

**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 failure 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.