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.