

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0162 CAF**

**GERARDO GARZA and
MELISSA GARZA,
Complainants**

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BEFORE THE OFFICE

OF

v.

**GENERAL MOTORS, LLC,
Respondent**

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Gerardo Garza and Melissa Garza (Complainants) assert that the fuel mileage on their 2013 Chevrolet Malibu Eco is inadequate and seek repurchase of the vehicle pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law). General Motors, LLC (GM or Respondent) argues that the alleged defect does not meet the statutory requirements for repurchase because Respondent does not warranty fuel mileage. The hearings examiner finds that Complainants' Lemon Law claim is preempted by federal law and should be dismissed.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Issues of jurisdiction were uncontested, and are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

On March 27, 2014, prior to the evidentiary hearing, Respondent filed a Motion to Dismiss (Motion), arguing that its advertising of fuel economy estimates for the 2013 Chevrolet Malibu Eco complies with federal law, that state regulation of fuel economy inconsistent with federal law is prohibited, and that Complainants' allegation of poor fuel economy is not a warrantable claim. Complainants did not file a response to the Motion. On April 4, 2014, the hearings examiner held a telephonic hearing on the Motion. On the same date, Order No. 3 denying Respondent's Motion was issued.¹

¹ Respondent's Motion to Dismiss cited as authority, 1 Texas Administrative Code § 155.503(b)(1), which permits all or a portion of a contested case to be dismissed from the docket of the State Office of Administrative Hearings (SOAH) for lack of jurisdiction by SOAH or the referring agency; mootness; failure to state a claim for which relief can be granted; or unnecessary duplication of proceedings. SOAH's procedural rules have no application in this administrative proceeding before the Texas Department of Motor Vehicles (Department). The hearings examiner further notes that, unlike SOAH's procedural rules, the Department's rules do not provide for dismissal of all or part of a contested case on summary disposition, *i.e.*, in the absence of an evidentiary hearing. *See* SOAH's rule at 1 Texas Administrative Code § 155.505.

On April 30, 2014, the hearing on the merits convened before Hearings Examiner Anne K. Perez in Laredo, Texas. Complainants appeared and represented themselves. Attorney Wendy D. May appeared telephonically on behalf of Respondent.² The record closed at the conclusion of the hearing on April 30, 2014.

On May 8, 2014, Respondent filed a Motion for Submission of Evidence, requesting to supplement the record with 85 pages of documents.³ The audiotaped recording of the April 30, 2014 hearing establishes that, while Complainants were granted leave to file written posthearing argument in response to Respondent's legal argument, Complainants declined the opportunity and the evidentiary record closed on April 30, 2014. Respondent's late-filed Motion for Submission of Evidence is therefore denied.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides administrative remedies for a consumer whose vehicle cannot be made to conform to an applicable express warranty. Texas Occupations Code § 2301.604, in relevant part, provides:

- (a) A manufacturer . . . that is unable to 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 shall reimburse the owner for reasonable incidental costs resulting from loss of use of the motor vehicle because of the nonconformity or defect and:
- (1) replace the motor vehicle with a comparable motor vehicle; or
 - (2) accept return of the vehicle from the owner and refund to the owner the full purchase price....

² Respondent's attorney was permitted to make a telephonic appearance over Complainants' objection and despite counsel's failure to file a written motion requesting to appear telephonically at the hearing, as required by 43 Texas Administrative Code § 215.47.

³ It is noted for the record that Respondent's late-filed evidence consists of documents that, for the most part, were admitted as Complainants' exhibits, *e.g.*, copies of the applicable vehicle warranty (53 pages) and vehicle repair orders. Other papers contained in Respondent's late submission reflect handwritten (often illegible) notations for which no foundation was laid, and hearsay statements concerning photographic evidence.

“Impairment of market value” means a substantial loss in market value caused by a nonconformity in the vehicle, and “serious safety hazard” means a life-threatening malfunction or defect that significantly impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes.⁴

B. Complainant’s Evidence and Arguments

Complainants purchased the 2013 Chevrolet Malibu Eco (or Malibu Eco) from Don Hewlett Chevrolet of Georgetown, Texas on December 8, 2012, with mileage of 294 at the time of delivery.⁵ On the date of hearing the vehicle’s mileage was approximately 12,500. At this time, Respondent’s limited warranty coverage for the vehicle remains in place, with “bumper-to-bumper” coverage for three years or 36,000 miles, whichever comes first, and powertrain coverage for five years or 100,000 miles, whichever comes first.⁶

Complainants noted that when they purchased the Malibu Eco the window sticker advertised fuel economy of 25 miles per gallon (mpg) in the city and 37 mpg on the highway, for a combined total of 29 mpg. The window sticker further promoted “3.5 gallons of fuel per 100 miles.”⁷ Yet, Complainants assert that actual fuel mileage achieved by the vehicle has never approached this level of efficiency, averaging only 16-17 mpg, and rarely exceeding 19 mpg.

Gerardo Garza testified that the couple’s trade-in vehicle was a 2008 Chevrolet Malibu. In December 2012 they decided to up-grade to a 2013 Malibu with an “Eco” (half-gasoline, half-electric) engine, knowing that it would cost more up-front but expecting to save on fuel expenses in the longer term. He recalled first noticing a problem with the new car’s fuel mileage on the drive home to Laredo, Texas from the dealership in Georgetown: “I told my wife, maybe they didn’t top off the tank or something, because we’re already running out of gas.”

Melissa Garza testified that she is the primary driver of the Malibu Eco. She confirmed that the vehicle’s fuel inefficiency was apparent “from day one,” and in February 2013 she began documenting the problem. Each time she stopped to refuel the vehicle, she explained, she took pictures of the car’s trip odometer reading, the final readout from the fuel pump,⁸ and her receipt for the transaction (reflecting the date, the sales price of the fuel, and the number of gallons purchased). She said she was careful to refill the tank completely and to clear the vehicle’s mileage tracker after completing these steps. On each occasion, she calculated the car’s actual fuel consumption (mpg) by dividing the trip mileage by the number of gallons necessary to refill the tank.

⁴ Tex. Occ. Code § 2301.604(a)(1) and (2).

⁵ Complainants Ex. 3, Lemon Law Complaint Form.

⁶ Complainants Ex. 24, 2013 Chevrolet Limited Warranty and Owner Assistance Information.

⁷ Complainants Ex. 2, copy of window sticker.

⁸ The 2013 Chevrolet Malibu Owner Manual indicates the fuel tank holds 15.8 gallons of fuel. Complainants Ex. 25, p. 12-2.

Ms. Garza testified that she followed these procedures to calculate the vehicle's fuel consumption between February 18, 2013 and April 21, 2014. Documentary evidence admitted at hearing,⁹ in conjunction with Ms. Garza's testimony concerning her calculations, are summarized in the table below:¹⁰

Date	Odometer Reading	Mileage Driven Per Trip Odometer	Gallons Pumped	Actual Mileage Per Gallon
05-08-2013	4,475	239.8	14.002	17.13
05-31-2013	5,130	235.5	13.665	17.24
06-21-2013	5,726	196.7	13.986	14.06
09-22-2013	6,448	198.1	14.291	13.86
10-17-2013	7,101	216.6	12.677	17.09
10-30-2013	7,714	219.5	14.077	15.59
12-12-2013	8,856	222.8	13.853	16.08
12-21-2013	9,100	243.9	13.503	18.06
01-12-2014	9,584	250.9	14.033	17.88
03-18-2014	11,352	230.6	13.494	17.09
03-25-2014	11,589	236.8	13.898	17.04
04-02-2014	11,814	224.4	13.88	16.17
04-11-2014	12,058	244.2	14.358	17.01

Mr. Garza testified that in May 2013 the couple began bringing the vehicle in to Family Chevrolet of Laredo, complaining of inadequate fuel mileage. Mr. Garza, who is an auto mechanic and owns a certified automotive repair business, described his extensive dealings with Family Chevrolet service personnel regarding the Malibu Eco's fuel inefficiency. He expressed frustration with dealership technicians, who repeatedly tested the vehicle's fuel economy by filling up the tank, driving the car for a short distance, then topping off the tank and calculating the car's average mpg based on this limited information. Mr. Garza was adamant that the vehicle's impaired fuel economy becomes apparent only when it is driven a couple of hundred miles on a full tank of gas, but no one at the dealership was willing to test the Malibu Eco in this manner.

Mr. Garza testified that his frustration with the vehicle, and the way he was treated by service technicians, peaked on February 24, 2014 when GM representative Roy Hernandez arranged for a GM

⁹ Photographs of the vehicle's trip odometer readings, and the corresponding fuel pump readings and gas purchase receipts were admitted as Complainants' Exs. 10-13 and 15-23.

¹⁰ The table reflects Ms. Garza's findings regarding the vehicle's actual fuel mileage for 13 full tanks of gas purchased over eight months. A similar chart prepared by Ms. Garza (admitted as Complainants Ex. 14) reflects identical calculations based on mileage figures and fuel purchases occurring on 11 other dates, but supporting documentary evidence (photographs) for these additional entries is not of record.

field service engineer to inspect the vehicle at Family Chevrolet. Mr. Garza understood that he was going to accompany the GM technician on a test drive of the vehicle during on-board computer diagnostic testing, but he was wrong: "I waited at the dealership for four hours and saw no one. . . . If someone came they must have driven out the back way because I didn't get to see or talk to anyone about the car."

Family Chevrolet's repair orders for Complainants' vehicle reflect the following information:¹¹

Date In & Date Out	Mileage	Reported Concern	Diagnostic Action	Dealer's Findings
05-08-2013 to 05-09-2014	4,485	Vehicle not giving correct fuel mileage	Reprogram ECM to latest update; reset mpg & test drove 30 miles; car avg. 31 mpg	No problem found
05-20-2013 to 05-23-2013	4,829	Vehicle not giving correct fuel mileage	Called GM Tech. Asst. & was told to verify ECM calibration. Calibration was current and correct. Drove vehicle 65 miles on both city and hwy. Vehicle avg. 30.1 mpg	Vehicle passed
06-05-2013 to 06-05-2013	5,238 to 5,314	Fuel mileage very poor; getting 16-17 mpg	Filled tank to get baseline for fuel consumption. Drove 23 miles hwy./11 miles city (total of 34 miles); refilled tank with .5 gallon for avg. of 68 mpg; on 2nd road test, drove 17 miles hwy./ 25 miles city (total of 42 miles), refilled tank with .9 gallon for avg. of	Did not duplicate concern. Released vehicle with 5,314 mileage & full tank for customer to drive; will recheck mpg when customer returns. Customer returned on 06-11-2013 with 5,527 mileage, i.e., 213 miles driven on one tank.

¹¹ The service invoices were admitted as Complainants Exs. 2-6, 6A, 7, and 8. For clarity and ease of reference, quotes from the invoices are summarized and corrected for spelling errors.

			42.67 mpg	Refilled tank with 13 gallons for avg. of 16.39 mpg
07-09-2013 to 09-13-2013	6,051 to 6,059 ¹²	Fuel mileage very poor; getting 16-17 mpg	Inspected, removed, & replaced generator control module (GCM); old one failed test and "smoked;" after repairs passed test	Cause: Recall 13136 Loss of battery charge- Repaired by replacing GCM
02-24-2014 to 02-24-2014	10,671 to 10,743	Vehicle gets very poor fuel mileage	Starting mileage was 10,671; drove vehicle for 72 miles while GM field engineer gathered data	

Complainants both testified that their vehicle continues to exhibit extremely poor fuel mileage. Ms. Garza in particular expressed deep disappointment in the Malibu Eco's performance, noting that her prior vehicle (a 2008 Chevrolet Malibu) achieved average fuel economy of 23 mpg, considerably higher than the same model with a hybrid engine.

On cross-examination, Ms. Garza testified that her driving habits are consistent with that of any "mom." She drives to work, takes her children to school, and goes grocery shopping. She obeys the speed limit and all traffic signals. She indicated that the Laredo terrain is flat rather than hilly. She denied excessive use of the vehicle's air conditioner or heater.

C. Respondent's Evidence and Arguments

At the April 30, 2014 hearing, Respondent offered the affidavit testimony of field service engineer Kevin Brown, who purportedly inspected Complainant's Malibu Eco at Family Chevrolet on February 24, 2014. Complainants objected to admission of the affidavit on the basis that Mr. Brown was unavailable for cross-examination in person or by telephone. The objection was sustained and Mr. Brown's 5-page affidavit was excluded.¹³ Respondent did not offer any other documentary evidence at the hearing.

¹² Complainants agree that their vehicle was at the dealer for repairs between July 9 and September 13, 2013. However, contrary to the repair order admitted as Complainant's Ex. 7, Mr. and Mrs. Garza both testified that when the vehicle was released to them on September 13, 2013, the mileage was 6,263, *i.e.*, 212 miles higher than shown on the dealer's invoice.

¹³ The record includes counsel's offer of proof describing paragraphs 6-19 of Mr. Brown's affidavit.

Respondent argued that Complainants' Lemon Law claim fails as a matter of law. Respondent noted that the United States Environmental Protection Agency (EPA) and Federal Trade Commission regulate the calculation, disclosure, and advertising of fuel economy (mpg) estimates,¹⁴ and that federal law regarding fuel economy preempts state regulation that is inconsistent with EPA standards.¹⁵ Respondent is moreover required to comply with federal statutes and agency regulations regarding disclosures of EPA fuel economy estimates to consumers.¹⁶ The EPA estimates are designed "to assist consumers in making comparisons of the fuel economy of new vehicles,"¹⁷ but they do not predict the fuel economy that an individual driver will achieve because actual fuel economy is affected by a host of factors, among them driving habits, vehicle maintenance, and weather and traffic conditions.¹⁸ For this reason, EPA mpg ratings are expressly labeled as "estimates," and the law provides that they are not a warranty of actual fuel economy under federal or state law.¹⁹

D. Analysis

The Lemon Law provides remedies for a consumer whose vehicle fails to conform to the manufacturer's warranty. Relief in the form of repurchase or replacement is available when the manufacturer is unable to conform a vehicle to an express warranty by repairing a defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle, after a reasonable number of attempts.²⁰

Complainants credibly testified that over a period of 11 months, actual fuel mileage achieved by their Malibu Eco averaged only 16-17 mpg, and rarely exceeded 19 mpg. Ms. Garza's testimony (and Complainants' supporting documentation) concerning the vehicle's average fuel economy was far more credible than the servicing dealer's findings, which were based limited road testing of the vehicle. Complainants are understandably upset and dissatisfied about their vehicle's poor performance.

However, Respondent did not warrant the Malibu Eco's fuel mileage. The fuel mileage ratings listed on the new vehicle's window sticker are established by the EPA, and federal law dictates that EPA mpg ratings are estimates and do not constitute a warranty of actual fuel economy. The Lemon Law does not extend to defects or conditions not covered by the manufacturer's warranty.

Based on these reasons, the hearings examiner finds that the complaint should be dismissed.

¹⁴ 49 U.S.C. § 32901 *et seq.*

¹⁵ 49 U.S.C. § 32919.

¹⁶ 49 U.S.C. §§ 32904 and 32908.

¹⁷ *Paduano v. American Honda Motor Co.*, 169 Cal. App.4th 1453, 1464 (2009).

¹⁸ 40 C.F.R. §§ 600.307-08(b)(4).

¹⁹ 49 U.S.C. § 32908(d).

²⁰ Tex. Occ. Code § 2301.604.

III. FINDINGS OF FACT

1. Gerardo Garza and Melissa Garza (Complainants) purchased a new 2013 Chevrolet Malibu Eco on December 20, 2012 from Don Hewlett Chevrolet of Georgetown, Texas, with mileage of 294 at the time of delivery.
2. The manufacturer of the vehicle, General Motors, LLC (Respondent) issued a limited warranty for the vehicle, with bumper-to-bumper coverage for three years or 36,000 miles, whichever comes first, and powertrain (engine, transmission, and drive train) coverage for five years or 100,000 miles, whichever comes first.
3. The Environmental Protection Agency's (EPA) window sticker for the 2013 Malibu Eco estimates fuel economy of 25 miles per gallon (mpg) in the city and 37 mpg on the highway, for a combined total of 29 mpg.
4. Shortly after purchase, Complainants noticed that their vehicle's fuel mileage was far below the EPA's estimated fuel consumption for the vehicle. Over a period of eleven months, the actual fuel mileage achieved by Complainants' vehicle averaged 16-17 mpg, and rarely exceeded 19 mpg.
5. The vehicle was serviced by Family Chevrolet in Laredo, Texas regarding Complainants' issue of fuel inefficiency on at least the following dates:
 - a. May 8, 2013 at 4,485 miles;
 - b. May 20, 2013 at 4,829 miles;
 - c. June 5, 2013 at 5,238 miles; and
 - d. July 9, 2013 at 6,051 miles.
6. The servicing dealer's testing of the vehicle's fuel economy was inadequate and unreliable, and any repairs performed by dealer personnel did not improve fuel efficiency.
7. Complainants' vehicle continues achieve average fuel economy of 16-17 mpg, but the cause of this fuel inefficiency was not established by evidence.
8. Respondent did not warrant the vehicle's fuel mileage consistent with EPA mpg estimates.
9. Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 15, 2014.

10. On April 4, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
11. The hearing convened on April 30, 2014, in Laredo, Texas before Hearings Examiner Anne K. Perez. Complainants appeared and represented themselves. Attorney Wendy D. May appeared telephonically on behalf of Respondent. The record closed at the conclusion of the hearing on April 30, 2014.

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. Complainants 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. The United States Environmental Protection Agency (EPA) and Federal Trade Commission regulate the calculation, disclosure, and advertising of fuel economy estimates. 49 U.S.C. § 32901 *et seq.*
6. Respondent is required to comply with federal statutes and agency regulations regarding disclosures of fuel economy. 49 U.S.C. §§ 32904 and 32908.
7. Federal law regarding fuel economy preempts any state regulation that is inconsistent with EPA standards. 49 U.S.C. § 32919.
8. The EPA requires the window sticker disclosure for every new vehicle to include the disclaimer stating that actual mileage will vary depending on how the vehicle is driven and maintained. 40 C.F.R. §§600.307-08(b)(4).

9. The vehicle's warranty does not cover fuel mileage and as a result, the Lemon Law does not provide a remedy for Complainants.
10. Complainants' 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

SIGNED May 23, 2014.

Anne K Perez / SDA by permission
ANNE K. PEREZ, HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES