OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2017 - March 2017 (1st Quarter)

NONCONFORMITY 681.102(15), F.S.

Descart v. Ford Motor Company, 2016-0455/WPB (Fla. NMVAB January 11, 2017)

The Consumer complained of a transmission condition characterized by an intermittent shudder or shake on acceleration in her 2015 Ford Fiesta. The Consumer testified that when she accelerated, intermittently the vehicle shuddered or shook. She explained that she would take the vehicle to the dealer with her complaint, the problem would be repaired, but within a couple of weeks the vehicle would again exhibit an intermittent shudder or shake when accelerating on the highway. The Consumer added that on one occasion the transmission malfunction light came on, followed by a slight shake or shudder.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that there was nothing wrong with the vehicle, and it was operating as designed. He stated that the vehicle did have a problem with the transmission and, after conducting diagnostic tests, the clutch was replaced which corrected the concern. He testified that the Ford Fiesta had the new "6 speed dual disc dry clutch transmission" which had the characteristics of a manual transmission, providing for improved fuel economy. According to the representative, the vehicle essentially has a manual transmission that is shifted electronically (the computer controls the shift), resulting in firmer gear engagement. He noted that there had been issues with the seals on the clutches which, according to the Manufacturer's documentation, could result in the vehicle "exhibit[ing] excessive transmission clutch shudder."

A majority of the Board found that, based on the evidence presented, the transmission condition characterized by an intermittent shudder or shake on acceleration substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Lumpkin v. Ford Motor Company, 2016-0446/TPA (Fla. NMVAB March 23, 2017)

The Consumers complained of an exhaust smell entering the cabin in their 2015 Ford Explorer. Mr. Lumpkin testified that the exhaust smell was always present, although it was worse when he turned the engine off after a long-distance drive and then re-started the engine. He stated that he always used his air conditioner in recirculation mode, and was advised that once the vehicle has cooled down, he should periodically change the setting to allow outside air in. He explained that he followed this suggestion on several occasions, and found that it made

no difference in the degree of the smell. He described one occasion in which his family was in the vehicle during a long drive, and his mother-in-law got so nauseated from the exhaust smell in the cabin that he pulled over and called the authorized service agent for an immediate appointment. According to him, the exhaust smell was so bad during the drive to the hearing that he had to roll down the windows.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that it was impossible to get rid of 100 percent of the outside smells in any vehicle. He explained that TSB 14-0130 was an attempt to get rid of most unwanted smells, and that it applied to 2011 through 2015 Ford Explorers due to a "body" change in those vehicles. According to the representative, beginning with the 2011 model year, the rubber air extractors with rubber flaps were moved to the rear of the vehicle, under the rear bumper. He acknowledged that the Consumers were likely smelling "impurities in the exhaust," because the rubber flaps do not seal 100 percent. In his opinion, a driver should not smell these exhaust fumes unless the a/c is set to recirculation mode and the driver floors the accelerator pedal. He additionally acknowledged that other owners of 2011 through 2015 vehicles have complained of an exhaust smell, even after the performance of TSB 14-0130.

The Board found that the evidence established that the exhaust smell entering the cabin substantially impaired the use and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a refund.

Kerwit v. Toyota Motor Sales, USA, Inc., 2016-0382/FTL (Fla. NMVAB February 9, 2017)

The Consumer complained of a toxic odor emanating from the air conditioning system in her 2015 Toyota Camry. The Consumer described the odor as a noxious chemical smell similar to that of nail polish remover. The Consumer stated that when the odor appeared, which had occurred both at startup and several miles into a drive, she had to turn off the air conditioner and open the windows, which then caused the odor to dissipate. The Consumer added that the odor first appeared not long after she purchased the vehicle in August 2015, and continued to occur on an intermittent basis.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer focused its diagnostic efforts on locating a mold or mildew odor emanating from an environmental concern, as evidenced by the two technical service bulletins attached to the Consumer's repair orders that both addressed odors related the environment. The Manufacturer's representative testified that a mold or mildew odor would typically originate from the evaporator; however, the Manufacturer was never able to locate any contaminants or debris in the evaporator that would emit an odor. No testimony or evidence was presented to reflect that the Manufacturer or its authorized service agent ever attempted to detect or diagnose a chemical, rather than environmental, odor.

A majority of the Board found that the evidence established that the toxic odor emanating from the air conditioning system substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Castaneda v. BMW of North America, LLC, 2016-0484/MIA (Fla. NMVAB February 10, 2017)

The Consumer complained of a defective navigation "GPS" system in her 2015 BMW 750Li. The Consumer testified that two days after leasing the vehicle, she realized that the navigation system repeatedly directed her to a place other than the address she entered into the system. She added that she relied on the navigation system at all times, especially when she was not familiar with a particular location. The Consumer testified that the navigation system would not recognize addresses or certain zip codes she requested, and on a couple of occasions the navigation system directed her to proceed the wrong way on a one-way street. She stated she was now reluctant to drive her vehicle as she feared for her safety.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he test drove the vehicle and that the navigation system was working as designed. He explained that the software in the navigation system avoids "cashless roads." He added that, depending on the software version, the zip codes may not be digitized and included in the software, thereby causing the navigation system not to recognize the zip code requested. He also testified that the Consumer's complaint that her navigation failed to route her to a particular address could be attributed to the fact that navigation must be constantly updated with new addresses for newly constructed buildings.

The Board found that the evidence established that the defective navigation "GPS" system substantially impaired the use, value and/or safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Dutcher v. General Motors, LLC, 2016-0578/TPA (Fla. NMVAB March 13, 2017)

The Consumer complained of a defective GPS/navigation system in his 2015 GMC Sierra. The Consumer testified that the GPS/navigation system began intermittently malfunctioning in September 2015, which was approximately ten months after he purchased the vehicle. According to the Consumer, at various times, the display showed his vehicle was located in the middle of the Gulf of Mexico; the maps "jumped around" erratically "every two seconds;" the icons on the display "moved by themselves;" or alternatively, the display screen would freeze and the buttons on the screen would not respond when touched.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness explained that there were three components that made up the radio or infotainment system, of which the GPS/navigation system was a part: the center stack, which was the main radio; the display screen; and the human

machine interface (HMI) module. He stated that software updates related to the GPS/navigation/radio systems were performed on the Consumer's vehicle during several repair visits. Although he never duplicated any of the Consumer's complaints concerning the GPS/navigation system, he said he looked for service bulletins addressing infotainment system problems, and also consulted "TAC," which was General Motor's technical assistance center. According to the Manufacturer's witness, he was not allowed to replace a part on a vehicle unless he duplicates a complaint, and then TAC must authorize him to order the part and replace it. It was not until the August 2016 repair visit that he was authorized to replace the radio display portion of the system, and when the Consumer returned in September 2016, again complaining about the navigation system, TAC authorized him to replace the center stack.

The Board found that the evidence established that the defective GPS/navigation system substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Ostrander v. General Motors, LLC, 2016-0295/WPB (Fla. NMVAB January 18, 2017)

The Consumer complained of gaps between adjacent body panels that exceeded factory specification in his 2014 Chevrolet Corvette Z51. The Consumer testified that when he picked up his vehicle, he noticed the improper body fit of the panels. He stated that while the gap width changed from day to day, the most consistently noticeable gap was the one surrounding the lift-gate. The Consumer testified that, based on the measurements he took of the gaps between the body panels, each gap exceeded 4.5 mm, which was outside the tolerance specifications provided by the Manufacturer in the owner's manual.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that every car will have variances; they are not perfect and that was why the manual provides for tolerance adjustments, plus or minus. He explained that he has inspected at least ten similar vehicles and they all have the same gaps about which the Consumer complains. He added that the body of this model vehicle was made of carbon fiber, and that heat and humidity influence the gaps in the vehicle, causing the panels to either expand or contract. He stated that all the body panel gaps in the vehicle are within the "tolerances stated in the specs" of 3.5 to 4.0 mm, plus or minus the acceptable variance.

The Board found that the evidence failed to establish that the gaps between adjacent body panels complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Schikora v. Toyota Motor Sales, USA, Inc., 2016-0438/MIA (Fla. NMVAB February 17, 2017)

The Consumer complained of a jerking and loss of power upon acceleration in his 2014 Lexus IS 250. The Consumer testified that in May 2016, his vehicle began to jerk and lose power upon acceleration on an intermittent basis. He stated that the check engine light would also temporarily illuminate. The Consumer stated that after each repair, the jerking and loss of power upon acceleration would reoccur four to five hours after he picked up his vehicle from the dealership.

The Manufacturer asserted the alleged nonconformity was the result of abuse or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer identified two potential causes of the Consumer's complaint that the vehicle was jerking and losing power on acceleration. The Manufacturer's representative testified that during four different repair visits, the authorized service agent was never able to duplicate the Consumer's complaint that the vehicle was jerking and losing power upon acceleration. However, at the June 18, 2016 repair visit, it was noted that the vehicle was being driven with low levels of gas. The representative also pointed out that the vehicle exhibited low levels of fuel in almost all of the Consumer's photographs. According to him, driving a vehicle with low gas levels could cause it to jerk and/or lose power. He then explained that during the final repair attempt, the vehicle did not exhibit any jerking or hesitation during an 11-mile test drive. However, his examination of the vehicle revealed fourteen open circuit Diagnostic Trouble Codes (DTC) in the current and history columns. According to the representative, his expertise and experience taught him that codes would also be present in the pending column if a problem currently existed in the vehicle. Upon further examination of the vehicle, he discovered that pliers had been used to remove the bolts on the cover of the Engine Control Unit (ECU), which alerted his suspicion of vehicle tampering because the dealership would never use pliers to remove bolts. He then found that he could identically duplicate all fourteen DTCs by unplugging the E3 connector, which can only be accessed by removing the ECU cover. At the conclusion of the final repair attempt, he put tamper proof paint on the ECU cover, connectors and engine sensors so that he could obtain evidence of tampering during a future inspection of the vehicle; however, the Manufacturer has not examined the vehicle since the final repair attempt because the Consumer cancelled his pre-hearing inspection. In his opinion, any evidence of a problem with the vehicle was caused by vehicle tampering and the vehicle was currently operating as designed.

The Board, upon consideration of the evidence presented, and more specifically the evidence showing that the vehicle had been repeatedly driven with low gas levels and that pliers had been used to remove the bolts on the cover of the Engine Control Unit, the greater weight of the evidence supports the Manufacturer's affirmative defense that the jerking and loss of power upon acceleration was the result of abuse, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the jerking and loss of power upon acceleration complained of by the Consumer did not constitute a "nonconformity" as defined by the statute and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Arteaga v. BMW of North America, LLC, 2016-0400/MIA (Fla. NMVAB March 22, 2017)

The Consumer's 2014 BMW 535i was declared a "Lemon" by the Board due to a defective fuel system and a malfunctioning air conditioning system. The Consumer requested reimbursement of $839.94 for rental car insurance as an incidental charge. The Consumer testified that she had to purchase separate car insurance for the rental vehicles that were provided by BMW because the BMW dealership would not accept her car insurance. The Board awarded the Consumer $839.94 for the rental car insurance.

Collateral Charges §681.102(3), F.S.

Adelson v. BMW of North America, LLC, 2016-0557/FTL (Fla. NMVAB March 1, 2017)

The Consumer requests reimbursement of $52.10 for a high occupancy vehicle (HOV) decal to drive a hybrid vehicle in the HOV highway lane, and $1,525.00 for installation of a level 2 EV charger in the Consumer's garage as collateral charges. The Manufacturer objected to reimbursement for the HOV decal because the Consumer was paying less in tolls by using the HOV decal. The Manufacturer also objected to reimbursement for installation of the level 2 EV charger because the Manufacturer claimed that the installation increased the value of the Consumer's home. The Board rejected the Manufacturer's objection and awarded the Consumer the $52.10 for a HOV decal and $1,525.00 for installation of a level 2 EV charger in the Consumer's garage.

De Armas v. General Motors, LLC, 2016-0560/MIA (Fla. NMVAB March 29, 2017)

The Consumer requested reimbursement of $80.00 for tinted windows and $120.00 for a truck bed liner as collateral charges. The Manufacturer objected to the reimbursement of those collateral charges because the Consumer had not provided any receipts to substantiate his request. The Board rejected the Manufacturer's objection and awarded the Consumer the $80.00 for tinted windows and $120.00 for a truck bed liner as collateral charges.

Net Trade-in Allowance §681.102(18), F.S.

Gafford v. FCA US LLC, 2016-0457/TPA (Fla. NMVAB January 26, 2017)

The Consumers traded in a used 2012 Nissan Maxima encumbered by debt in the amount of $14,927.47, for which a gross allowance of $16,000.00 was assigned, resulting in a net trade-in allowance of $1,072.53, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumers. The Manufacturer did not produce the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in, as required by Section 681.102(18), Florida Statutes; rather, the

Manufacturer asked that the Board use the gross trade-in amount reflected in the purchase contract. The Board rejected the Manufacturer's request. The Consumers provided the NADA information to the Board, and according to the NADA Guide, the trade-in vehicle had a base retail price of $17,650.00. Adjustment for mileage and accessories as testified to by the Consumers and/or reflected in the file documents, resulted in a total retail price of $17,950.00. Deduction of the debt resulted in a net trade-in allowance of $3,022.53.

Flynn v. Nissan Motor Corporation, USA, 2016-0542/ORL (Fla. NMVAB January 29, 2017)

The Consumer traded in a used 2013 Nissan Frontier encumbered by debt in the amount of $17,169.63, for which a gross allowance of $17,500.00 was assigned, resulting in a net trade-in allowance of $330.37, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. The Manufacturer did not produce the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in, as required by Section 681.102(18), Florida Statutes prior to the hearing; however, the Consumer provided the NADA information to the Board, and according to the NADA Guide, the trade-in vehicle had a base retail price of $21,325.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a total retail price of $21,675.00. Deduction of the debt resulted in a net trade-in allowance of $4,505.37.

MISCELLANEOUS PROCEDURAL ISSUES:

Flynn v. Nissan Motor Corporation, USA, 2016-0542/ORL (Fla. NMVAB January 29, 2017)

The Manufacturer's Answer was filed on January 9, 2016, five days beyond the date required for timely filing. Pursuant to paragraph (8), *Hearings Before the Florida New Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration," and any affirmative defenses raised in the Manufacturer's untimely Answer "cannot be raised at the hearing, unless permitted by the Board." At the hearing, the Manufacturer's representative had no explanation for why the Answer was not timely filed. The Consumer objected to allowing the Manufacturer to assert any of its affirmative defenses at the hearing. Upon consideration, the Manufacturer was not permitted to raise its untimely-asserted affirmative defenses at the hearing. The Manufacturer's representative was permitted to cross-examine the Consumer, and to give a closing statement.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2017 - June 2017 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.

Thomas v. Ford Motor Company, 2017-0087/ORL (Fla. NMVAB May 26, 2017)

The Consumer complained of an exhaust smell inside the cabin of his 2015 Ford Explorer. The Consumer's wife testified that she began smelling a noxious odor approximately nine months after purchase. In describing the odor, she said "it smelled like exhaust all coming at my face." The smell occurred every time she would drive on the highway with the air conditioner running, which was every day when she drove her daughter to, and picked her up from, day care. According to her, the odor made her so nauseous that she would "throw-up." As a result, she stopped driving the vehicle and they purchased a substitute vehicle in January 2017. The Consumer testified that he drove the vehicle most recently the Thursday before the hearing, and when he got home he was not feeling well and his wife noticed that his face was "all puffy" and his eyes were "bloodshot."

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle or, in the alternative, any defects had been conformed to the warranty within a reasonable number of repair attempts. The Manufacturer's representative testified that he handled 50 exhaust odor cases on Ford's technical hotline, and acknowledged that there was a technical service bulletin (TSB) pertaining to exhaust odors entering the cabin for model year 2011 through 2015 Ford Explorers. According to the Manufacturer's representative, the odor generally occurs during heavy acceleration but dissipates within a few seconds. During the Manufacturer's inspection/repair in January 2017, he testified that he verified that the TSB was performed correctly on the Consumer's vehicle. He further stated that, at that time, he test drove the Consumer's vehicle twice and could not duplicate any exhaust odor. However, he did acknowledge smelling a faint exhaust odor at the end of his most recent test drive performed at the pre-hearing inspection on April 20, 2017.

The Board found that the evidence established that the exhaust smell inside the cabin substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Castleyoung v. Kia Motors America, Inc., 2017-0051/STP (Fla. NMVAB April 7, 2017)

The Consumer complained that the battery in her 2015 Kia Soul would not hold a charge as a result of improperly installed running lights. The Consumer testified that when she

purchased her vehicle, she told the salesperson that she did not drive a great deal, and needed a car that was reliable. However, she testified that on many occasions, she was not able to start the vehicle because the battery was dead, and she has had to rely on her neighbors and the tow company to charge the battery for her. She acknowledged that she does not drive the vehicle every day, and estimated that she drove the vehicle between 25 to 45 or 50 miles per week. She explained that she lives in Florida most of the year, and travels back to Canada for the summer. When she did not drive the vehicle to Canada, she left it in Sarasota, and her neighbors drove the vehicle for her. With regard to the vehicle's daytime running lights, she acknowledged that she insisted that any vehicle she purchase be equipped with the lights, and testified that she took delivery of the vehicle with the running lights installed. The Consumer's neighbor testified that when the Consumer was away he would "crank her car" and drive it around the neighborhood every four or five days. He reported that on a number of occasions, the vehicle would not "crank" after putting the key in the ignition multiple times, and he had to use his battery charger to start the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, and the alleged nonconformity was the result of abuse, neglect, or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. More specifically, the Manufacturer asserted that the alleged nonconformity was the result of the Consumer not driving the vehicle enough to charge the battery, and the installation of "aftermarket" daytime running lights that caused the battery to not hold a charge. The Manufacturer's representative testified that "if the vehicle is not driven enough, the alternator will not hold a charge." He recommended that the vehicle be driven on the interstate for 20 to 25 minutes each day in order to keep the battery charged. In his opinion, "just driving in the neighborhood won't activate the alternator to recharge the battery." He acknowledged that the daytime running lights were not wired correctly, which was the "main culprit" in the battery not holding a charge. According to him, the running lights were installed by a subcontractor, who installed the running lights incorrectly. He did not dispute that Sunset Kia of Sarasota, a Manufacturer's authorized service agent, arranged for installation of the running lights, and did so prior to delivery of the vehicle to the Consumer. He acknowledged that the mis-wiring of the running lights was the cause of Consumer's problem, and that her driving habits were not responsible for running down the vehicle's battery.

The Board found the evidence established that the battery not holding a charge substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. The Board found insufficient evidence to support the Manufacturer's assertion that the battery not holding a charge was due to the Consumer's neglect by not driving enough. In addition, the Board specifically rejected the Manufacturer's assertion that the installation of the running lights constituted unauthorized modification or alteration to the vehicle, and therefore cannot constitute a "nonconformity" under the statute. The greater weight of the evidence established that the nonconformity was the result of the incorrect wiring of the daytime running lights, which were installed prior to delivery of the vehicle, under the direction of the Manufacturer's authorized service agent, and therefore did not fall within the exclusionary

language of the statutory definition. §681.102(15), Fla. Stat. Accordingly, the Consumer was awarded a refund.

Holman v. Mitsubishi Motors North America, Inc., 2017-0005/ORL (Fla. NMVAB April 24, 2017)

The Consumers complained that intermittently, the Bluetooth in their 2015 Mitsubishi Lancer Evolution cut out while being used to make calls or receive calls using a cell phone. The Consumer testified that usually once a day, calls made using the Bluetooth connection were dropped, or the other party could not be heard, if connected, and that could happen even if he was using the steering wheel controls to originate the call. He acknowledged that he can sometimes switch from the Bluetooth connection through the car and continue the call using his hand-held phone; however, he noted that created a safety problem because the vehicle had a manual transmission. He stated that when he got the stick shift, he knew that "he had to have Bluetooth." After being told the problem might be his phone that was not connecting properly to the vehicle, he bought a new iPhone, but he continued to experience the connectivity problem. The most recent occurrence of the Bluetooth problem was the Monday before the hearing.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that Bluetooth was not a government mandated or standardized feature, and manufacturers all use different systems, so "it is up to the different manufacturers to make it work right." He observed that there was "a huge array of different phones and operating systems" and stated that "Bluetooth, in general, no matter what manufacturer or phone system, has compatibility issues." He stated that "some phones work great," and noted that some manufacturers publish a list of cell phones that are compatible with their vehicles; however, he stated that Mitsubishi did not have such a list. In contrast, the Manufacturer's representative said there was a list of compatible devices on Mitsubishi's website, but acknowledged that he had not consulted the list to see if the Consumer's cell phone was compatible with his vehicle.

The Board found that the evidence established that, under the circumstances presented in this case, the Bluetooth connection intermittently cutting out while being used to make calls or receive calls using a cell phone substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes a Reasonable Number of Attempts §681.104, §681.1095(8), F.S.

Leiva-Valinete and Valiente v. BMW of North America, LLC, 2016-0416/MIA (Fla. NMVAB May 22, 2017)

The Consumers complained of a defective seatbelt warning system in their 2016 Mini Cooper Countryman. Mr. Valiente testified that even though the passenger seat of the vehicle was unoccupied, the vehicle's seatbelt warning system would chime, indicating that the seatbelt had not been engaged. In order to stop the chime, the driver had to reach across the unoccupied passenger seat and engage the seatbelt. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective seatbelt warning system on July 8-15, 2016, and July 26-August 1, 2016. On August 15, 2016, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on August 19, 2016. On August 25, 2016, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, no problem was found with the seatbelt warning system. Following the final repair attempt, the Consumers presented the vehicle to the Manufacturer's authorized service agent for repair of the seat belt warning system defects on November 11, 2016, January 4, 2017, and April 10, 2017. The reason for the seatbelt warning system defect was finally discovered at the April 10, 2017, repair attempt, and Mr. Valiente was told that the that a part to correct the problem had been ordered. However, at hearing Mr. Valiente testified that he recently received a text message notifying him that the incorrect part had been shipped by the Manufacturer, and that it would be another six to eight weeks before the correct part arrived.

With regard to the existence of a nonconformity, the Board found that the evidence established that the defective seatbelt warning system substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The question remaining, however, was whether the nonconformity had been corrected within a reasonable number of attempts. The Board noted that while Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, a consumer is not required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law; the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. The Board found the evidence established that the nonconformity was subjected to repair by the Manufacturer's authorized service agent on two occasions, with no problem found at either repair attempt, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt. The defective seatbelt warning system nonconformity continued to exist after the final repair attempt, as evidenced by the Consumer's testimony and the three repair attempts that occurred for this problem following the Manufacturer's final repair attempt, with a defective part being identified at the last repair attempt. Under the circumstances of this case, the Board found that the Manufacturer had been afforded a reasonable number of attempts to correct the defective seatbelt warning system nonconformity, and has failed to do so. Accordingly, the Consumers were awarded a refund.

Final Repair Attempt §681.104(1)(a), F.S.; §§681.104(1)(a), 681.104(3)(a)1., F.S.

Codina and Munoz v. FCA US LLC, 2016-0070/WPB (Fla. NMVAB May 30, 2017)

The Consumers complained of water intrusion in the main cabin of their 2016 Jeep Cherokee. On January 26, 2017, the Consumers placed their written notification to the Manufacturer, intended to provide the Manufacturer with a final opportunity to repair the vehicle, into the United States Postal Service system, using certified mail. However, the written notification was never delivered to the Manufacturer, and a final repair attempt was never scheduled.

The Manufacturer asserted they did not receive a final repair attempt in this case and the Consumers failed to properly notify the Manufacturer. The Manufacturer's representative testified that the Manufacturer never received a motor vehicle defect notice, and presented documentation of tracking results from the United States Postal Service website that showed that the Consumers' motor vehicle defect notification remained "in transit to destination" as of May 4, 2017, and was never actually delivered to the Manufacturer. He asserted that the Consumers were not eligible for relief because the Manufacturer was never provided with the opportunity for a final repair attempt.

The Board found that the evidence established that the Consumers put a motor vehicle defect notification into the mail on January 26, 2017, for delivery to the Manufacturer; however, the Manufacturer never received the written notification. The statute clearly contemplates that the Manufacturer, upon compliance with the conditions set forth in the statute, be given the opportunity to conduct a final repair attempt. The Board therefore found that the Manufacturer had not yet been provided with its opportunity for a final repair attempt. By failing to provide the Manufacturer with a final repair attempt/inspection, as statutorily mandated in Section 681.104(3), Florida Statutes, the Manufacturer was not provided with a reasonable number of attempts, and the Consumers were not eligible for the relief requested under the Lemon Law. Accordingly, the Consumers' case was dismissed.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair§681.104(1)(b), §681.104(3)(b)1., F.S.

Berry v. Hyundai Motor America, 2017-0030/TPA (Fla. NMVAB May 3, 2017)

The Consumer complained of an electrical condition in his 2016 Hyundai Genesis that intermittently caused a shudder at idle, illumination of the brake assist light, problems pairing the phone with Bluetooth, a malfunctioning "heads up" display, and alerts from the collision control warning system for no apparent reason. The Board found the electrical condition was a nonconformity and that the vehicle was out of service by reason of repair of the electrical condition for a cumulative total of 38 out-of-service days. On November 3, 2016, the Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification on November 7, 2016. The Consumer received a letter from the Manufacturer

instructing him to drop off the vehicle at Coconut Creek Hyundai on Monday, November 21, 2016, by 5:00 p.m. According to the Consumer, the vehicle was presented at Coconut Creek Hyundai on November 17, 2016, because he was going out of town for Thanksgiving. He told the service manager that he was leaving the vehicle for the November 21, 2017, inspection, as instructed by the Manufacturer. He was told that he could not leave the vehicle and was asked to leave. The Consumer testified that he immediately called Hyundai consumer affairs and, in spite of the fact that the Manufacturer's letter instructed him to present the vehicle at Coconut Creek Hyundai, he was told that he "was supposed to go to King Hyundai of Deerfield Beach." The Consumer was told that he would receive a call back to let him know what to do next; however, the Consumer never received a call.

The Manufacturer asserted the claim by the Consumer was not filed in good faith, in that it did not "meet the presumption of Lemon Law, which is at least 3 repair attempts plus a final repair or 30 days down." The Manufacturer's representative asserted that the Consumer failed to allow Hyundai a final opportunity to cure any alleged defects. With regard to the post-notice opportunity to inspect or repair the vehicle, the Manufacturer's representative acknowledged that he had no reason to dispute that the Consumer made every attempt to leave the vehicle at Coconut Creek Hyundai on November 17, 2016, as instructed by the Manufacturer, that "problems arose" when the Consumer was told to go to the wrong dealership, and that the Manufacturer's consumer affairs representative failed to return the Consumer's phone call and advise him what to do next.

The Board found that the evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the Consumer mailed the required written notification to the Manufacturer. Following receipt of the notification, both Manufacturer and its service agent had the opportunity to inspect or repair the vehicle but failed or refused to do so. Accordingly, it was presumed that a reasonable number of attempts have been undertaken to conform the motor vehicle to the warranty and the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Bates v. FCA US LLC, 2017-0113/WPB (Fla. NMVAB June 12, 2017)

The Consumer complained of a coolant leak in his 2015 Dodge Ram. The Consumer testified that starting in June 2016, he observed that the coolant level in the reservoir looked low and suspected that the EGR cooler was seeping fluid. The Consumer explained that when he took the vehicle for repairs, the dealership advised him on multiple occasions that they were unable to locate any type of leak, but the Consumer noticed that the coolant level in the reservoir continued to appear low after each repair. The Consumer stated that he occasionally detected the smell of coolant but never observed any type of leak on the ground. The Consumer also stated that he had never seen a check engine light or low coolant level light illuminated on the dashboard. The

Consumer added that although the vehicle had never overheated, he was concerned that low coolant would cause the vehicle to overheat in the future.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that the dealership conducted a pressure test on three different occasions and was unable to find any evidence of a leak or crack in the EGR cooler. He stated that the vehicle had a 3-way valve inside the coolant system controlled by the Powertrain Control Module, and explained that the coolant level would change depending on the position of the valve, which directed coolant to different areas of the vehicle to achieve an optimum operating temperature and maximize fuel economy. The Manufacturer's representative testified that the vehicle had never been involved in an overheating condition, which was the only situation in which a vehicle would lose coolant. He confirmed that a pressure test and a visual inspection of the EGR cooler during the final repair attempt did not reveal any type of leak.

The Board found that the evidence failed to establish that the coolant leak complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

Guerrero v. Land Rover of North America, 2017-0045/TLH (Fla. NMVAB April 6, 2017)

The Consumer's 2016 Land Rover Range Rover Sport was declared a "Lemon" by the Board due to failure of the Eco system to restart from a stop. The Consumer requested reimbursement of $182.49 for a rental car to take a family trip from Georgia to Florida in February of 2017 as an incidental charge. The Manufacturer objected to the rental car, arguing that based on the mileage placed on the vehicle during the time period surrounding the family trip, the Consumer was otherwise normally driving the vehicle. The Board awarded the Consumer $182.49 for the rental car to take a family trip from Georgia to Florida in February of 2017 as an incidental charge. The Manufacturer's objection to the rental car reimbursement was denied. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Pham v. Tesla Motors, Inc., 2017-00134/JAX (Fla. NMVAB June 5, 2017)

The Consumer's 2016 Tesla Model X was declared a "Lemon" by the Board. The Consumer requested $2,400.00 for an electrician to install a charger station for the subject vehicle in his garage, as an incidental charge. The request was granted by the Board.

MISCELLANEOUS PROCEDURAL ISSUES

Oberman v. Kia Motors America Inc., 2017-0088/WPB (Fla. NMVAB May 23, 2017)

At the beginning of the arbitration hearing, the Manufacturer sought to assert as an affirmative defense that the Consumer released the Manufacturer from its obligation by signing a release on or about October 6, 2016. According to the Manufacturer, in exchange for a car payment reimbursement of $336.89, the Consumer signed a Settlement Agreement and General Release that prohibited the Consumer from bringing a lemon law claim before the New Motor Vehicle Arbitration Board. The Consumer objected to the Manufacturer's assertion, citing section 681.115, Florida Statute, which states that "any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this chapter . . . is void as contrary to public policy." Upon consideration, the Board found that Florida Statute protected the Consumer's right to bring his case before the New Motor Vehicle Arbitration Board and instructed the Consumer to proceed with his case.

Loveless v. Ford Motor Company, 2016-0555/TPA (Fla. NMVAB May 1, 2017)

At the start of the hearing, the Manufacturer moved to dismiss the case, asserting that the case should be dismissed with prejudice because the Consumer did not appear at the hearing previously scheduled for March 21, 2017, and had not contacted the Board Administrator within one day from the original hearing date, pursuant to paragraphs (35) and (36), *Hearings Before the Florida New Motor Vehicle Arbitration Board*. The Manufacturer also argued that the Consumer's grandson, who had contacted the Board Administrator on behalf of the Consumer the morning of the March 21, 2017 hearing, was not her "agent" and therefore did not have the authority to request a continuance on her behalf, and that the Consumer's failure to appear had not been the result of "unforeseen" circumstances. The Consumer testified that she had emergency heart surgery, was discharged from the hospital three days prior to the original hearing, and experienced both physical and cognitive effects from the anesthesia. She provided a medical note from her heart surgeon. Paragraph (29), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, provides that "[t]he Arbitration Board may reschedule the hearing on its own motion or upon the request of either party." Upon consideration of the circumstances and argument presented, the Board determined that the continuance order previously issued was not provisional; that the Board may continue a hearing on its own motion; and that the panel had no authority to set aside the decision of a prior panel to continue a hearing. Therefore, the Manufacturer's Motion to Dismiss was denied.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2017 - September 2017 (3rd Quarter)

JURISDICTION:

Olson v. Ford Motor Company, 2017-0200/FTL (Fla. NMVAB July 7, 2017)

The parties stipulated that, on November 29, 2014, the Consumers purchased a 2014 Ford C-MAX motor vehicle. On October 14, 2016, the Consumers filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Ford. The procedure rendered a decision awarding a replacement vehicle and instructed the Manufacturer to comply within 45 days from the Manufacturer's receipt of the Consumers' acceptance of the BBB decision. The Consumers accepted and signed the BBB's Acceptance of Decision Form on February 2, 2017. The Manufacturer failed to comply with the BBB deadline and on May 10, 2017, the Consumers requested arbitration by this Board, seeking a refund.

The Manufacturer asserted the Request for Arbitration was not filed within 60 days after the expiration of the Lemon Law rights period, or 30 days after the final action of a certified procedure, whichever date occurred later. The Manufacturer argued that when the Consumers filed their Request for Arbitration with the Attorney General's Office on May 10, 2017, it was beyond the deadline established by statute: the latter of either 60 days after the expiration of their Lemon Law rights period, or 30 days after the final action of the BBB. The Manufacturer argued that the final action of the certified procedure occurred on January 27, 2017, the date that the BBB mailed the decision to the Consumers, and that the Consumers' May 10, 2017, filing was more than 30 days after the final action of the certified procedure. The Manufacturer asserted that due to their untimely filing, the Consumers were not eligible to seek relief under the Lemon Law.

The Board found that, based on the evidence presented, the final action of the certified procedure occurred on February 2, 2017, when the Consumers accepted and signed the BBB's Acceptance or Rejection of Decision Form. The Consumers filed the Request for Arbitration on May 10, 2017, more than 30 days after the final action of the certified procedure. Accordingly, the Request for Arbitration was not filed within the time period required by the statute, and the Consumers were not qualified for repurchase relief under the Lemon Law.

Consumer §681.102(4)F.S.

Gonzalez v. Nissan Motor Corporation, USA, 2017-0109/MIA (Fla. NMVAB August 2, 2017)

At the outset of the hearing, the Manufacturer moved to have the case dismissed, arguing that the Consumer was not qualified for relief because the vehicle had been repossessed by the

lienholder. The Consumer testified that he believed that the title to the vehicle was still in his name and stated that he had the registration of the vehicle.

In order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be a "consumer." Section 681.102(4), Florida Statutes, defines a "Consumer" as:

> the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

The Board concluded that even though the Consumer's vehicle maybe in the possession of the lienholder, the evidence was sufficient to determine that the Consumer was the title owner of the vehicle. There was no dispute that, at the time of purchase and during the course of repairs, the Consumer was entitled by the terms of the Manufacturer's warranty to enforce the obligations of that warranty. Accordingly, he met the statutory definition of a "consumer" and was entitled to enforce the obligations of the warranty. The Manufacturer's assertion to the contrary was rejected and the Motion to Dismiss was denied.

NONCONFORMITY 681.102(15), F.S.

Kreisberg v. Jaguar Cars, 2017-0164/MIA (Fla. NMVAB July 3, 2017)

The Consumer complained of an intermittent malfunction of the "Intelligent Stop/Start" system in his 2016 Jaguar F Type. The Consumer testified that one of the motivating factors for him in leasing the vehicle was the "Intelligent Stop/Start" system feature of the vehicle. He said that feature was advertised by the Manufacturer as a selling point, and it was a feature which was good for the environment and also helped him save money. He explained that the feature shuts off the engine when you get to a stop sign or traffic light stop; once you take your foot off the brake pedal, the engine resumes. He stated that for the first nine months of the lease, the "Intelligent Stop/Start" system worked perfectly. However, the "Intelligent Stop/Start" system suddenly became problematic: the feature either worked for an entire trip or it did not work at all. He testified that he had kept a log of the performance of the "Intelligent Stop/Start" system, and based on his log, he had determined that the system only functions 15% of the time. He added that he knew that the feature could be disengaged; however, he had not disengaged the feature.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that the battery charge and the air conditioner demands on the vehicle can affect how the "Intelligent Stop/Start" system works. He inspected the vehicle and did not find any stored codes; however, he performed a systems check and found an indication that the battery was low for the "Intelligent Stop/Start" feature to work. A different Manufacturer's witness acknowledged that there was initially a

problem with the Gateway Module and the same was replaced in the vehicle. He testified that the battery charge had to be at 85% capacity for the "Intelligent Stop/Start" system to work. He stated that one of the repair orders reflected that the battery was reset; it was not replaced. He agreed that other vehicles have had problems with the "Intelligent Stop/Start" system, evidenced by the existence of the TSB for the feature, and that this vehicle had been to the dealer with the concern a lot more times than other vehicles about which he was aware.

The Board found that the evidence established that the intermittent malfunction of the "Intelligent Stop/Start" system substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule, and had not been repaired within a reasonable number of attempts. Accordingly, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Reid v. BMW of North America, LLC, 2017-0206/TPA (Fla. NMVAB August 14, 2017)

The Consumer complained of excessive wind and road noise in his 2016 BMW 740. The Consumer testified that he noticed the wind noise as he drove home immediately after taking possession of the vehicle. He described the wind noise as an "annoying noise, like a window is rolled down," and noted that when the vehicle was being driven at speeds of 65 to 70 miles per hour, it was "a steady noise" that could be heard over the sound of the air conditioner and the radio. He was told that the wind noise was "characteristic" of the vehicle, and he acknowledged that he heard the same wind noise in three other BMW 7 series vehicles that were given to him as loaner vehicles. He said that he could not describe the sound of the road noise; however, he asserted that it was an "overpowering," constant noise that was heard no matter what type of road surface the vehicle was being driven upon.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he drove the Consumer's vehicle on April 25, 2017, at 70 miles per hour on the highway, with the fan on low and all the windows closed. He did not hear any abnormal or excessive wind or road noise while driving the Consumer's vehicle. Using an iPhone app, he measured the sound inside the vehicle and obtained readings averaging 80 to 84 decibels. He acknowledged that there were no specifications establishing an acceptable noise level inside BMW vehicles. However, he testified that he was driving the same 2016 BMW 7 series vehicle for his company vehicle at that time, so he used the same iPhone app to test the noise level in that vehicle. He found the sound inside his company vehicle averaged within the same 80 to 84 decibel range while cruising at 70 miles per hour on the same stretch of the highway. Although he stated that he did hear the sound of the air flowing over the outside mirrors in both vehicles, he asserted this was a "normal" sound that occurred because the mirrors stuck out.

During the hearing, the Board test drove the vehicle in the presence of both parties. During the nine-mile test drive, all of the doors and windows were firmly closed, and when the vehicle reached a speed of 53 miles per hour, the air conditioner was turned off. During that part of the test drive, the Board member driving the vehicle reached speeds of 66 to 67 miles per hour. He reported hearing only normal road noise, and no abnormal wind noise. The remaining Board members noted that they "really had to listen" to hear a very slight "whispering noise." One of those Board members asked the Consumer if that "whispering noise" was the sound about which he was complaining, and he responded in the affirmative. After changing drivers to head back to the hearing site, the vehicle was driven at speeds up to 73 miles per hour. The air conditioner and radio were turned on briefly, and the slight "whispering noise" could not be heard at all with the radio or air conditioner on.

The Board found that the evidence failed to establish that the excessive wind and road noise complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Gonzalez v. Nissan Motor Corporation, USA, 2017-0109/MIA (Fla. NMVAB August 2, 2017)

The Consumer complained of an electrical failure which caused the vehicle not to start in his 2016 Nissan Maxima. The Consumer stated that on September 13, 2016, his vehicle was towed to the dealer because it would not start and remained at the dealer for 18 days. Two days later after he picked up the vehicle from the dealer, on September 30, 2016, the vehicle had to be towed in to the dealer for a second time. The Consumer acknowledged that at some point during the second repair attempt, the mechanic at the dealer told him that the car had been hit by lightning.

The Manufacturer asserted the alleged nonconformity was the result of an accident of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer alleged that the vehicle "was struck by some extraordinary amount of electricity from an outside source." The Manufacturer's representative testified that the technician notes reflect that the first time the vehicle was brought to the dealer for the no start concern on September 13, 2016, the Intelligent Power Distribution Module (IPDM) was replaced. He explained that the IPDM was the vehicle's electronic fuse box which turned the vehicle on. He stated that upon inspection of the Consumer's vehicle, he noticed two things: (1) that the third brake light "LED" bulb (low voltage design) had some extreme "flash burning"; and (2) that the IPDM had a stain or burnt mark inside its casing. He explained that both were caused by a flash from a "high voltage event" or "arc" which led him to believe that the vehicle had either been struck by lightning, or had been damaged by a lightning strike near the vehicle. He showed the damaged parts that had been removed from the Consumer's vehicle to the Board. A different Manufacturer representative also testified that in his opinion, a "near" lightning strike would be enough to cause the electrical damage that the Consumer's vehicle sustained. He additionally stated that the vehicle's own voltage could not have caused this type of damage.

A majority of the Board concluded that the greater weight of the evidence established that the electrical failure which caused the vehicle not to start was the result of a near lightning strike, which was an accident. The accident was not caused by the Manufacturer or its authorized service agent. Accordingly, the complained of defect did not constitute a "nonconformity" as defined by the statute and the Consumer's case was dismissed.

MISCELLANEOUS PROCEDURAL ISSUES:

Williams v. Ford Motor Company, 2017-0136/JAX (Fla. NMVAB August 1, 2017)

The Manufacturer sought to submit videos into evidence that were taken during its prehearing inspection of the Consumers' vehicle. The Consumers objected due to the Manufacturer's failure to comply with Paragraph (16), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, which required all information gathered as a result of the Manufacturer's prehearing inspection of the vehicle to be provided to the Consumers, in writing, as soon as it is available, but no later than 7 business days before the date of the hearing. The videos were not provided to the Consumer in a viewable format until July 10, 2017, two business days before the hearing. In accordance with Paragraph (16), the Board did not permit the videos taken during the prehearing inspection to be submitted into evidence.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2017 - December 2017 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Escobar v. Mercedes-Benz USA, LLC, 2017-0359/FTL (Fla. NMVAB November 16, 2017)

The parties stipulated that the Consumer leased a 2016 Mercedes GLE450 AMG Coupe. The Manufacturer asserted that the Consumer was not qualified for repurchase relief under the Lemon Law because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. Focusing on the documents accepted into evidence, the Manufacturer pointed out that the vehicle was leased to the Consumer by a Massachusetts dealership; the Massachusetts dealership was listed as the Lessor on the lease document; and that there was no evidence that the Florida Lemon Law fee was paid as part of the transaction. Pointing to the Consumer's acknowledgment that the vehicle was delivered to Florida by an independent transport hired by the Consumer, the Manufacturer argued that the dealership's responsibility for the vehicle, and participation in the sales transaction, ended in Massachusetts, when the vehicle was picked up for transport by the Consumer's independent transport company. The Manufacturer argued that, other than the ultimate registration of the vehicle in Florida, and possibly the payment of sales tax on the lease, there was nothing that tied the present case to Florida.

The Consumer asserted that the vehicle was sold in this state, and that his vehicle was therefore a "motor vehicle" under the Lemon Law. He testified that he had been unable to find the vehicle he wanted from a Florida dealer that would negotiate with him, so he conducted a nationwide search for the vehicle using the AutoTrader web site. He found a vehicle he was interested in at a Massachusetts dealership, and was able to negotiate an acceptable price. The Consumer testified that the deal was arranged and completed through exchanges via Fed Ex, email and text messaging, and acknowledged that he was charged for courier/Fed Ex fees incurred by the Massachusetts dealership. The Consumer acknowledged that he independently made the arrangements to have the vehicle delivered to him in Florida, and was responsible for the cost of transport.

Section 681.102 (14), Florida Statutes, defines a "motor vehicle" as:

> a new vehicle, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a recreational vehicle or a vehicle used as a demonstrator or leased vehicle if a manufacturer's warranty was issued as a

> condition of sale, or the lessee is responsible for repairs, but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds or the living facilities of recreational vehicles.

In order for a consumer to qualify for relief under the Lemon Law, the vehicle which is the subject of the claim must meet the above-quoted definition. Upon consideration of the totality of the evidence presented, including (1) the Consumer conducted a nationwide search for the vehicle; (2) the Consumer was charged for courier costs incurred by the dealership in association with the purchase; and (3) the Consumer was responsible for the cost of transporting the vehicle from Massachusetts to Florida, which evidenced delivery of the vehicle to the Consumer in Massachusetts, the Board found that the motor vehicle was not "sold in this state" and therefore did not constitute a "motor vehicle" under the statute. Accordingly, the Consumer's case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Ruiz v. Toyota Motor Sales USA, Inc., 2017-0342/FTL (Fla. NMVAB October 25, 2017)

The Consumer complained of a pull to the right in his 2017 Toyota Tundra. The Consumer testified that the evening he purchased the vehicle, he noticed the pull on his short drive home, but better realized the extent of the problem while driving the vehicle with his wife the next day, so he immediately returned to the authorized service agent for repair. He described the vehicle's alignment as "completely off." At that first repair visit, the day after he purchased the vehicle, he stated that when the vehicle was returned to him that day, he almost immediately noted that the problem was not corrected, so he requested further repairs that day. According to him, despite multiple repair attempts by the authorized service agent, the vehicle continued to pull to the right. He stated that the pulling occurred under all driving conditions, and was of sufficient severity that he had to pull the wheel to the left in order to offset the vehicle's pull to the right. The Consumer noted that at one point, he had a sore arm and thumb from the effort required to compensate for the pull to the right. In order to make sure that what he was experiencing was not "his imagination," he testified that he took the vehicle to other companies that specialize in alignment repairs in April of 2017 and September of 2017. He was told that the vehicle was pulling to the right, and that the vehicle needed an alignment. He acknowledged that the pull was not as pronounced as it was when he initially took the vehicle in for repair, but stated that constant pressure was still required on the steering wheel in order to keep the vehicle driving straight.

The Manufacturer asserted the vehicle was operating as designed. A Manufacturer's representative was involved with the vehicle at the March 30, 2017, final repair. He testified that the vehicle was inspected for problems that would typically cause a vehicle to pull, and he identified none of the problems that typically would lead to an alignment issue, leading to the conclusion, based on the test drive, that the vehicle was following the crown of the road. Another Manufacturer's representative testified that nothing was observed in the vehicle during the test drive that was considered unusual for a big truck.

During the hearing, the Board inspected and test drove the vehicle under a variety of driving conditions. Two Board members noticed the vehicle pulling to the right during highway driving, regardless of the "slope of the highway." One Board member noted that he had to constantly correct the steering wheel in the same direction in order for the vehicle to track straight. The Board found that the evidence established that the vehicle pulling to the right substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Gutierrez v. Hyundai Motor America, 2017-0309/FTL (Fla. NMVAB November 16, 2017)

The Consumer complained of a defective panoramic sunroof in his 2015 Hyundai Sonata. The Consumer testified that his concern started with a subtle squeaking noise coming from the panoramic roof. He explained that he was told the sunroof had an air leak, which was fixed by pushing the sunroof seal in. The noise came back after a couple of weeks. The Consumer stated he returned to the authorized service agent, at which time silicone was applied to the sunroof seal in an attempt to stop the noise. The noise continued. The Consumer stated that he later received notice from the Manufacturer that there was a recall for all Sonata vehicles equipped with the panoramic sunroof option. The recall notice stated that the sunroof may detach while driving due to a bonding issue with the sunroof wind deflector. Pursuant to the recall notice, the Consumer returned to the authorized service agent to have the sunroof glass replaced. Thereafter, the Consumer began to hear a rattle noise, in addition to the squeaking noise. He testified that the rattle noise would improve after each subsequent repair, but would quickly return. The squeaking noise always remained present.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that the Consumer used his sunroof and the noise did not come back for a week or so after each repair visit.

During the hearing, the Board inspected and test drove the vehicle on city streets for one mile. During the test drive, a squeaking and rattling noise from the sunroof area was heard by all. A Board member described the noise as being like a package of plastic water bottles moving in the back seat of a car. Another Board member described it as a piece of metal bumping on another piece of metal. The Board found that the evidence established that the defective panoramic sunroof substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a replacement vehicle.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Garrett v. Toyota Motor Sales USA, Inc., 2017-0291/TLH (Fla. NMVAB October 13, 2017)

The Consumer complained that the fabric covering the vehicle's seats "frays" in her 2015 Toyota Corolla. The Consumer testified that she first became aware of this when an employee of the Manufacturer's authorized service agent assisted her in adjusting the driver's seat. At that time, she saw some loose threads hanging from the bottom of the driver's seat and pointed that out to the authorized service agent. In addition, the Consumer indicated that she believed the fabric was currently fraying at the seam lines on the bolster of the driver's seat back. She indicated that the current fraying "is not always visible depending on the amount of sunshine."

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that the Manufacturer was not able to verify a concern of the vehicle's seat upholstery fabric fraying. He asserted that the Manufacturer attempted to assist the Consumer by replacing the driver's bottom seat cover in the Consumer's vehicle during the repair attempt in April 2017. He stated that there was no defect in the upholstery fabric of the seats.

During the hearing, all visible surfaces of the vehicle's seats were inspected by each Board member and the Consumer showed them where she believed there was current fraying. The members of the Board observed what was characterized as normal automobile upholstery; no fraying of the seat upholstery was observed. The Board found that the evidence failed to establish that the seat upholstery fabric fraying complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Nieuwenhuizen v. BMW of North America, LLC, 2017-0340/ORL (Fla. NMVAB November 15, 2017)

The Consumer complained of a drive train malfunction in his 2016 BMW 428i Gran Coupe. The Consumer testified that he first began experiencing the drive train malfunction problem on January 2, 2017. He stated that the problem had always occurred while the vehicle was being driven at speeds of approximately 45 miles per hour, and when it happened, the "check engine" warning light came on, the screen displayed the message "drive train malfunction," and the transmission stayed in one gear for a very long time before it jerked into the next gear. The Consumer stated that he has no training as an auto mechanic and denied that he had ever opened the hood of the vehicle, seen a message advising him to close the hood, disconnected the waste gate connector, or directed anyone else to do so. He also stated that no one has looked at the engine or under the hood of his vehicle except representatives of Fields BMW, the authorized

service agent to which he took his vehicle for repair. The Consumer's wife likewise testified that neither she, nor anyone on her behalf, has tampered with the vehicle.

In its Amended Answer filed prior to the hearing, the Manufacturer asserted the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent, and the claim by the Consumer was not filed in good faith because the Consumer, or someone on his behalf, tampered with the subject vehicle. The Manufacturer's witness testified that the first time the Consumer's vehicle came in for repair, it was hooked up to diagnostic equipment, and a fault code for the Digital Motor Electronics (DME) waste gate was found. The DME waste gate is part of the turbocharger, and is what allows the turbocharger to perform its duties to increase engine horsepower when necessary. The electronic waste gate actuator was replaced at the first repair visit, and a week later, a connector at the waste gate actuator was repaired. During the next four visits, the same fault code was found, and the wiring harness module for the waste gate controller was replaced, the waste gate actuator was replaced for a second time, the complete turbocharger assembly was replaced, and the DME control module, which controls all the electronics for the engine, was replaced.

According to the Manufacturer's witness, at no time was the Consumer's complaint duplicated, nor did the authorized service agent ever see the "drive train malfunction" message displayed. He said he "had suspicions" about what was going on with the vehicle, so he looked into the "fault context," which gave information about when the fault code was set, at what mileage, at what speed, and the engine rpms, etc. This data showed that when the fault in the Consumer's vehicle was set, there were zero or very low engine rpms, meaning that the fault was occurring mostly during start up or when the engine was not running, and at zero speed, meaning that the vehicle was not moving, which was inconsistent with the Consumer's report that the drive train malfunction always occurred while the vehicle was in motion and being driven at approximately 45 miles per hour. The witness testified that he attached a tie-strap to the waste gate connector in order to make sure that the connector was not coming loose, and also to be able to tell if someone was disconnecting that connector and then reconnecting it. According to him, the connector was easy to unplug without using any tools, so he disconnected it to see what fault he would get, and he found that disconnecting it created the exact fault code that had been found in the Consumer's vehicle. Subsequently, he had occasion to inspect the tie-strap, but he was unable to conclusively determine that the connector had been disconnected because he found that it could be moved down and the connector could be unplugged without breaking the tie-strap. After the DME was replaced, even though the Consumer sent written notification to the Manufacturer, the witness thought the vehicle was repaired because the fault had not recurred, so no repairs were performed in June 2017; however, when the vehicle returned in July 2017 with the same fault code, it was determined that no further repairs would be performed unless the problem could be duplicated. At that time, he was instructed to put anti-tampering tape or paint around the waste gate and DME connection points. When the vehicle was inspected on October 23, 2017, the anti-tampering paint on the connector for the waste gate actuator showed signs of having been disturbed and "did not look like what we put on there." He asserted that no one from the authorized service agent did anything to the paint and, in his view; the only explanation for the difference was that someone had tampered with the connector.

The Manufacturer's representative testified that he saw the photographs that were later submitted into evidence, he determined that "something was up" because a gap could be seen where the thick anti-tampering paint had been broken on the back side of the connector. At the prehearing inspection, he checked for fault codes and found the same fault code for the waste gate actuator had been set three miles prior to the inspection, and the Consumer's house was three miles from the authorized service agent where the inspection occurred. He then did "key reads," meaning that he reviewed the data stored in the Consumer's key, which includes information such as when the car was due for service, any fault codes that had been set, etc. In reviewing the key data, he found there were several "check control messages" noted. Among those was a message that had been displayed to notify the driver that the bonnet (or hood) of the vehicle was open, and the date showed that notification had occurred at the same mileage at which the "drive train malfunction" message was displayed. He stated that "there is no question in his mind that tampering is going on" with this vehicle based on his review of the data and photographs.

During the hearing, the Board inspected the vehicle in the parking lot at the hearing site, where the hood was opened and the Board inspected the connector on which the anti-tampering paint was applied. It was obvious that the connector had been disconnected. Two Board Members attempted to disconnect the connector and were unable to do so.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." (Emphasis added) §681.102(15), Fla. Stat. Upon consideration of the evidence presented, specifically the fault context data and key read data, which showed that the vehicle was not in motion and the hood was open when the fault codes were set, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the drive train malfunction was the result of abuse, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the drive train malfunction complained of by the Consumer did not constitute a "nonconformity" as defined by the statute, and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

Hayes v. FCA US LLC, 2017-0263/MIA (Fla. NMVAB December 21, 2017)

The Consumers' 2015 Dodge Grand Caravan was declared a "Lemon" by the Board based on the following nonconformities: vibration and shaking while driving, an inoperable rear hatch, defective front struts, a misfire condition, a defective rear latch, a defective air conditioner rear blow motor, a "no start" condition, and a defective lock cylinder. The Consumers requested reimbursement of the following as incidental charges: $56.94 for certified mail costs, $74.28 for copies made at Fed Ex, and $563.32 for new tires. The Consumers additionally sought reimbursement of $34.23 for the cost of ink purchased from Office Depot; $105.00 for

maintenance service for the Consumers' 2011 vehicle; hotel expenses for additional nights incurred during out-of-town trips to dog shows; and the cost of an inspection of the subject vehicle performed by an independent mechanic the day before the hearing, but following the filing of the Manufacturer's Amended Answer withdrawing its affirmative defenses. The Consumer explained that because the subject vehicle was at the authorized service agent for repair, she had to utilize another household vehicle, a 2011 model vehicle, and had to pay a $105.00 co-payment for maintenance repairs to that vehicle. The Consumer testified that she incurred the additional hotel expenses because she did not feel that driving her 2011 vehicle at night was safe, so instead of leaving the out-of-town dog shows the day they ended, she would stay the night and leave for home the following day. With regard to the request for reimbursement for the vehicle inspection, the Consumer testified that she wanted a second opinion as to the defects of her vehicle, so she took the vehicle to an outside mechanic. The Manufacturer objected to the request for reimbursement of the cost of ink, the cost of the co-pay for repair of the Consumers' 2011 vehicle, the cost of additional hotel expenses incurred, and the cost of the inspection.

The Board found that the award should include reimbursement of the following as reasonable incidental charges: $56.94 for certified mail costs, $74.28 for the cost of copies at Fed Ex, and $563.32 for new tires the Consumers purchased for the vehicle. Consumers' request for reimbursement of $34.23 for the cost of ink purchased from Office Depot; $105.00 for maintenance service for the Consumers' 2011 vehicle; hotel expenses for additional nights incurred during out-of-town trips to dog shows; and the cost of an inspection of the subject vehicle performed by an independent mechanic the day before the hearing, were all denied, as the Board found that those costs were not a direct result of the nonconformities. §681.102(7), Fla. Stat.

Enzor v. Nissan Motor Corporation, USA, 2017-0386/JAX (Fla. NMVAB December 5, 2017)

The Consumer's 2016 Nissan Sentra was declared a "Lemon" by the Board. The Consumer stated that she dropped her vehicle off at the authorized service agent for the post-notice repair attempt on June 26, 2017, and at that time was given a rental car from Gainesville Nissan. She testified that her vehicle remained with the authorized service agent, and she retained the rental car that had been provided to her by the authorized service agent, until August 17, 2017, when the rental car was hit by another vehicle while it was parked at her residence. At that time, she contacted Gainesville Nissan, which responded by notifying her that she could pick up her vehicle and return the rental. The Consumer requested reimbursement of $500.00 for payment requested by Gainesville Nissan to cover the Consumer's insurance deductible as an incidental charge. The Consumer explained that she received a phone call the day before the hearing from Gainesville Nissan, requesting that she pay them $500.00. The $500.00 was represented to be the deductable under the Consumer's car insurance for the damage to the Consumer's rental car on August 17, 2017. As of the hearing, the Consumer had not made the requested $500.00 payment to the dealership. The Manufacturer objected to the $500.00 request as not being directly caused by the nonconformity. The Consumer's request for the $500.00 was denied, as a majority of the Board found that the cost was not a direct result of the nonconformity. §681.102(7), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Caba v. American Honda Motor Company, 2017-0329/FTL (Fla. NMVAB November 17, 2017)

During the hearing, the Consumer sought to introduce into evidence a video of the alleged defects that were the subject of the case. The video was not provided to the Board or to the Manufacturer prior to the hearing. The Manufacturer objected to the video. Pursuant to paragraphs (6) and (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Board may decline to consider documents or other evidence not filed with the Board Administrator, and provided to the opposing party, no later than five days before the scheduled hearing. Upon consideration, the Board denied the Consumer's request to include the video into evidence.

In addition, the Manufacturer sought to introduce into evidence a video located on the website YouTube.com. A link to the video was provided to the Consumer and to the Board before the hearing; a copy of the video, saved to DVD or any type of flash or thumb drive, was never provided. According to the *Office of the Attorney General, Notice to Parties, E-Filing Procedures & Requirements*: "Video files and audio files . . . that are sent via email attachment will not be accepted and will not be considered filed. These must be sent via US Postal Services or other courier." The Consumer objected to the video. Based on the aforementioned *Notice to Parties*, the video was not accepted into evidence.