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.