OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2014 - March 2014 (1st Quarter)

NONCONFORMITY 681.102(15), F.S.

Chiofalo v. Ford Motor Company, 2013-0408/MIA (Fla. NMVAB February 17, 2014)
The Consumer complained of a vibration upon acceleration and also during speeds between 35 and 40 miles per hour in his 2013 Ford F150. The vibration did not begin until after the vehicle had been driven for about 9,000 miles. The Consumer began to feel the vibration as soon as he started the engine and depressed the gas pedal; then, it stopped and started again when the vehicle was traveling between 35 to 40 miles per hour. Since the last repair attempt, the vibration was worse when there was weight in the back of the truck.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; in the alternative, the vehicle was repaired prior to the Manufacturer's final repair attempt. A Field Service Engineer for Ford Motor Company test drove the truck at the final repair attempt and again at Ford's prehearing inspection. He did not experience vibration that he considered to be "abnormal" during either of those test drives. He described the truck as having a "stiff" suspension for hauling payloads and towing; in addition, the tires were "stiff" and the driveline was "stiff." His opinion was that the dealership replaced the driveshaft in an attempt to "fine tune" it to achieve a "lower tolerance" for the vibration. The Board concluded that the vibration upon acceleration and when driving between 35 and 40 miles per hour 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 nonconformity continued to exist after the final repair attempt. Accordingly, the Consumer was awarded a refund.

McConnon v. Hyundai Motor America, 2013-0413/FTL (Fla. NMVAB February 24, 2014)
The Consumer complained of a defective telephone/navigation/entertainment system in her 2012 Hyundai Vera Cruz. Before she leased the vehicle, the Consumer asked the salesman at Lehman Auto World, the Manufacturer's authorized service agent, if it was equipped with a full navigation system, as a salesman at another dealership told her the only vehicle so equipped was in North Carolina. According to the Consumer, the salesman told her if she wanted this vehicle it would be so equipped, and it was so equipped when she took delivery. The Consumer started experiencing problems immediately on her drive out of the dealership; the GPS did not work properly and the telephone voice incoming and outgoing was "terrible." Since then, two other telephone/navigation systems have been installed in her vehicle, but she continued to have the same problems. The poor quality on the telephone was affecting her ability to conduct business, especially when a customer requested that she call back. The owner of Mobile Sounds was a witness at the hearing and testified that his technician installed each of the telephone/navigation systems in Consumer's vehicle at the request of Lehman Auto World, and he was paid by Lehman Auto World. He never spoke with the Consumer regarding the installation or payment of any of

the three systems that were installed. He further testified that, in addition to each of the installations that were performed by his technicians, he personally went to the Consumer's home on multiple occasions in an attempt to rectify the problems that were occurring with the systems.

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 unauthorized modifications or alterations of the motor vehicle by persons other then the manufacturer or its authorized service agent. According to a District Parts & Service Manager for Hyundai Motor America, the Rosen and Alpine systems installed in the Consumer's car were "aftermarket" parts that were not warranted by Hyundai. He maintained that, if the Hyundai dealership arranged for the systems to be installed, it was without the Manufacturer's authorization. The Board concluded that the defective telephone/navigation system 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 modification, while not authorized by the Manufacturer, was authorized by its authorized service agent; therefore, the Manufacturer's assertion that the nonconformity was the result of unauthorized modification of the vehicle was rejected. Accordingly, the Consumer was awarded a refund.

McBride v. Toyota Motor Sales USA Inc., 2013-0445/JAX (Fla. NMVAB March 10, 2014)
The Consumers complained of a mold or mildew odor from the air conditioning vents in their 2013 Toyota Sienna XLE. The Consumers first noticed the odor around the time of their 5,000 mile service, but attributed it to the fact that there had been a lot of rain in their area; they assumed the odor would go away after the rain subsided. The odor remained, however, and worsened. The odor was described as pungent, and became worse as the outside temperature and humidity increased. The odor occurred when the vehicle was first started in the morning, lasting for 40 to 60 seconds. The odor would recur if the vehicle sat without the engine running for approximately one and one-half hours, although it was not as pungent later in the day as it was first thing in the morning. Mr. McBride acknowledged that he declined to have a cleaning and filter change performed that was recommended in a Toyota Technical Service Bulletin (TSB) related to HVAC odors, because he felt that he should not have to pay $300.00 for the service, particularly since the service was intended only to improve, and not to eliminate, the odor problem. Mr. McBride pointed out that the 2011 Toyota Sienna he and his wife traded in for the 2013 Sienna did not exhibit a similar problem. Mr. McBride testified that the odor was a health problem for him, because of his allergies, and he was concerned about the health of his three-year-old and one-week-old children.

The Manufacturer, represented by Southeast Toyota Distributors, asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. In addition, Southeast Toyota Distributors stated, "[f]urthermore, the customer declined the dealer and manufacturer the opportunity(ies) [sic] to perform the Technical Service Bulletin that would minimize what the customer is experiencing." A Senior Field Technical Specialist with Southeast Toyota Distributors, testified that Toyota Motor Sales USA, Inc., had determined that HVAC odors were not covered under its warranty, and were therefore the responsibility of the Consumer to correct. He indicated that he has frequently smelled the odor in question in other Toyota vehicles, and believes it was not mold, but simply "stale air." He acknowledged he had no personal knowledge as to whether any tests were performed by the Manufacturer to confirm that the odor was not caused by mold. The Board concluded that the mold or mildew odor from the

air conditioning vents 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 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.

Zhang v. Volvo Cars of North America, 2013-0432/TPA (Fla. NMVAB March 7, 2014)
The Consumer complained of an oil leak in the intermediate section of the engine block by the front crank plug, and a loud, rattle noise from the dash in her 2012 Volvo XC60. The Board found those problems to be nonconformities. The vehicle was out of service by reason of repair of the nonconformities for a total of 28 cumulative days. 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 and thereafter, the vehicle was subjected to repair by the by the Manufacturer. The Manufacturer asserted that the vehicle had not been out of service by reason of repair for 30 days; therefore, the Consumer was not entitled to relief. 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. A majority of the Board concluded that the nonconformities caused the vehicle to be out of service by reason of repair a total of 28 days. After 15 or more days out of service, the Manufacturer received the written notification from the Consumer required by Section 681.104(1)(b), Florida Statutes. After receipt of said notification, the Manufacturer or its authorized service agent had at least one opportunity to inspect or repair the vehicle, also as required by the statute. 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 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.

Smith v. General Motors LLC, 2013-0342/MIA (Fla. NMVAB January 10, 2014)
The Consumer asserted that the air conditioner did not cool the back passenger compartment in his 2013 Buick LaCrosse. The Consumer set the temperature on the vehicle's air conditioner between 70 and 74 degrees, and while the front of the vehicle got cool and was comfortable, the passengers in back complained it was too hot. According to the Consumer, in order for the back passengers to be comfortable, he had to set the temperature in the vehicle to 69 degrees or lower, which made it uncomfortably cold in front. He stated the rear of the vehicle does not have its

own air conditioner vents. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. A Field Service Engineer for General Motors explained this was a black vehicle with black interior, a sunroof, and no tinting on the windows. In addition, while the vehicle was equipped with dual climate controls in the front, the rear did not have separate temperature controls. At one of the repair attempts the air conditioner was set to 60 degrees and when the technician checked the temperature at the air duct, it read near 52 degrees. The Board found that the evidence failed to establish that the air conditioner failing to cool the back 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.

Parramore v. Ford Motor Company, 2013-0390/TPA (Fla. NMVAB February 17, 2014)
The Consumers asserted that there were sharp edges on window seams and door moldings in their 2013 Ford Escape. Mrs. Parramore testified that on the date of delivery of the vehicle, she cut her finger on the driver's door/window molding. Shortly thereafter, she bruised her legs on a "sharp" edge on the bottom of the door while exiting the vehicle. According to Mrs. Parramore, this happened two to three times. She indicated that these occurrences left a "bad taste in her mouth." The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified there was no problem with the molding in this vehicle. According to the witness, all Ford vehicles, except for the Mustang, are designed with a metal insert in the molding; however, the end caps are made of plastic. During a July 2013 repair attempt, he ran his fingers across the inch strips on all four doors and felt no abrasions. There was a "part line" on the molding; however, it was not rough enough to injure a person. At the Manufacturer's final repair attempt, any visible plastic mold part lines in the areas pointed out by the Consumers were filed down. During the hearing, the Board inspected the vehicle in the presence of the parties. All four doors and windows were visually inspected and touched on the interior and exterior of the vehicle. No sharp molding edges were seen or felt. The Board found that the evidence failed to establish that the door and window molding edges, as complained of by the Consumers, 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 Consumers' case was dismissed.

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

Fried v. BMW of North America LLC, 2013-0320/FTM (Fla. NMVAB January 21, 2014)
The Consumers' 2011 BMW 328ic caught fire under the hood causing damage to the inside of hood. The Consumers opined that the fire started due to the constant use of the trickle charger as suggested by the Manufacturer's authorized service agent. The Consumers acknowledged that they possess two other vehicles and that this vehicle was used infrequently. The Manufacturer asserted the alleged fire under the hood nonconformity was the result of an accident by persons other than the Manufacturer or its authorized service agent. A National Field Analyzer for BMW of North America testified that, on October 10, 2013, he inspected the vehicle and found the trickle charger clamp still attached and lined up with the burn spots on the bottom of the hood. Any damage to the inside of the hood resulted from the trickle charger cable being in close

proximity to the underside of the hood while charging. In his opinion, if the hood had been up 18 or 20 inches; no arching burns could have occurred. The Board concluded that the greater weight of the evidence established that the fire under the hood was the result of the hood being situated in close proximity to the charger parts while the vehicle was being charged, which was an accident. The accident was not caused by the Manufacturer or its authorized service agent. accordingly, the complained of defect did not constitute a "nonconformity." The Consumers' case was dismissed.

Morakis v. Mercedes-Benz USA LLC, 2013-0351/WPB (Fla. NMVAB February 7, 2014)
The Consumer complained of a condition which caused the engine to overheat and the gears to lockup, and a resulting unpleasant odor in her 2012 Mercedes-Benz GLK350. The Consumer detected the odor before she was aware the engine was overheating, as was evidenced by the fact that the air filter was replaced at the first repair attempt. The Consumer had installed a radar warning detector and a DVD player on the passenger side of the vehicle for her children to watch. According to the Consumer, she was the only person who drives the vehicle. The Manufacturer asserted the alleged nonconformity was the result of abuse by persons other than the manufacturer or its authorized service agent; and the claim by the Consumer was not filed in good faith as the Consumer modified the vehicle by wiring an aftermarket device into the network at the "EIS." The Shop Manager at Mercedes-Benz of Palm Beach testified that, while plastic radiator tanks and plastic fittings in transmission lines have been in use for 20 or 30 years, he has never seen plastic parts melted like those in the Consumer's vehicle. He was personally involved with the repairs to the vehicle in May, June and July of 2013, that he personally test drove the vehicle at each of those visits, and that the engine never overheated with him. According to him, a cause for the overheating was never found, but at the June 2013 repair attempt the radiator, transmission and torque converter were replaced, only to have the vehicle come back in July with the same pieces melted again. A Field Technical Specialist for Mercedes-Benz USA, testified that, in his opinion, someone "brake torqued" the vehicle, which meant, put the vehicle in neutral gear and gunned the engine, resulting in the extreme overheating and damaged parts. Upon consideration by the Board of the evidence presented, it was concluded that the vehicle overheating condition complained of by the Consumer was the result of abuse by persons other than the Manufacturer or its authorized service agent. Consequently, the problem the Consumer complained about 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.:

Incidental Charges §681.102(8), F.S.

Crenshaw v. Toyota Motor Sales USA Inc., Lexus Division, 2014-0023/PEN (Fla. NMVAB March 24, 2014)
The Consumer's 2014 Lexus IS 250F was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as incidental charges: $154.50 for removal of the window tint (as recommended on November 7, 2013 by Lexus of New Orleans as a possible resolution to the keyless entry malfunction); $318.87 for gasoline purchased in connection with travel from his home in Pensacola to the authorized service agents; $291.85 for unreimbursed

vehicle rental charges; an additional $138.00 for rental vehicle and equipment necessary to tow the vehicle from New Orleans to Pensacola; $346.59 in hotel charges; $42.94 for copying costs; and $72.95 for postage to send written notification to the Manufacturer and documents to the Manufacturer and the Office of Attorney General. The Board granted all the incidental charges listed above that were requested by the Consumer.

MISCELLANEOUS PROCEDURAL ISSUES:

Hudson v. Kia Motors America Inc., 2013-0352/STP (Fla. NMVAB February 14, 2014)
During the hearing, the Manufacturer sought to assert the following statutory affirmative defense not timely raised in its Manufacturer's Answer: the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. Paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer and filed within the prescribed time periods may not be raised at the hearing, except as otherwise provided in the rules or as permitted by the Board. The Manufacturer's representative explained that, due to "excusable neglect," Kia did not time-stamp the Notice of Arbitration and upon inquiry by its attorneys as to the date of receipt, Kia misinformed its attorneys of the date it had received the Notice of Arbitration, which resulted in the attorneys calendaring an incorrect due date for the Manufacturer's Answer. The Consumer objected to the Manufacturer's request to present its untimely asserted defense. Upon consideration by the Board, the Manufacturer was not permitted to raise the untimely asserted affirmative defense at the hearing. The Manufacturer's Attorney was allowed to cross-examine the Consumer, to present rebuttal testimony and to give a closing statement. The Board further ruled that the Manufacturer would be allowed to present evidence to support its additional defense that the Consumer had not presented the vehicle "for the required three repairs plus a final repair attempt" of one or more of the alleged nonconformities, asserted in the written Answer; however, no testimony was presented at the hearing to support that defense.

Hoeltke v. Ford Motor Company, 2013-0450/ORL (Fla. NMVAB February 21, 2014)
At the start of the hearing, the Manufacturer, through Counsel, made a "Motion to Dismiss" the case, asserting that the Board lacked jurisdiction to hear the claim. The Manufacturer, through counsel, argued that, because the Consumer had filed a personal injury action in circuit court, matters relating to accident, causation and personal injuries were necessarily at issue in the case, and the Board was without jurisdiction to make findings on those issues. Upon consideration, the Board determined that the case presented by the Consumer requested the Board to make findings regarding the alleged nonconformity, and whether a reasonable number of repair attempts were undertaken, which were matters well within its jurisdiction. *See* §681.1095(8), Fla. Stat. Therefore, the Manufacturer's Motion to Dismiss was denied.