OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2017 - December 2017 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Escobar v. Mercedes-Benz USA, LLC, 2017-0359/FTL (Fla. NMVAB November 16, 2017)

The parties stipulated that the Consumer leased a 2016 Mercedes GLE450 AMG Coupe. The Manufacturer asserted that the Consumer was not qualified for repurchase relief under the Lemon Law because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. Focusing on the documents accepted into evidence, the Manufacturer pointed out that the vehicle was leased to the Consumer by a Massachusetts dealership; the Massachusetts dealership was listed as the Lessor on the lease document; and that there was no evidence that the Florida Lemon Law fee was paid as part of the transaction. Pointing to the Consumer's acknowledgment that the vehicle was delivered to Florida by an independent transport hired by the Consumer, the Manufacturer argued that the dealership's responsibility for the vehicle, and participation in the sales transaction, ended in Massachusetts, when the vehicle was picked up for transport by the Consumer's independent transport company. The Manufacturer argued that, other than the ultimate registration of the vehicle in Florida, and possibly the payment of sales tax on the lease, there was nothing that tied the present case to Florida.

The Consumer asserted that the vehicle was sold in this state, and that his vehicle was therefore a "motor vehicle" under the Lemon Law. He testified that he had been unable to find the vehicle he wanted from a Florida dealer that would negotiate with him, so he conducted a nationwide search for the vehicle using the AutoTrader web site. He found a vehicle he was interested in at a Massachusetts dealership, and was able to negotiate an acceptable price. The Consumer testified that the deal was arranged and completed through exchanges via Fed Ex, email and text messaging, and acknowledged that he was charged for courier/Fed Ex fees incurred by the Massachusetts dealership. The Consumer acknowledged that he independently made the arrangements to have the vehicle delivered to him in Florida, and was responsible for the cost of transport.

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

In order for a consumer to qualify for relief under the Lemon Law, the vehicle which is the subject of the claim must meet the above-quoted definition. Upon consideration of the totality of the evidence presented, including (1) the Consumer conducted a nationwide search for the vehicle; (2) the Consumer was charged for courier costs incurred by the dealership in association with the purchase; and (3) the Consumer was responsible for the cost of transporting the vehicle from Massachusetts to Florida, which evidenced delivery of the vehicle to the Consumer in Massachusetts, the Board found that the motor vehicle was not "sold in this state" and therefore did not constitute a "motor vehicle" under the statute. Accordingly, the Consumer's case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Ruiz v. Toyota Motor Sales USA, Inc., 2017-0342/FTL (Fla. NMVAB October 25, 2017)

The Consumer complained of a pull to the right in his 2017 Toyota Tundra. The Consumer testified that the evening he purchased the vehicle, he noticed the pull on his short drive home, but better realized the extent of the problem while driving the vehicle with his wife the next day, so he immediately returned to the authorized service agent for repair. He described the vehicle's alignment as "completely off." At that first repair visit, the day after he purchased the vehicle, he stated that when the vehicle was returned to him that day, he almost immediately noted that the problem was not corrected, so he requested further repairs that day. According to him, despite multiple repair attempts by the authorized service agent, the vehicle continued to pull to the right. He stated that the pulling occurred under all driving conditions, and was of sufficient severity that he had to pull the wheel to the left in order to offset the vehicle's pull to the right. The Consumer noted that at one point, he had a sore arm and thumb from the effort required to compensate for the pull to the right. In order to make sure that what he was experiencing was not "his imagination," he testified that he took the vehicle to other companies that specialize in alignment repairs in April of 2017 and September of 2017. He was told that the vehicle was pulling to the right, and that the vehicle needed an alignment. He acknowledged that the pull was not as pronounced as it was when he initially took the vehicle in for repair, but stated that constant pressure was still required on the steering wheel in order to keep the vehicle driving straight.

The Manufacturer asserted the vehicle was operating as designed. A Manufacturer's representative was involved with the vehicle at the March 30, 2017, final repair. He testified that the vehicle was inspected for problems that would typically cause a vehicle to pull, and he identified none of the problems that typically would lead to an alignment issue, leading to the conclusion, based on the test drive, that the vehicle was following the crown of the road. Another Manufacturer's representative testified that nothing was observed in the vehicle during the test drive that was considered unusual for a big truck.

During the hearing, the Board inspected and test drove the vehicle under a variety of driving conditions. Two Board members noticed the vehicle pulling to the right during highway driving, regardless of the "slope of the highway." One Board member noted that he had to constantly correct the steering wheel in the same direction in order for the vehicle to track straight. The Board found that the evidence established that the vehicle pulling to the right substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Gutierrez v. Hyundai Motor America, 2017-0309/FTL (Fla. NMVAB November 16, 2017)

The Consumer complained of a defective panoramic sunroof in his 2015 Hyundai Sonata. The Consumer testified that his concern started with a subtle squeaking noise coming from the panoramic roof. He explained that he was told the sunroof had an air leak, which was fixed by pushing the sunroof seal in. The noise came back after a couple of weeks. The Consumer stated he returned to the authorized service agent, at which time silicone was applied to the sunroof seal in an attempt to stop the noise. The noise continued. The Consumer stated that he later received notice from the Manufacturer that there was a recall for all Sonata vehicles equipped with the panoramic sunroof option. The recall notice stated that the sunroof may detach while driving due to a bonding issue with the sunroof wind deflector. Pursuant to the recall notice, the Consumer returned to the authorized service agent to have the sunroof glass replaced. Thereafter, the Consumer began to hear a rattle noise, in addition to the squeaking noise. He testified that the rattle noise would improve after each subsequent repair, but would quickly return. The squeaking noise always remained present.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that the Consumer used his sunroof and the noise did not come back for a week or so after each repair visit.

During the hearing, the Board inspected and test drove the vehicle on city streets for one mile. During the test drive, a squeaking and rattling noise from the sunroof area was heard by all. A Board member described the noise as being like a package of plastic water bottles moving in the back seat of a car. Another Board member described it as a piece of metal bumping on another piece of metal. The Board found that the evidence established that the defective panoramic sunroof 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.

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.

Garrett v. Toyota Motor Sales USA, Inc., 2017-0291/TLH (Fla. NMVAB October 13, 2017)

The Consumer complained that the fabric covering the vehicle's seats "frays" in her 2015 Toyota Corolla. The Consumer testified that she first became aware of this when an employee of the Manufacturer's authorized service agent assisted her in adjusting the driver's seat. At that time, she saw some loose threads hanging from the bottom of the driver's seat and pointed that out to the authorized service agent. In addition, the Consumer indicated that she believed the fabric was currently fraying at the seam lines on the bolster of the driver's seat back. She indicated that the current fraying "is not always visible depending on the amount of sunshine."

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 the Manufacturer was not able to verify a concern of the vehicle's seat upholstery fabric fraying. He asserted that the Manufacturer attempted to assist the Consumer by replacing the driver's bottom seat cover in the Consumer's vehicle during the repair attempt in April 2017. He stated that there was no defect in the upholstery fabric of the seats.

During the hearing, all visible surfaces of the vehicle's seats were inspected by each Board member and the Consumer showed them where she believed there was current fraying. The members of the Board observed what was characterized as normal automobile upholstery; no fraying of the seat upholstery was observed. The Board found that the evidence failed to establish that the seat upholstery fabric fraying 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.

Nieuwenhuizen v. BMW of North America, LLC, 2017-0340/ORL (Fla. NMVAB November 15, 2017)

The Consumer complained of a drive train malfunction in his 2016 BMW 428i Gran Coupe. The Consumer testified that he first began experiencing the drive train malfunction problem on January 2, 2017. He stated that the problem had always occurred while the vehicle was being driven at speeds of approximately 45 miles per hour, and when it happened, the "check engine" warning light came on, the screen displayed the message "drive train malfunction," and the transmission stayed in one gear for a very long time before it jerked into the next gear. The Consumer stated that he has no training as an auto mechanic and denied that he had ever opened the hood of the vehicle, seen a message advising him to close the hood, disconnected the waste gate connector, or directed anyone else to do so. He also stated that no one has looked at the engine or under the hood of his vehicle except representatives of Fields BMW, the authorized

service agent to which he took his vehicle for repair. The Consumer's wife likewise testified that neither she, nor anyone on her behalf, has tampered with the vehicle.

In its Amended Answer filed prior to the hearing, the Manufacturer asserted the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent, and the claim by the Consumer was not filed in good faith because the Consumer, or someone on his behalf, tampered with the subject vehicle. The Manufacturer's witness testified that the first time the Consumer's vehicle came in for repair, it was hooked up to diagnostic equipment, and a fault code for the Digital Motor Electronics (DME) waste gate was found. The DME waste gate is part of the turbocharger, and is what allows the turbocharger to perform its duties to increase engine horsepower when necessary. The electronic waste gate actuator was replaced at the first repair visit, and a week later, a connector at the waste gate actuator was repaired. During the next four visits, the same fault code was found, and the wiring harness module for the waste gate controller was replaced, the waste gate actuator was replaced for a second time, the complete turbocharger assembly was replaced, and the DME control module, which controls all the electronics for the engine, was replaced.

According to the Manufacturer's witness, at no time was the Consumer's complaint duplicated, nor did the authorized service agent ever see the "drive train malfunction" message displayed. He said he "had suspicions" about what was going on with the vehicle, so he looked into the "fault context," which gave information about when the fault code was set, at what mileage, at what speed, and the engine rpms, etc. This data showed that when the fault in the Consumer's vehicle was set, there were zero or very low engine rpms, meaning that the fault was occurring mostly during start up or when the engine was not running, and at zero speed, meaning that the vehicle was not moving, which was inconsistent with the Consumer's report that the drive train malfunction always occurred while the vehicle was in motion and being driven at approximately 45 miles per hour. The witness testified that he attached a tie-strap to the waste gate connector in order to make sure that the connector was not coming loose, and also to be able to tell if someone was disconnecting that connector and then reconnecting it. According to him, the connector was easy to unplug without using any tools, so he disconnected it to see what fault he would get, and he found that disconnecting it created the exact fault code that had been found in the Consumer's vehicle. Subsequently, he had occasion to inspect the tie-strap, but he was unable to conclusively determine that the connector had been disconnected because he found that it could be moved down and the connector could be unplugged without breaking the tie-strap. After the DME was replaced, even though the Consumer sent written notification to the Manufacturer, the witness thought the vehicle was repaired because the fault had not recurred, so no repairs were performed in June 2017; however, when the vehicle returned in July 2017 with the same fault code, it was determined that no further repairs would be performed unless the problem could be duplicated. At that time, he was instructed to put anti-tampering tape or paint around the waste gate and DME connection points. When the vehicle was inspected on October 23, 2017, the anti-tampering paint on the connector for the waste gate actuator showed signs of having been disturbed and "did not look like what we put on there." He asserted that no one from the authorized service agent did anything to the paint and, in his view; the only explanation for the difference was that someone had tampered with the connector.

The Manufacturer's representative testified that he saw the photographs that were later submitted into evidence, he determined that "something was up" because a gap could be seen where the thick anti-tampering paint had been broken on the back side of the connector. At the prehearing inspection, he checked for fault codes and found the same fault code for the waste gate actuator had been set three miles prior to the inspection, and the Consumer's house was three miles from the authorized service agent where the inspection occurred. He then did "key reads," meaning that he reviewed the data stored in the Consumer's key, which includes information such as when the car was due for service, any fault codes that had been set, etc. In reviewing the key data, he found there were several "check control messages" noted. Among those was a message that had been displayed to notify the driver that the bonnet (or hood) of the vehicle was open, and the date showed that notification had occurred at the same mileage at which the "drive train malfunction" message was displayed. He stated that "there is no question in his mind that tampering is going on" with this vehicle based on his review of the data and photographs.

During the hearing, the Board inspected the vehicle in the parking lot at the hearing site, where the hood was opened and the Board inspected the connector on which the anti-tampering paint was applied. It was obvious that the connector had been disconnected. Two Board Members attempted to disconnect the connector and were unable to do so.

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." (Emphasis added) §681.102(15), Fla. Stat. Upon consideration of the evidence presented, specifically the fault context data and key read data, which showed that the vehicle was not in motion and the hood was open when the fault codes were set, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the drive train malfunction was the result of abuse, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the drive train malfunction complained of by the Consumer did not constitute a "nonconformity" as defined by the statute, and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

Hayes v. FCA US LLC, 2017-0263/MIA (Fla. NMVAB December 21, 2017)

The Consumers' 2015 Dodge Grand Caravan was declared a "Lemon" by the Board based on the following nonconformities: vibration and shaking while driving, an inoperable rear hatch, defective front struts, a misfire condition, a defective rear latch, a defective air conditioner rear blow motor, a "no start" condition, and a defective lock cylinder. The Consumers requested reimbursement of the following as incidental charges: $56.94 for certified mail costs, $74.28 for copies made at Fed Ex, and $563.32 for new tires. The Consumers additionally sought reimbursement of $34.23 for the cost of ink purchased from Office Depot; $105.00 for

maintenance service for the Consumers' 2011 vehicle; hotel expenses for additional nights incurred during out-of-town trips to dog shows; and the cost of an inspection of the subject vehicle performed by an independent mechanic the day before the hearing, but following the filing of the Manufacturer's Amended Answer withdrawing its affirmative defenses. The Consumer explained that because the subject vehicle was at the authorized service agent for repair, she had to utilize another household vehicle, a 2011 model vehicle, and had to pay a $105.00 co-payment for maintenance repairs to that vehicle. The Consumer testified that she incurred the additional hotel expenses because she did not feel that driving her 2011 vehicle at night was safe, so instead of leaving the out-of-town dog shows the day they ended, she would stay the night and leave for home the following day. With regard to the request for reimbursement for the vehicle inspection, the Consumer testified that she wanted a second opinion as to the defects of her vehicle, so she took the vehicle to an outside mechanic. The Manufacturer objected to the request for reimbursement of the cost of ink, the cost of the co-pay for repair of the Consumers' 2011 vehicle, the cost of additional hotel expenses incurred, and the cost of the inspection.

The Board found that the award should include reimbursement of the following as reasonable incidental charges: $56.94 for certified mail costs, $74.28 for the cost of copies at Fed Ex, and $563.32 for new tires the Consumers purchased for the vehicle. Consumers' request for reimbursement of $34.23 for the cost of ink purchased from Office Depot; $105.00 for maintenance service for the Consumers' 2011 vehicle; hotel expenses for additional nights incurred during out-of-town trips to dog shows; and the cost of an inspection of the subject vehicle performed by an independent mechanic the day before the hearing, were all denied, as the Board found that those costs were not a direct result of the nonconformities. §681.102(7), Fla. Stat.

Enzor v. Nissan Motor Corporation, USA, 2017-0386/JAX (Fla. NMVAB December 5, 2017)

The Consumer's 2016 Nissan Sentra was declared a "Lemon" by the Board. The Consumer stated that she dropped her vehicle off at the authorized service agent for the post-notice repair attempt on June 26, 2017, and at that time was given a rental car from Gainesville Nissan. She testified that her vehicle remained with the authorized service agent, and she retained the rental car that had been provided to her by the authorized service agent, until August 17, 2017, when the rental car was hit by another vehicle while it was parked at her residence. At that time, she contacted Gainesville Nissan, which responded by notifying her that she could pick up her vehicle and return the rental. The Consumer requested reimbursement of $500.00 for payment requested by Gainesville Nissan to cover the Consumer's insurance deductible as an incidental charge. The Consumer explained that she received a phone call the day before the hearing from Gainesville Nissan, requesting that she pay them $500.00. The $500.00 was represented to be the deductable under the Consumer's car insurance for the damage to the Consumer's rental car on August 17, 2017. As of the hearing, the Consumer had not made the requested $500.00 payment to the dealership. The Manufacturer objected to the $500.00 request as not being directly caused by the nonconformity. The Consumer's request for the $500.00 was denied, as a majority of the Board found that the cost was not a direct result of the nonconformity. §681.102(7), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Caba v. American Honda Motor Company, 2017-0329/FTL (Fla. NMVAB November 17, 2017)

During the hearing, the Consumer sought to introduce into evidence a video of the alleged defects that were the subject of the case. The video was not provided to the Board or to the Manufacturer prior to the hearing. The Manufacturer objected to the video. Pursuant to paragraphs (6) and (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Board may decline to consider documents or other evidence not filed with the Board Administrator, and provided to the opposing party, no later than five days before the scheduled hearing. Upon consideration, the Board denied the Consumer's request to include the video into evidence.

In addition, the Manufacturer sought to introduce into evidence a video located on the website YouTube.com. A link to the video was provided to the Consumer and to the Board before the hearing; a copy of the video, saved to DVD or any type of flash or thumb drive, was never provided. According to the *Office of the Attorney General, Notice to Parties, E-Filing Procedures & Requirements*: "Video files and audio files . . . that are sent via email attachment will not be accepted and will not be considered filed. These must be sent via US Postal Services or other courier." The Consumer objected to the video. Based on the aforementioned *Notice to Parties*, the video was not accepted into evidence.