OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2015 - March 2015 (1st Quarter)

JURISDICTION

Motor Vehicle §681.102(14), F.S.

Baskin v. FCA US LLC, 2014-0470/JAX (Fla. NMVAB March 6, 2015)

The Consumer was the owner of a company called DMV Transport LLC, the principal business of which was to transport vehicles using a fifth wheel trailer attached to the Dodge RAM 5500 that was the subject of the claim. The Consumer transported up to five vehicles at a time, and acknowledged that the trailer was normally attached to the subject vehicle. He asserted that the 9,108 pound vehicle weight listed on the Manufacturer Statement of Origin for the vehicle included the weight of the fifth wheel hitch, the toolbox, and a full tank of diesel fuel.

The Manufacturer argued that the case should be dismissed because the Consumer's vehicle was not a "motor vehicle" as defined in Section 681.102 (14), Florida Statutes, because the truck weighed over 10,000 pounds gross vehicle weight. In support of its contention, a Manufacturer Statement of Origin was submitted, which listed the weight of the truck at 9,108 pounds. Evidence was also submitted showing that one gallon of diesel fuel weighed approximately seven pounds, and that the fuel tank capacity in the truck was 52 gallons. The Manufacturer also asserted that the fifth wheel trailer added weight to the vehicle itself, and that additional weight must be included in the calculation of the vehicle's gross vehicle weight. According to the Manufacturer, approximately 10 percent of the total weight of the trailer and cargo was generally added to the gross weight of the truck itself. In this case, the trailer alone, not accounting for any vehicles carried on it, would add approximately 900 pounds to the weight of the vehicle. In addition to the foregoing, the Manufacturer also argued that 307 pounds for the fifth wheel hitch, 200 pounds for a toolbox and equipment in the toolbox, and 180 pounds for the approximate weight of the Consumer (the normal occupant), should be added to the gross vehicle weight of the vehicle, bringing the total gross vehicle weight to in excess of 10,000 pounds.

The Board considered the definition of "Gross Vehicle Weight" set out in Rule 2-30.001(2)(d), Florida Administrative Code, and found the gross vehicle weight of the Consumer's truck would include the 9,108 pounds listed on the Manufacturer Statement of Origin (which included the weight of the fifth wheel hitch and the toolbox), 364 pounds for a full tank of diesel fuel, 100 pounds for the weight of the equipment in the toolbox, 180 pounds for the weight of the Consumer, and 900 pounds for the weight that was added to the truck when the trailer was attached, for a gross vehicle weight of 10,652 pounds. Since the gross vehicle weight exceeded the limit set forth in the statute, the truck was not a "motor vehicle" as defined in Chapter 681, Florida Statutes, the Consumer was not qualified for repurchase relief under the Lemon Law, and the case was dismissed.

NONCONFORMITY 681.102(15), F.S. (2015)

Resler v. Toyota Motor Sales, U.S.A., Inc., 2014-0261/WPB (Fla. NMVAB January 2, 2015)

The Consumer complained of a foul odor coming from the air conditioner in her 2013 Toyota Scion. The Consumer testified that shortly after she purchased the vehicle, she started noticing a foul odor coming from the air conditioner and started bringing it in to the authorized service provider so it could be addressed. The first repair attempt occurred after the vehicle had been driven only 453 miles, at which time the authorized service agent identified a microbial growth in the evaporator box that was treated with an enzyme spray. The Consumer testified that neither the enzyme spray, nor the additional services provided "for customer satisfaction" had addressed the problem. Two Consumer' witnesses both testified that they had each driven the Consumer's vehicle and had experienced the foul odor coming from the air conditioner.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer presented testimony that the odor was normal as there were no signs of bacterial growth on the evaporator, and the smell was attributed to exterior factors. Alternatively, the Manufacturer also explained that dirt, pet hair, and spills in the vehicle and trunk could also cause odors. The recommended treatment was installation of a charcoal filter and misting service to be performed annually at the Consumer's expense, but which was done on the Final Repair attempt as a good will gesture.

The Board found that the foul odor from the air conditioner 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. Accordingly, the Consumer was awarded a refund.

Effenberger v. Nissan Motor Corporation U.S.A., 2014-0377/WPB (Fla. NMVAB February 2, 2015)

The Consumers complained that the hybrid engine in their 2014 Infiniti QX 60 Hybrid provided poor gas mileage. The Consumers testified that they purchased a vehicle with a hybrid engine specifically for environmental concerns and for the increased gas mileage it would provide. The vehicle was advertised as providing fuel economy in the range of 25 mpg (City) to 28 mpg (Highway), with an average of 26 mpg (Combined City/Highway). However, beginning on their initial trip home, the Consumers experienced a burning electrical smell, an engine warning light that came on, and the motor vehicle used a significant amount of gas for the distance to drive home. The Consumers kept detailed records of their mileage, including photos of the dashboard mileage read-outs and spreadsheets showing miles driven and gas purchased, all of which showed that the mileage they were getting in the vehicle has averaged 15.9 mpg, substantially below the advertised range.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. At the arbitration hearing, the Manufacturer presented testimony that the only code that was ever found was at 84 miles, and never recurred. The Manufacturer's witness further asserted that the vehicle was still in the 4,000 mile break-in period, during which time the engine gets "looser" and the parts "free-up." Additionally, in order for the vehicle to operate solely on the hybrid engine, the air conditioner cannot be turned on. When the air conditioner was turned on, it required the traditional gasoline-based engine to

operate, decreasing the vehicle's gas mileage. According to the Manufacturer, the vehicle was operating properly and as designed.

The Board found that the evidence had established that the hybrid engine providing poor gas mileage substantially impaired the 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, F.S.; §681.1095(8), F.S.

MacQueen v. American Motor Honda Company, 2015-0015/WPB (Fla. NMVAB March 12, 2015)

The Consumers complained that the A/C control icons on the main touch screen intermittently flashed on and off in their 2014 Acura MDX, and that when this occurred the icons were not operable. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent flashing of the A/C icons on October 10, 2014 (Consumers told that there was no fix for the flashing/disappearing screen icons, no repair order provided); and December 6, 2014 (vehicle inspected and display found to be flashing; noted that Manufacturer aware of screen flashes and working on a "fix," no repairs performed).

On December 9, 2014, 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 December 12, 2014. On December 19, 2014, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the audio unit and the HVAC unit were replaced "in the interest of client satisfaction." The A/C control icons on the main touch screen continued to intermittently flash on and off after the final repair attempt.

The Board found the problem to be a nonconformity. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent a total of 3 times, including one repair attempt after the Manufacturer's receipt of written notice. Under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumers were 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.

Faul v. Hyundai Motor America, 2014-0328/WPB (Fla. NMVAB January 23, 2015)

The Consumers complained of premature wearing of the driver's seat leather cover in their 2013 Hyundai Azera. The Consumer asserts that, while the seat cover was replaced for a second time at the final repair attempt, and was installed by a subcontracted specialist with expertise in leather work, the new seat now shows signs of premature wear, and the problem had therefore not been corrected.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle because the nonconformity had already been corrected. The Manufacturer's witness testified that the area of the seat that the Consumers were unhappy about was the bolster on the side of the driver's seat, which would receive the most wear in the vehicle because the driver would rub against this area when entering and exiting the vehicle.

The Board found that the evidence failed to establish that the premature wearing of the driver's seat leather cover, as complained of by the Consumers, substantially impairs the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

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

Hurricane Metal and Roofing Supply LLC and Evgenia Pavlyukova v. Nissan Motor Corporation U.S.A., 2014-0433/FTL (Fla. NMVAB February 3, 2015)

The Consumers complained of an oil leak, specifically a leak in the turbo oil feed line, in their 2013 Nissan GT-R. Mr. Kelts, the Consumer's husband, testified that his wife was the primary driver of the car. He initially asserted that he used the vehicle to attend high performance driving schools, where he receives certificates that his medical doctors require him to obtain, due to his seizures, in order to get clearance to drive; however, he subsequently admitted to attending the high performance schools as a hobby, and to driving the car under both his name and his pseudonym. With regard to the asserted nonconformity, Mr. Kelts testified that sometime in May 2013, the car smelled of oil and he found oil residue on the passenger side of the vehicle. He took the car to the dealer where it was verified that the whole car was covered in oil: front to back, as well as underneath, all over the exhaust, suspension, wheels, tires and brake pads. He acknowledged that he had exhaust modifications done on the vehicle.

The Manufacturer asserted the alleged nonconformity was the result of abuse or unauthorized modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent, specifically the significant racing modifications made to it; and the alleged nonconformity was caused by either the Consumers' or Mr. Kelts' use of the vehicle in racing and endurance driving events. The Manufacturer's witness testified that he reviewed the Dealer Repair Orders in the case, as well as motor sport/race event calendars supplied to him by counsel for the Manufacturer, and they reflected that the Consumers brought the vehicle to the authorized service agent for service before and after every motor sport/race

event that Mr. Kelts participated in with the vehicle. According to the witness, the vehicle's tires and fluids were replaced after every competitive driving event, which was indicative of the extreme conditions under which the vehicle was being operated. He noted that the Manufacturer's written warranty expressly provides that the warranty was voided if the vehicle was used for racing or is used on the track for competitive driving, a reflection of the extreme stresses put on a vehicle under those conditions. It was his opinion that the fracture in the oil feed line complained of by the Consumers was consistent with the stresses that result from racing-like conditions, and the increased heat and vibrations that occur under those conditions. He further testified that the exhaust modification performed on the vehicle, which was accomplished by someone other than the Manufacturer or its authorized service agent, also contributed to the facture of the turbo oil feed line. He explained that the modifications would result in denser air running through the engine, further increasing the pressure put on the oil feed line.

The Board considered the statutory definition of "nonconformity," which provides that a "nonconformity" is 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." §681.102(15), Fla. Stat. Upon consideration of the evidence presented, it was concluded by the Board that the vehicle oil leak, specifically the leak in the turbo oil feed line, was the result of both the unauthorized modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent, and the manner in which the Consumers were utilizing and/or abusing the vehicle. The Consumers, through language included in the vehicle's warranty book, were expressly warned about the potential for damage to the vehicle that could result from racing and/or competitive driving. As such, the complained-of defect did not constitute a "nonconformity" as defined by the statute; therefore the Consumers were not qualified for repurchase relief under the Lemon Law.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(8), F.S.

Nero v. Subaru of America Inc, 2014-0459/ORL (Fla. NMVAB February 17, 2015)

The Manufacturer stipulated that the Consumer's 2015 WRX STI was a "lemon" and a hearing was conducted for the sole purpose of calculating the Consumer's remedy. The Consumer requested reimbursement of the following as incidental charges: $4,846.82 for rental of alternative transportation from October 25, 2014, through February 26, 2015, and $52.38 for an independent inspection by Holler Honda after the Consumer observed the vehicle was leaking oil. With regard to the alternative transportation, the Consumer explained that he was reluctant to continue driving the vehicle after being informed that the second engine replacement, just over three months after leasing the vehicle, was a "goodwill" gesture only and he would be financially responsible for any future problems with the engine. The Manufacturer objected to reimbursing the rental car charges, arguing that the charges were not reasonable because the subject vehicle was not inoperable during the period in which the rental charges were incurred. The Manufacturer also objected to reimbursement of the charges for the independent inspection on the ground that Holler Honda was not one of its authorized service agents. The Board award included

reimbursement of the requested $4,846.82 for rental of alternative transportation from October 25, 2014 through February 26, 2015, and $52.38 for an independent inspection by Holler Honda after the Consumer observed the vehicle was leaking oil, as reasonable incidental charges. The Manufacturer's objections to reimbursement for the rental car and independent inspection were denied. §681.102(7), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES

Romero v. BMW of North America LLC, 2014-0398/MIA (Fla. NMVAB January 13, 2015)

The Manufacturer's Answer was not timely filed. 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 gave the following explanation for the failure to timely file the Manufacturer's Answer, in arguing that the Manufacturer should be allowed to assert affirmative defenses to the claim: an Intern working at the Manufacturer's office in Westwood, New Jersey, misfiled the Approval of the Request for Arbitration sent by the Office of the Attorney General, resulting in the Manufacturer's failure to forward the Request for Arbitration to the Attorney in a timely manner. The Consumer objected to the Manufacturer's request. Upon consideration, a majority of the Board determined that good cause was not shown for the late filing of the answer; accordingly the Manufacturer was not allow to present any evidence in support of its affirmative defense.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2015 - June 2015 (2nd Quarter)

JURISDICTION

Consumer §681.102(4) F.S.

Castro v. American Honda Motor Company, 2015-0002/ORL (Fla. NMVAB April 6, 2015)

At the outset of the hearing, the Manufacturer moved that the case be dismissed, arguing that the Consumer was not qualified for relief because the vehicle was used for commercial purposes.

The Board looked at section 681.102(4), Florida Statutes, which 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.

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. The plain language of the third clause in the above-quoted definition does not repeat the use restriction set out in the first two clauses, and thereby makes available the protections of Chapter 681, Florida Statutes, to anyone "entitled … to enforce the obligations of the [manufacturer's] warranty." *See, Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc.*, 505 So. 2d 587, 589 (Fla. 2d DCA 1987). Accordingly, the Manufacturer's motion was denied by the Board.

NONCONFORMITY 681.102(15), F.S. (2014)

Jerome v. Hyundai Motor America, 2014-0438/WPB (Fla. NMVAB April 9, 2015)

The Consumer complained that the air conditioning system in her 2013 Hyundai Veloster was not cooling properly, and that the vehicle was pulling to the side. The Consumer testified that the vehicle was her first new car, and explained that she purchased a new vehicle because, between working and attending school, she was on the road 7 days a week and needed reliable transportation. After replacement of the evaporator in June of 2013, the air conditioning again stopped cooling the vehicle in early July of 2014. The Consumer testified that she took the vehicle to the authorized service agent at that time, but was told there were no rental vehicles available for her, so she had to continue driving the vehicle, in the south Florida heat, until the

July 22-26, 2014 repair attempt. Following that repair attempt, and after being inexplicably told there were no problems found, the Consumer had to continue to drive her vehicle seven days a week, without functioning air conditioning, in the heat of the south Florida summer, until the Manufacturer's post-notice repair of August 27-30, 2015.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle because it has been repaired. The Manufacturer's witness testified that he first became involved with the vehicle at the final repair attempt, at which time he noticed that the recirculation door for the air conditioning system seemed to get stuck in the "open" position, which would allow outside warm air to continuously enter the vehicle, taxing the ability of the air conditioner to cool the vehicle in the south Florida heat. As to the problem with the vehicle pulling, it was discovered that the front toe was out of specification after the initial alignment, and another alignment was performed to correct that problem.

The evidence established that the air conditioner not cooling properly and the vehicle pulling to the side both substantially impaired the use, value or safety 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 vehicle in this case was out of service for multiple attempts to repair of both the vehicle pulling and the air conditioning not cooling properly nonconformities. However, the Board was particularly troubled that, with regard to the air conditioning nonconformity, the vehicle would be returned to the Consumer unrepaired, with no explanation, forcing her to drive for an extended period of time, 7 days a week, in the extreme heat of south Florida with an air conditioner that did not cool the vehicle. Accordingly, the Consumer was awarded a refund.

Holland v. American Honda Motor Company, 2015-0126/WPB (Fla. NMVAB June 26, 2015)

The Consumer complained of an offensive odor from the air conditioner that smelled like mildew in her 2014 Honda CRV-LX. The Consumer testified that she started noticing a musty odor from the air conditioner a few weeks after purchase. The smell had gone away twice in response to actions taken by the authorized service agent, only to return after a few weeks, whereupon it got progressively worse. The smell had gotten so bad that the Consumer had to open the vehicle's windows in the morning before she started the vehicle.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that when the problem was verified at the November 1-11, 2014 repair, even after the application of an ionizer spray at the first repair attempt, they replaced the evaporator core and recharged the unit because that would be where the smell could logically come from. He acknowledged that they do not use electronic sniffers or use any bacterial testing to investigate claims involving vehicle smells. The Manufacturer's representative testified that it was his understanding that the odor would manifest itself after 30-40 minutes of the vehicle sitting. He had the vehicle sit in the sun, but still could not verify the problem.

The Board found that the evidence established that the offensive odor from the air conditioner 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.

Murray v. American Honda Motor Company, 2014-0471/FTL (Fla. NMVAB April 16, 2015)

The Consumer asserted that her 2014 Honda Accord LX had imperfections in the paint and body of the vehicle. The Consumer testified that the day after she purchased the vehicle, she could see imperfections in the paint, tiny dents, and tree sap markings on the hood of the vehicle. The Consumer stated that she took the vehicle back to dealer and they cleaned, polished and buffed the car, however some dents and marking continued on the car. The Consumer explained that the Dealer informed her that the environment caused the scratches and that it would paint the hood of the vehicle for her, however she refused as painting the car would decrease its value.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; no defect or condition existed in the subject vehicle; there had not been a reasonable number of repair attempts afforded to the Manufacturer to correct any existing nonconformity; and the Consumer refused to allow the Manufacturer to repaint the hood of vehicle, an offer which was made as a good will gesture because there was no defect or condition, but was instead a result of environmental causes. The Manufacturer's witness testified that the vehicle had been detailed, and that he could not see anything wrong with the paint. The Manufacturer's representative testified that while he could not see any defects with the paint, in November of 2014, he had observed some spots on the vehicle resulting from tree sap and offered to paint the hood; however, the Consumer refused the offer.

During the hearing, the Board inspected the vehicle. The Consumer attempted to point out all the scratches and tiny dents on the vehicle; however, she could not find all of them. The Manufacturer's representative stated that all he observed was some pollen and mineral deposits on the roof of the vehicle and some stone chips on the bumper. Scratches, swirl marks or spots on the vehicle were not observable unless the Consumer specifically pointed them out.

The Board found that the evidence failed to establish that the imperfections in the paint and body of the vehicle 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.

Prandi v. Ferrari North America Inc., 2014-0392/WPB (Fla. NMVAB May 28, 2015)

The Consumer complained of intermittent electrical issues and an electronic parking brake (EPB) malfunction in his 2013 Ferrari 458 Italia Coupe. The Consumer presented the testimony of Krzysztof Olschewski. Mr. Olschewski testified that he was the driver of the vehicle and the first issue he had with the car was that it would not start; thereafter, various warning lights started appearing on the dashboard. According to Mr. Olschewski, every time the engine light came on, he would take the vehicle to the dealer and the vehicle's computers would be reset, or he would be advised that there was an issue with the battery. On cross examination, Mr. Olschewski acknowledged he had installed several aftermarket accessories in the high performance vehicle,

including a carbon fiber dash board about a year after the vehicle was leased, which had totaled approximately $30,000.00.

The Manufacturer asserted 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. In support of the Manufacturer's assertions, the Manufacturer's representative testified that the installation of the aftermarket accessories performed by the Consumer had been very invasive to the vehicle, and modifications of that degree would cause problems down the "road" with this, or any, vehicle. It was the Manufacturer's position that the extensive modifications of the vehicle, performed by someone other than the Manufacturer or its authorized service agent, were at least partially the cause of the Consumer's electrical issues. The witness further stated that when the vehicle came in with the traction control light on, the shop performed a diagnostic test by swapping the coils to see which coil was defective. He opined, after reviewing the repair orders, that there had been nothing wrong with the coils; the only explanation for the traction control light coming on was that the coil was swapped prior to being brought to the authorized service agent, resulting in the illumination of the light. As to the EPB malfunction, he testified that the examination of the vehicle showed that the brake shoes were destroyed and/or disintegrated because the emergency brake was applied while the vehicle was being driven; additionally, the "on board computer" printout indicated that the engine was operating at 3600 RPM when the EPB was engaged and/or pressed.

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." §681.102(15), Fla. Stat. The Board found that the evidence established that the intermittent electrical issues were the result of alteration of the vehicle through the installation of aftermarket accessories by the Consumer. The evidence further established that the electronic parking brake (EPB) malfunction was the result of abuse or neglect performed by persons other than the Manufacturer or its authorized service agent. Because the complained-of defects did not constitute a "nonconformity" as defined by the statute, the Consumer was not qualified for repurchase relief under the Lemon Law and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Blanco-Lindsay and Lindsay v. Hyundai Motor America, 2015-0107/FTL (Fla. NMVAB May 20, 2015)

The Consumers' 2014 Hyundai Santa Fe Sport vehicle was declared a "lemon" by the Board. The Consumers requested reimbursement of $35.20 for gasoline purchased while driving a vehicle loaned to them by the authorized service agent. The Manufacturer objected to the $35.20 for gasoline, arguing that the Consumer would have had to put gas on her own vehicle. The Board rejected the Manufacturer's objection and awarded the Consumers $35.20 for gasoline purchased while driving a vehicle loaned to them by the authorized service agent.

Reasonable Offset for Use §681.102(19), F.S.

Ireland v. Ford Motor Company, 2015-0070/JAX (Fla. NMVAB April 28, 2015)

The Consumer's vehicle was found to be a lemon, and the Board proceeded to calculate the refund due them. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the date of the Better Business Autoline hearing was 47,471 miles (47,751 odometer miles reduced by 51 miles at delivery, and 229 other miles not attributable to the Consumers). The Consumers argued that 9,000 miles should be subtracted from that amount because the Consumers were told by the authorized service agent, on three separate occasions, to put 3,000 miles on the vehicle to allow the transmission to adapt to his driving habits.

The Manufacturer's Attorney argued that the Consumers drove those miles anyway as part of their normal use of the vehicle; therefore, they should still count toward the miles attributable to them.

The Consumers' argument that 9,000 miles should not be attributable to them was rejected by a majority of the Board because the Consumers put those miles on the vehicle anyway through normal use.

MISCELLANEOUS PROCEDURAL ISSUES:

Peters and Kelljchian-Peters v. Ford Motor Company, 2015-0167/FTL (Fla. NMVAB June 17, 2015)

The Manufacturer's Answer was not timely filed. 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 offered no excuse for its late filing. Upon consideration, the Board found that because the Manufacturer's Answer was not timely filed, neither its Answer, nor it's subsequently-filed Amended Answer, would be considered. The Manufacturer was not permitted to assert any defenses at the hearing or present the testimony of its witnesses. Counsel for the Manufacturer was permitted to cross-examine the Consumer and his witness, and make a closing statement on behalf of the Manufacturer.

Bell v. Toyota Motor Sales, USA, Inc., 2015-0050/MIA (Fla. NMVAB May 12, 2015)

The Manufacturer sought to introduce the Manufacturer's Prehearing Information Sheet and certain documents which had not been filed in a timely manner. Paragraph (10), Hearings *Before the Florida New Motor Vehicle Arbitration Board,* requires that the original Manufacturer's Prehearing Information Sheet, with any attachments, must be received by the Board Administrator no later than 5 days before the hearing, and a copy with all attachments must be received by the Consumer or their attorney no later than 5 days before the hearing. The Manufacturer's representative, in attempting to explain the failure to timely file, testified that the documents had been submitted timely to the Consumer and her attorney and that inadvertently the Manufacturer did not send a copy to the Board Administrator. The Consumer objected to the Manufacturer's request, asserting she did not receive the documents. Upon review of the

Manufacturer's documents, the Consumer did not object to the admission of the Motor Vehicle Defect Notification Form and the August 19, 2014 letter from the National Center for Dispute Settlement to the Consumer. Upon consideration, the Board found that the Manufacturer did not submit the documents timely and only admitted those documents to which the Consumer did not object.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2015 - September 2015 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4) F.S.

Gerald v. Volkswagen/Audi of America Inc., 2015-0101/STP (Fla. NMVAB July 1, 2015)

The Consumer leased a 2014 Volkswagen Jetta. On the date the final repair attempt was scheduled to take place, the Consumer testified that she took her vehicle to the dealership and left it there because she did not want to drive the vehicle "and will not take the vehicle back." At the hearing, the Consumer testified that the lease agreement on the vehicle was still in effect, that she was still making payments under the lease agreement, and that she could pick up the vehicle from the dealership if she wanted to do so.

The Manufacturer asserted "Claimant not a 'consumer' as defined by Lemon Law," alleging that the Consumer cannot enforce the obligations of the warranty on the vehicle because she has admitted she does not possess the vehicle, which she has abandoned by leaving it at the dealership.

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:

> [T]he 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 evidence established that the vehicle which was the subject of the Request for Arbitration, even though parked at the dealership at the time of hearing, was still under lease to the Consumer. The Consumer had continued to make her monthly lease payments. No evidence was provided that would indicate she could not immediately take possession of the vehicle, if she so desired. Accordingly, she 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 by the Board.

Motor Vehicle §681.102(14), F.S.

Schneider v. Ford Motor Company, 2015-0229/ORL (Fla. NMVAB August 5, 2015)

The Consumers complained of a vibration or "hop" that occurred in their 2013 Ford F350 when the vehicle was being driven in the range of 47 to 52 miles per hour. With respect to the gross vehicle weight of the vehicle, the Consumer testified that the gross vehicle weight (GVW) reflected on the registration issued December 2, 2014, had been corrected, and a new registration was issued on April 29, 2015, reflecting the vehicle's GVW to be 7,999 pounds. The net weight reflected on that registration was 7,434 pounds. The Consumer stated this truck was not used as a work truck for hauling on their ranch because they have other vehicles they use for that, and was not used for "5th wheeling." There was normally just one person traveling in the vehicle, and the truck has been used to tow an 18-foot flats boat on a trailer less than one time per month.

The Manufacturer asserted that the case should be dismissed because the Consumer's vehicle was "not a motor vehicle because it was a truck in excess of 10,000 pounds gross vehicle weight." Specifically, the Manufacturer pointed to the Florida Vehicle Registration, issued December 2, 2014, that reflected a gross vehicle weight of 11,500 pounds.

Section 681.102 (14), Florida Statutes, defines a "motor vehicle," in pertinent part, 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 <u>does not include</u> vehicles run only upon tracks, off-road vehicles, <u>trucks over 10,000 pounds gross vehicle weight</u>, motorcycles, mopeds or the living facilities of recreational vehicles.

Florida Administrative Code Rule 2-30.001(2)(d) defines "gross vehicle weight" as "the net, curb or actual weight of the truck, plus the weight of the load normally carried in it, including normal occupant(s), fuel and cargo."

In order for a consumer to qualify for relief under the Lemon Law, the vehicle which was the subject of the claim must be a "motor vehicle" as defined in the statute. A preponderance of the evidence, including the net weight reflected on both of the registration forms provided to the Board, together with the testimony that the truck was not normally used for carrying a load or towing, the weight of the normal occupants carried in the vehicle and fuel, supports a conclusion that the gross vehicle weight of the subject truck did not exceed the 10,000 pound limit set forth in the statute; therefore, it was concluded that the truck was a "motor vehicle" as defined by the statute. Accordingly, the Manufacturer's Motion to Dismiss was denied by the Board.

Pantera v. Volkswagen/Audi of America Inc., 2015-0189/TLH (Fla. NMVAB August 26, 2015)

The Consumer purchased a 2014 Volkswagen EOS through a dealership in Naples, Florida. The Consumer testified that she wanted this particular model, with accessories, and was only able to find it in Florida, after an internet search. The Consumer's son, a North Carolina resident, testified that he contacted the dealership where the vehicle was located, Volkswagen of Naples, in Naples, Florida, via telephone from his home in North Carolina. During the course of

his contact, a price was agreed upon and the method for completing the transaction was discussed. Thereafter, he flew to Florida, was picked up at the airport by personnel from Volkswagen of Naples, and was taken to the dealership on October 21, 2014. He testified that, at that time, he was shown the car in question, confirmed the pricing, completed the purchase paperwork, handed the dealership the check for the remaining balance of the vehicle, and took delivery of the vehicle. The vehicle was then driven by him to North Carolina.

The Manufacturer argued that the Consumer's vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, because the vehicle was not sold in Florida. The Manufacturer's counsel asserted that the lemon law exists to protect "our [Florida] citizens," and because the Consumer was not a resident of Florida, and did not pay Florida sales tax or, in particular, the $2.00 Florida Lemon Law fee, the purchase should be considered a North Carolina sale. Counsel further asserted that "[Florida] benefited in no way from the [Consumer's] purchase of this vehicle," and "there was nothing that tied [the Consumer's] vehicle to the State of Florida in terms of … being a Florida sale …."

A majority of the Board, based on the totality of the circumstances, found that the Consumer's vehicle was "sold in this state" and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. With regard to the Manufacturer's assertion that the failure to pay the $2.00 Lemon Law fee should be a litmus test for whether a vehicle was considered to have been sold in Florida, it was noted first, that Section 681.117, Florida Statutes, appears to require the collection of the fee for new motor vehicles being removed from the State for titling and registration, as was the case for the Consumer's vehicle, and second, that adherence to the Manufacturer's position would allow dealerships, who are responsible for collection of the Lemon Law fee under Section 681.117, Florida Statutes, to make the determination of whether a vehicle could be considered to have been sold in Florida.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Subock v. Kia Motors America, 2015-0091/WPB (Fla. NMVAB September 28, 2015)

The Consumer complained of a radio, seatbelt, brake and window problems in her 2014 Kia Sedona. On June 20, 2014, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on June 23, 2014. The Manufacturer had an opportunity to either inspect or repair the vehicle after receipt of the notice, but declined to do so.

The Manufacturer asserted the Consumer had not afforded the Manufacturer an opportunity to conduct a final repair attempt. Specifically, the Manufacturer argued that the correspondence sent on behalf of the Consumer was insufficient to satisfy the requirements of Section 681.104, Florida Statutes, because it was not a Motor Vehicle Defect Notification form and did not clearly state that the Consumer was asserting rights under Chapter 681, Florida Statutes.

The Board found the evidence established that the Consumer did mail the required written notification to the Manufacturer. The Manufacturer's contention that the correspondence sent on behalf of the Consumer were insufficient to place it on notice of a potential Lemon Law claim was rejected.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Wilson v. Ford Motor Company, 2015-0177/JAX (Fla. NMVAB July 1, 2015)

The Consumer's 2014 Ford Focus was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as incidental charges: $11.75 for mailing the defect notification form to the BBB/Autoline Program; $5.75 for mailing the defect notification form to the Office of the Attorney General; $6.00 for mailing the defect notification form to the Manufacturer; $3.30 for mailing the Customer Claim form to the BBB/Autoline Program; $12.00 for mailing the Request for Arbitration form to the Office of the Attorney General; $50.77 for the cost of issuing and mailing three witness subpoenas; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office; $206.23 for a rental car from February 27, 2015 through March 3, 2015, which the Consumer rented in order to visit a sick family member in Missouri, because the Consumer did not feel safe taking the vehicle on a long trip; $176.95 for a rental car during the May 29, 2015 repair attempt; $60.00 for the co-pay for three doctor visits the Consumer testified were as a result of her being diagnosed with trigger finger, which she alleged was caused by the steering nonconformity; and $27.15 for the cost of a doctor co-pay at Care Spot and corresponding medication purchased at Walgreens as a result of injuries to her knee and back caused by pushing the vehicle ¾ of a mile on May 29, 2015 after it broke down.

The Manufacturer objected to reimbursement of the following: $11.75 for mailing the defect notification form to the BBB/Autoline Program and $5.75 for mailing the defect notification form to the Office of the Attorney General, because the law only requires that form to be mailed to the Manufacturer; $31.58 for the cost of issuing and mailing two of the three witness subpoenas, asserting that two of the witnesses were listed on the Manufacturer's prehearing information sheet and would have been at the hearing anyway; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office because the documents could have been emailed for free; $206.23 for a rental car from February 27, 2015 through March 3, 2015 because the Consumer could have used her vehicle, or could have arranged for alternative transportation by borrowing a vehicle or flying; and both the $60.00 co-pay for three doctor visits where the Consumer was diagnosed with trigger finger, and the $27.15 for the doctor co-pay and medication from Walgreens that resulted from the Consumer pushing her vehicle ¾ of a mile on May 29, 2015, arguing that those costs were outside the purview of the Board's authority and could only be recovered in court through an action in tort.

The Board awarded reimbursement of the following as reasonable incidental charges: $5.75 for mailing the defect notification form to the Office of the Attorney General; $6.00 for mailing the defect notification form to the Manufacturer; $3.30 for mailing the Customer Claim form to the BBB/Autoline Program; $12.00 for mailing the Request for Arbitration form to the

Office of the Attorney General; $50.77 for the cost of issuing and mailing three witness subpoenas; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office; $176.95 for a rental car during the May 29, 2015 repair attempt; $27.15 for the cost of a doctor co-pay to Care Spot and corresponding medication purchased at Walgreens as a result of the Consumer having to push her vehicle ¾ of a mile on May 29, 2015, after the vehicle broke down. The Manufacturer's arguments to the contrary were rejected by the Board. The Consumer's request for reimbursement of $11.75 for mailing the defect notification form to the BBB/Autoline Program; $206.23 for a rental car from February 27, 2015 through March 3, 2015; and $60.00 for the co-pay for three doctor visits, were denied by the Board.

Sciarratta v. Volkswagen/Audi of America Inc., 2015-0220/FTL (Fla. NMVAB August 28, 2015)

The Consumer's 2013 Volkswagen EOS was declared a "lemon" by the Board due to a "no start" condition, which was characterized by the Consumer as the vehicle stopping while being driven, and/or not starting. The Consumer requested reimbursement of the following as incidental charges: a total of $2,104.78 for the cost of rental vehicles for the following dates: March 24-April 14, 2015 ($561.97); May 20–June 3, 2015 ($293.85); June 3–17, 2015 ($224.61); June 17– July 15, 2015 ($534.04); August 5–8, 2015 ($52.11); and August 8–19, 2015 ($203.20); plus an additional 2 weeks of rental charges that the Consumer will incur following the hearing but prior to receipt of the refund awarded by the Board ($235.00). The Consumer explained that she incurred the rental costs because she was scared to drive the vehicle on the highway, or to drive it when she had her granddaughter with her.

The Manufacturer objected to the rental charges incurred prior to June 9, 2015, on the basis they were unreasonable because prior to that time she did not know that the repairs performed would be unsuccessful.

The Board awarded the Consumer everything that was requested above. The Manufacturer's objection to the rental charges incurred prior to June 9, 2015 was denied.

Yesbick and Soogrim v. General Motors, LLC, 2015-0157/WPB (Fla. NMVAB July 15, 2015)

The Consumers' 2013 Chevrolet Tahoe was declared a "lemon" by the Board. The Consumers requested reimbursement as an incidental charge of $221.51 toward a car rental for a family trip, because the Consumer did not feel safe using the subject vehicle. The Consumer's request was awarded by the Board.

Reasonable Offset for Use §681.102(19), F.S.

McMurray v. American Honda Motor Company, 2015-0265/TPA (Fla. NMVAB September 4, 2015)

The agreed upon value of the Consumer's vehicle, for the purpose of calculating the statutory reasonable offset for use, was $40,759.02 ($41,259.02 reduced by a manufacturer rebate of $500.00). Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing was 5,430 miles (5,495 odometer miles reduced by 18

miles at delivery, and 47 other miles not attributable to the Consumer). The Manufacturer objected to cutting off the mileage as of the date of the NCDS hearing, arguing that the Consumer was not required to resort to that procedure because the mechanism was not state-certified under Section 681.108, Florida Statutes. However, according to the Consumer, she filed a claim with NCDS because the Manufacturer's documentation presented this as a requirement, and she did not find out until after that process was completed that it was, in fact, not required. The Board found that the Manufacturer was entitled to a reasonable offset for use of $1,844.35. The Manufacturer's objection to cutting off the mileage as of the date of the NCDS hearing was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Dream Development LLC and Dadario v. Maserati North America, Inc., 2015-0179/FTL (Fla. NMVAB July 6, 2015)

Prior the hearing, the Manufacturer filed a "Motion to Dismiss," asserting that the Consumer had failed to afford the Manufacturer the presumptive repair attempts provided by Chapter 681, Florida Statutes, and was therefore not eligible for relief. Paragraph (24), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, recognizes that motions seeking dismissal "are not preferred as a matter of practice before the Board, and the Board does not have the authority to grant summary judgments." Upon consideration, the Board noted the existence of possible factual issues thus precluding the granting of the motion at a preliminary stage of the proceedings, whereupon it was denied without prejudice to be reconsidered at the conclusion of the case. At the conclusion of the case, the motion was reconsidered by the Board and denied.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2015 - December 2015 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Siriphanthong v. Volkswagen/Audi of America Inc., 2015-0423/FTM (Fla. NMVAB December 7, 2015)

The parties stipulated that the Consumer purchased a 2012 Audi A4 in Florida. In the Request for Arbitration, the Consumer indicated that the vehicle was purchased as "new." At hearing, the Consumer pointed out that the heading on the purchase agreement was "New Vehicle Buyer's Order." The Consumer's husband explained that they had requested a CARFAX report from the dealership because the vehicle had over 7,000 miles on it. The Consumer acknowledged that the CARFAX report she received indicated that there had been a previous owner, but asserted that her salesperson told her the previous owner was the dealership itself, and that the car was listed as having a previous owner because the vehicle was an "executive car/demo car." The Consumer also acknowledged that she later requested another CARFAX report, which listed Lease Plan USA as a previous owner.

The Manufacturer asserted that the Consumer was not qualified for relief under the Lemon Law because the vehicle was "used" when the Consumer purchased it; therefore, it was not a "motor vehicle" as defined by the Lemon Law statute. In support of its position, the Manufacturer provided a document showing a title was issued for the subject vehicle to "Owner, Lease Plan USA, 3847 Taussig Avenue, Bridgeton, Missouri 63044-1216," on August 2, 2012. Lease Plan USA then leased the subject vehicle to Suncoast Motorsports, which used the vehicle as a loaner vehicle for customers who were getting their vehicles serviced at their dealership. On July 8, 2013, the vehicle was sold to the Consumer, with an indication on the purchase agreement that the vehicle was "USED." The Manufacturer also pointed out that on the State of Florida Application for Vehicle/Vessel Certificate of Title, which was submitted following the sale of the subject vehicle to the Consumer, the box indicating the vehicle was "Used" was checked off.

In order for the Consumer to qualify for refund/replacement relief under Chapter 681, Florida Statutes, the vehicle which was the subject of the claim must meet the statutory definition in Section 681.102 (14), Florida Statutes, which defines a "motor vehicle" as:

> a <u>new vehicle</u>, propelled by power other than muscular power, which is sold in this state to transport persons or property ….

The statutory definition of "motor vehicle" does not otherwise define what is meant by a "new" vehicle. The definitions of "motor vehicle" and "used motor vehicle" contained in Section

320.60, Florida Statutes, which is the motor vehicle licensing statute, while not governing, provide some guidance with regard to the distinction between "new" and "used" motor vehicles. Section 320.60, Florida Statutes, provides:

> (10) "Motor vehicle" means any automobile, motorcycle, or truck … the legal or equitable title to which has never been transferred by a manufacturer, distributor, importer, or dealer to an ultimate purchaser ….
>
> ***
>
> (13) "Used motor vehicle" means any motor vehicle the title to which has been transferred, at least once, by a manufacturer, distributor, importer, or dealer to an ultimate purchaser.
>
> ***

A majority of the Board concluded that the preponderance of the evidence supported the Manufacturer's contention that the subject vehicle was purchased by the Consumer as a "used" motor vehicle. When the original purchaser, Lease Plan USA, purchased the vehicle, the title passed to Lease Plan USA, making it the ultimate purchaser under Section 320.60(10), Florida Statutes. The evidence showing prior titling of the vehicle to Lease Plan USA, as well as the purchase documents and application for registration, which identify the vehicle as "used" when it was purchased by the Consumer, further supported that conclusion. Accordingly, the vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, and the Consumer's case was dismissed.

NONCONFORMITY 681.102(15), F.S. (2015)

Anderson v. FCA US LLC, 2015-0324/FTL (Fla. NMVAB November 25, 2015)

The Consumer complained of an electrical problem in which the Tire Pressure Monitoring System (TPMS) warning light was constantly illuminated in her 2014 Jeep Wrangler. The Consumer testified that the constant illumination of the TPMS warning light had continued to occur, despite several repair visits. As a result, she had restricted her use of the vehicle and did not take it on the highway anymore because she did not feel safe driving it. The Consumer's witness, an ASE Certified Master Technician, testified that the condition of the rims on the Consumer's vehicle belied the Manufacturer's assertion that it had replaced the two rear TPMS sensors on the Consumer's vehicle. He explained that if, indeed, those sensors had been replaced, the technician would have had to also balance the tires, but the repair orders do not indicate that balancing was done. According to him, the tires on the Consumer's vehicle were chopped, but not worn, which he opined would not cause the TPMS warning light to illuminate.

The Manufacturer's representative explained that the authorized service agent made several good faith repairs to try and identify the problem involving the TPMS system. When those measures failed, they put stock tires on the vehicle which did not trigger illumination of the TPMS warning light. Noting that the tires on the vehicle were exhibiting a chopped tire wear pattern, they concluded that the tires were causing the problem. Consequently, they advised the

Consumer that she needed to replace her tires. He further explained that tire maintenance and replacement are the Consumer's responsibility.

During the hearing, the Board inspected the vehicle. The tires were visually inspected, and the Board noted that the front tires appeared to show more wear and signs of chopping than the back tires. When the engine was started, the Board members observed that the TPMS warning light was illuminated. A majority of the Board found that the evidence established that the electrical problem in which the TPMS warning light was constantly illuminated substantially impaired the use, value or safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion that the Consumer was negligent for not replacing the tires was rejected. Accordingly, the Consumer was awarded a refund.

Moore v. General Motors LLC, 2015-0251/TPA (Fla. NMVAB October 10, 2015)

The Consumer complained of an offensive smell and leak condition in her 2014 GMC Sierra 1500. The Consumer testified that prior to the first repair attempt on July 25, 2014, she noticed that the black molding around the sunroof was "falling down" and blocking the sunroof from closing. She returned the vehicle to the authorized service agent on October 18, 2014, after observing a leak from the front passenger A pillar, a mold smell inside and outside the vehicle, wet carpet on the front passenger side after a rain, and the sunroof molding "falling down" again. On November 8, 2014, the vehicle was brought in again for the musty smell. At that time the carpets were shampooed, and the left and right pillar moldings were replaced; however, she believed the musty smell was still present, as well as a new, strong chemical smell. She took the vehicle to another Manufacturer's authorized service agent on December 4, 2014, to have the front carpet replaced. After the carpet was replaced, however, she still smelled a musty/chemical odor on the drive home. The Consumer, her husband, and her son have all experienced burning eyes and a scratchy throat when riding in the subject vehicle, especially on longer trips with the seat heaters on.

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 looked at the vehicle and talked to the Service Advisor at Eagle Buick GMC, at the February 2015, repair. According to him, the only discernible smell at the time was a "propane" smell, which he testified could easily come from other vehicles on the road if the air conditioner vents were left on fresh air rather than in the recirculation mode. He took the vehicle on a 13 mile test drive, in stop-and-go traffic, and experienced no unusual odors other than a new carpet smell. He acknowledged that he never talked to the Consumer or her husband about what they were experiencing.

During the hearing, the Board inspected the vehicle and a musty smell was experienced outside of the vehicle and the strong smell of new carpet was detected inside the vehicle. The Board found that the evidence, including the vehicle inspection, established that the offensive smell and leak condition 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.

Brenneka v. Toyota Motor Sales USA, INC., 2015-0291/FTL (Fla. NMVAB November 13, 2015)

The Consumer complained that his 2013 Toyota Tundra pulled to the right, causing premature and uneven tire wear. The Consumer testified that, shortly after buying the vehicle, he started noticing a strong pull to the right when he was driving. That had caused uneven and premature wearing of the tires, with the first set of tires requiring replacement at approximately 10,000 miles. The Consumer testified that the vehicle continued to strongly pull right, and that the current tires on the vehicle were also showing uneven wear.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor. The Manufacturer's representative testified that when he inspected the Consumer's vehicle, he observed the drift but it was very slight and consistent with the crown of the road. Another Manufacturer's representative reiterated that observation, and further testified that the drift was comparable to another like vehicle that he also test drove.

During the hearing, the Board inspected and test drove the vehicle and reported that the vehicle pulled to the right during the drive, and observed wear to the outer edges of the tires. The Board found that the evidence established that the pull to the right, causing premature and uneven tire wear, 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.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Soto v. FCA US LLC, 2015-0343/STP (Fla. NMVAB October 26, 2015)

The Consumer complained of a transmission condition causing the transmission to intermittently fail to go into gear in his 2015 Chrysler 200. The vehicle was presented to the Manufacturer's authorized service agent for repair of the transmission condition on April 3 - 8, 2015, and May 16 - June 4, 2015. On June 10, 2014, counsel for the Consumer sent a one-page letter, dated June 4, 2014, to the Manufacturer, along with a Motor Vehicle Defect Notification form. The documents were sent to "Chrysler Group LLC, 100 Chrysler Drive, Auburn Hills MI 48326-2766."

The Manufacturer asserted the Consumer failed to allow FCA US LLC a final opportunity to cure any alleged defects as required by Section 681.104(1)(a), Florida Statutes. The Manufacturer's representative testified that, as required by law, consumers are notified in their owner's manual of the address they are to use for the purpose of notifying the Manufacturer of its opportunity for a final repair attempt. In this case, the address set out in the Consumer's owner's manual is "FCA US LLC Customer Center, P.O. Box 21-8004, Auburn Hills, MI 48321-8004." According to the Manufacturer, the address used by the Consumer's counsel to send the letter and Motor Vehicle Defect Notification was the Manufacturer's corporate office. Although the Motor Vehicle Defect Notification form eventually reached the proper office, it was not until after the documents had been routed through two other offices, and well past the ten days from receipt of the form that the Manufacturer had in which to request the final repair attempt.

Moreover, the Manufacturer asserted that the letter itself was a general customer dissatisfaction letter, and not a Motor Vehicle Defect Notification or appropriate request for final repair attempt under the Florida Lemon Law statute, since the letter also asserted rights under the Magnuson-Moss Warranty Protection Act and The Deceptive and Unfair Trade Practices Act.

Section 681.104(1)(a), Florida Statutes, requires that:

> [a]fter three attempts have been made to repair the same nonconformity, the consumer shall give written notification, by registered or express mail, to the manufacturer, of the need to repair the nonconformity to allow the manufacturer a final attempt to cure the nonconformity. The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the consumer's receipt of the response. … If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

Pursuant to section 681.103(2), Florida Statutes, manufacturers are required to "provide to … consumers conspicuous notice of the address and phone number for its zone, district, or regional office for this state in the written warranty or owner's manual."

Based on the evidence presented, the Board found that the written notification was not sent to the Manufacturer at the address provided to the Consumer for that purpose. As such, the Consumer had not yet provided the Manufacturer with the opportunity for a "final attempt to cure the nonconformity," as required under Section 681.104(1)(a), Florida Statutes. Accordingly, the Consumer's case was dismissed.

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.

Baird v. Ford Motor Company, 2015-0318/WPB (Fla. NMVAB October 28, 2015)

The Consumer complained of rust on the underbody of his 2015 Ford F-150. The Consumer testified that three days after purchasing the vehicle, he found a significant amount of rust on the underbody of the vehicle. He contacted the authorized service agent, who inspected the vehicle and offered to either provide him a replacement vehicle or to treat the affected area. However, because the proffered vehicle was not in his desired color, and because he was advised by an out-of-state "Millwright" that the problem could not be effectively treated, he did not accept either offer.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle because surface rust was normal and beneficial to the components in question. The Manufacturer's witness testified that he inspected the vehicle the one time that the Consumer brought it back to the dealership. His inspection revealed that there

was surface rust on the "non-paint, non-appearance" surfaces that were routinely given no finish coating, and he testified that rust in these areas was normal. He explained that even if left untreated, this rust will not cause damage; however, for customer satisfaction he offered to apply an acid-based cleaner and to paint the area. He stated that he has never seen a vehicle come back with a rust complaint after this acid-based treatment has been applied. The Manufacturer's representative testified that he had seen this type of surface rust on many vehicles with heavy-duty underbody components that were not treated. He explained that those components are left untreated by the Manufacturer with the intention that surface rust develops, because it created a protective coating which was a normal, intended characteristic for that vehicle.

Upon consideration of the evidence presented, a majority of the Board found that the evidence failed to establish that the rust on the underbody of the vehicle, as 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.

Busch Pharmacy LLC and Patel v. Mercedes-Benz USA LLC, 2015-0407/TPA (Fla. NMVAB November 12, 2015)

The Consumer complained that the left front wheel "flew off" while driving his 2014 Mercedes GL450. The Consumer testified that he was sitting in the rear of the vehicle while one of his assistants was driving. When the speed reached approximately 60 miles per hour, the right front wheel suddenly came off the vehicle and hit the vehicle's front fender. The Consumer was concerned and frustrated that the vehicle had been at the Manufacturer's authorized service agent since May 29, 2015. The authorized service agent has been waiting for a fender from the Manufacturer, which has been on national backorder. He additionally acknowledged that in approximately February or March of 2015, he had a nail in that same tire and took it to Firestone to have the tire plugged. He stated that his vehicle was never put on the lift and he did not believe that the tire was patched at that time. He was unable to provide any paperwork from Firestone stating what was done to the tire.

The Manufacturer asserted the alleged nonconformity was the result of an accident or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer contended that there was no manufacturing defect or condition; rather, the wheel came off the vehicle because the lug nuts were left loose when the tire at issue was patched, prior to the incident. The Manufacturer's witness testified that on May 29, 2015, while putting the vehicle's original tire on a new rim after the accident, he observed a patch on the inside of the tire. According to him, the only way to apply a patch to the inside of a tire was to completely remove the tire from the vehicle, necessitating removal of the lug nuts. In his opinion, the wheel lugs had been left loose when the tire was patched and placed back on the vehicle, and if wheel lugs were left loose, they will back all the way off the stems, leaving the wheel free to come off the vehicle. He further stated that, prior to the wheel falling off, the last time the vehicle was seen by any Manufacturer's authorized service agent was December 17, 2014, when the vehicle came in for an oil change and no work was done to the tires. Approximately two weeks prior to hearing, he inspected the vehicle and took photographs which showed a plug on the exterior of the tire and a patch on the interior of the

tire. In his opinion, the tire had to have been taken off the wheel and lug nuts loosened at some point between December 17, 2014 and the wheel incident.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the left front wheel suddenly flying off while driving complained of by the Consumer was the result of an accident or unauthorized modifications or alterations of the motor vehicle by persons other then the manufacturer or its authorized service agent. Accordingly, the Consumers' complaint of the left front wheel suddenly flying off while driving did not constitute a nonconformity within the meaning of the law, and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Reasonable Offset for Use §681.102(19), F.S.

Moore v. General Motors LLC, 2015-0251/TPA (Fla. NMVAB October 10, 2015)

The Consumer's vehicle was declared a "lemon" by the Board as described under the "Nonconformity" section above. Prior to the hearing, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by General Motors. The procedure declined to consider the Consumer's complaint on the grounds that it was without jurisdiction to do so. Subsequently, the Consumer requested arbitration by this Board, seeking a refund.

During the refund calculation, the Board voted, without objection from the Manufacturer, to freeze the Consumer's mileage as of the date she filed her claim with the BBB, resulting in the mileage attributable to the Consumer being 23,661 miles (23,850 odometer miles as of the date of filing, reduced by 11 miles at delivery and 178 other miles not attributable to the Consumer).

MISCELLANEOUS PROCEDURAL ISSUES:

Endrizzi v. Mercedes-Benz USA LLC, 2015-0279/ORL (Fla. NMVAB October 13, 2015)

One day prior to the hearing, the Board Administrator received two photographs from the Manufacturer by U.S. Mail. Pursuant to paragraphs (6) and (22), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, all documents a party intends to present for consideration by the Board must be received by the Board Administrator and the opposing party no later than five days before the hearing. Failure to do so may result in the Board declining to consider the documents "unless good cause is shown for [the] failure to comply." Although Counsel for the Manufacturer asserted the photographs had been timely-emailed to the Consumer, the Consumer stated she had not received them five days before the hearing, and objected to the photographs as not being timely-provided to her. She additionally asserted that, had she timely received the two photographs, she would have submitted photographs of her own in response to these new photographs.

Upon consideration by the Board, the late-filed photographs were not considered at the hearing.