

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0363 CAF**

**REGINALD THOMAS,  
Complainant**

v.

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Reginald Thomas (Complainant) asserts that the fuel mileage on his 2013 GMC Terrain is inadequate and seeks repurchase of the vehicle pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law). General Motors LLC (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 January 12, 2016, prior to the evidentiary hearing, Respondent filed a Motion to Dismiss (Motion), arguing that the miles per gallon ratings are estimates and not warranted by Respondent and that federal law pre-empts the state Lemon Law complaint. Complainant responded to the Motion on January 12, 2016, and stated that he disagreed with Respondent's arguments. On January 12, 2016, Order No. 3 denying Respondent's Motion was issued.

On February 12, 2016, the hearing on the merits convened before Hearings Examiner Edward Sandoval in Galveston, Texas. Complainant, Reginald Thomas, appeared and represented himself. Samuel Snyder, attorney with Hartline, Dacus, Barger, Dreyer LLP, represented Respondent. Bruce Morris, Field Service Engineer, testified for Respondent. Shawn Angel, District Manager for After-Sales, observed. The record closed at the conclusion of the hearing on February 12, 2016.

## 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....

“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.<sup>1</sup>

### B. Complainant’s Evidence and Arguments

Complainant purchased a new 2013 GMC Terrain from Classic Auto Group (Classic) in Galveston, Texas on October 28, 2013, with mileage of 11 at the time of delivery.<sup>2</sup> On the date of hearing the vehicle’s mileage was approximately 14,980. At this time, Respondent’s limited warranty coverage for the vehicle remains in place, with coverage for three (3) years or 36,000 miles, whichever comes first.

Complainant testified that when he purchased the vehicle the window sticker advertised fuel economy of 26 miles per gallon (mpg) in the city and 32 mpg on the highway. Yet, Complainant asserts that actual fuel mileage achieved by the vehicle has never approached this level of efficiency, averaging only 19-20 mpg. Complainant testified that he has determined the fuel mileage

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<sup>1</sup> Tex. Occ. Code § 2301.601(1) and (4).

<sup>2</sup> Complainant Ex. 1, Vehicle Purchase Order dated October 28, 2013.

by filling up the vehicle's gas tank before driving it. He divides the number of gallons used by the miles driven in the vehicle to determine the mpg.

Complainant testified that he first noticed a problem with the vehicle's fuel mileage in November of 2013. He took the vehicle to Classic sometime that same month to complain about the issue and was informed that he should give the issue about 5000 miles and it would clear up. No repair order was prepared at the time.

Complainant testified that the vehicle stopped operating during a Christmas trip to Biloxi, Mississippi and that he had to get it repaired. During the drive to Biloxi, Complainant determined that he had averaged about 21 mpg in the vehicle.

Complainant stated that he took the vehicle to Classic for repair for the fuel mileage issue sometime in 2014. However, he could not recall the exact date. Complainant also took the vehicle to Classic for repair for the issue on January 21, 2015, at 7,297 miles;<sup>3</sup> February 24, 2015, at 8,133 miles;<sup>4</sup> March 17, 2015, at 8,556 miles;<sup>5</sup> and April 20, 2015, at 9,202 miles.<sup>6</sup> Classic's service technicians investigated Complainant's complaints on each occasion and determined that there was no issue with the vehicle's fuel mileage. On each occasion, Complainant received a loaner vehicle while his vehicle was in Classic's possession.

On June 10, 2015, Complainant took the vehicle to Gay Buick-GMC (Gay) in Dickinson, Texas for repair for the fuel mileage issue. Gay's service technician determined that the vehicle's fuel trim was lean, the throttle position was closed, the air intake was loose, and the throttle body was sticking.<sup>7</sup> So, the technician secured the air tube and replaced and reprogrammed the throttle body.<sup>8</sup> After the repairs were performed, the technician determined that the vehicle was getting 33 mpg.<sup>9</sup> The vehicle's mileage on this occasion was 9,536.<sup>10</sup> Complainant received a loaner vehicle while his vehicle was being repaired. Complainant stated that the vehicle's mpg reverted back to 20 after driving about 45 miles after leaving the dealership.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) with an effective date of August 18, 2015.<sup>11</sup> Complainant sent an e-mail to Respondent advising them of his dissatisfaction with the vehicle's fuel efficiency.<sup>12</sup>

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<sup>3</sup> Complainant Ex. 3, Repair Order dated January 21, 2015.

<sup>4</sup> Complainant Ex. 4, Repair Order dated February 24, 2015.

<sup>5</sup> Complainant Ex. 5, Repair Order dated March 17, 2015.

<sup>6</sup> Complainant Ex. 6, Repair Order dated April 20, 2015.

<sup>7</sup> Complainant Ex. 7, Repair Order dated June 10, 2015.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Complainant Ex. 2, Lemon Law Complaint dated August 18, 2015.

<sup>12</sup> Complainant Ex. 9, Undated E-mail addressed to General Motors.

On September 8, 2015, Complainant took the vehicle to Classic to address the fuel efficiency issue. A field representative determined that the vehicle was okay.<sup>13</sup> The vehicle's mileage on this occasion was 12,012.<sup>14</sup> Complainant was provided with a rental vehicle while his vehicle was being repaired.

Complainant testified that the vehicle has always gotten between 19-20 mpg and that this is the mileage that it's currently getting. He feels that the fuel mileage is not acceptable.

During cross-examination, Complainant testified that he was told by the salesperson that the vehicle would average about 32 mpg on the highway and 26 mpg in the city. He is aware that the information regarding mpg on the vehicle stickers are estimates, but he feels that getting about a third less mileage per gallon of gas is too much of a discrepancy. He checks the vehicle's tires periodically and he ensures that they are inflated to 33 to 34 pounds per square inch. He also usually drives in clear weather, so he feels that weather should not be a factor in the vehicle's fuel efficiency.

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

Bruce Morris, Field Service Engineer, testified for Respondent. Mr. Morris has a degree in Automotive and Diesel Technology from Universal Technical Institute (UTI). He's worked as an instructor, shop foreman, and service technician in the past. He has 25 Automotive Service Excellence (ASE) certifications and has 10 General Motors (GM) certifications. He is classified as a GM World Class technician. Among his job duties as a field service engineer is to help out dealer technicians with difficult automotive diagnoses.

Mr. Morris conducted a final repair attempt on the vehicle on September 8, 2015, at Classic. When he arrived at the dealer's location, Mr. Morris attached a scan tool to the vehicle to determine if the vehicle had any diagnostic trouble codes (DTC's). He found none. He took photographs of the vehicle and then looked at the vehicle's driver information center (DIC) to see what mpg was recorded on it. Mr. Morris saw that the DIC indicated that Complainant had averaged 19.4 mpg at an average speed of 26.5 mph. Mr. Morris then conducted a fuel consumption test to determine the vehicle's fuel efficiency. He took four (4) 15 mile test drives in the vehicle. The test drives were performed on a flat road in the Galveston area. At a speed of 55 mph, the vehicle averaged 36.1 mpg. At a speed of 60 mph, the vehicle averaged 36.8 mpg. At a speed of 65 mph, the vehicle averaged 31.8 mpg. Finally, at a speed of 70 mph, the vehicle averaged 27.7 mpg. Mr. Morris determined that over the 66 miles driven in the vehicle (including stopping and getting up to the necessary speeds), the vehicle averaged 23.82 mpg.<sup>15</sup> Mr. Morris determined that the vehicle was operating as designed.

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<sup>13</sup> Complainant Ex. 8, Repair Order dated September 8, 2015.

<sup>14</sup> *Id.*

<sup>15</sup> Respondent Ex. 2, Vehicle Legal Inspection dated September 8, 2015.

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,<sup>16</sup> and that federal law regarding fuel economy preempts state regulation that is inconsistent with EPA standards.<sup>17</sup> Respondent is moreover required to comply with federal statutes and agency regulations regarding disclosures of EPA fuel economy estimates to consumers.<sup>18</sup> The EPA estimates are designed “to assist consumers in making comparisons of the fuel economy of new vehicles,”<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

#### 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.<sup>22</sup>

Complainant credibly testified that the actual fuel mileage achieved by his vehicle averaged only 19-20 mpg. Complainant is upset and dissatisfied about the vehicle’s fuel efficiency.

Complainant’s Lemon Law claim fails as a matter of law. Respondent did not warrant the vehicle’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.

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<sup>16</sup> 49 U.S.C. § 32901 *et seq.*

<sup>17</sup> 49 U.S.C. § 32919.

<sup>18</sup> 49 U.S.C. §§ 32904 and 32908.

<sup>19</sup> *Paduano v. American Honda Motor Co.*, 169 Cal. App.4th 1453, 1464 (2009).

<sup>20</sup> 40 C.F.R. §§ 600.307-08(b)(4).

<sup>21</sup> 49 U.S.C. § 32908(d).

<sup>22</sup> Tex. Occ. Code § 2301.604.

**III. FINDINGS OF FACT**

1. Reginald Thomas (Complainant) purchased a new 2013 GMC Terrain on October 28, 2013 from Classic Auto Group in Galveston, Texas, with mileage of 11 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.
3. The Environmental Protection Agency's (EPA) window sticker for the 2013 GMC Terrain estimates fuel economy of 26 miles per gallon (mpg) in the city and 32 mpg on the highway.
4. Shortly after purchase, Complainant noticed that the vehicle's fuel mileage was below the EPA's estimated fuel consumption for the vehicle. The actual fuel mileage achieved by Complainant's vehicle averaged 19-20 mpg.
5. The vehicle was serviced by Classic Auto Group in Galveston, Texas regarding Complainant's issue of fuel inefficiency on at least the following dates:
  - a. January 21, 2015 at 7,297 miles;
  - b. February 24, 2015 at 8,133 miles;
  - c. March 17, 2015 at 8,556 miles; and
  - d. April 20, 2015 at 9,202 miles.
6. The dealer's technicians determined that there was not a repairable issue with the vehicle and no repairs were performed on any of the repair visits.
7. The vehicle was serviced by Gay Buick-GMC in Dickinson, Texas on June 10, 2015, regarding Complainant's issue of fuel inefficiency.
8. Gay's service technician secured the vehicle's air tube and replaced and reprogrammed the vehicle's throttle body in order to address Complainant's concern.
9. Complainant's vehicle continues to achieve an average fuel economy of 19-20 mpg, but the cause of this fuel inefficiency was not established by evidence.
10. Respondent did not warrant the vehicle's fuel mileage consistent with EPA mpg estimates.
11. Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on August 18, 2015.

12. On November 20, 2015, 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.
13. On February 12, 2016, the hearing on the merits convened before Hearings Examiner Edward Sandoval in Galveston, Texas. Complainant, Reginald Thomas, appeared and represented himself. Samuel Snyder, attorney with Hartline, Dacus, Barger, Dreyer LLP, represented Respondent. Bruce Morris, Field Service Engineer, testified for Respondent. Shawn Angel, District Manager for After-Sales, observed. The record closed at the conclusion of the hearing on February 12, 2016.

#### 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. 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 Complainant.
10. 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 relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

**SIGNED February 16, 2016**

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