to repair the vehicle to Complainant's satisfaction. A continuance in the hearing was conducted on February 1, 2017, in Houston, Texas. Complainant represented himself in the continuance. Mr. Roach represented Respondent in the continued hearing. The hearing record was closed on February 1, 2017.

#### IV. CONCLUSIONS OF LAW

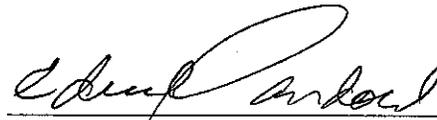
1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. 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 proved by a preponderance of the evidence that the vehicle has a verifiable

- defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a)(3).
  8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
  9. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**. However, Respondent is **ORDERED** to **PERFORM ALL NECESSARY REPAIRS** to conform the vehicle to the limited warranty. All such repairs must be performed within 20 days from the issuance of this order.

**SIGNED March 16, 2017.**



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