OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2018 - March 2018 (1st Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Mutch Expedite LLC, Robert Moffett and Matthew Reid v. Ford Motor Company, 2017-0471/JAX (Fla. NMVAB February 13, 2018)

The Manufacturer asserted the "Owner" was "not a 'Consumer'" as that term was defined by the Lemon Law. The Manufacturer elicited testimony from one of the Consumers that the vehicle was a "commercial vehicle," and was not used for personal, family or household purposes. 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:

> 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.

(emphasis added). The Manufacturer asserted that the Consumers were not qualified for relief under the Lemon Law in this case because the vehicle was used solely for commercial or business purposes. That argument was rejected on the basis of *Results Real Estate v. Lazy Days R.V. Center*, 505 So. 2d 587 (Fla. 2nd DCA 1987); the Manufacturer presented no evidence showing the Consumers were not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat. Therefore, the Manufacturer's assertion was denied and the Consumers were subsequently awarded a refund by the Board.

NONCONFORMITY 681.102(15), F.S.

Silberstein v. Volkswagen/Audi of America, Inc., 2017-0369/FTL (Fla. NMVAB January 25, 2018)

The Consumer complained of an intermittent brake noise in his 2015 Audi S5 Cabriolet. Shortly after his purchase of the vehicle, the Consumer began to notice an intermittent brake squeak that mostly occurred when bringing the vehicle to a stop from low speeds. He explained

that because 80% of his driving was done around town, most of his driving was done at low speeds. The Consumer testified that the squeak initially occurred infrequently, but increased in frequency as the vehicle's mileage increased. And while the noise initially occurred most often in the morning, as the vehicle's mileage increased the Consumer began to hear the noise throughout the day. The Consumer stated that by the September 16, 2016 repair attempt, when the vehicle had more than 8,000 miles, he felt like the brakes were "screaming like a banshee." The Consumer acknowledged that the repairs performed at that time, replacement of the brake pads and rotors, did improve the noise. The improvement was only temporarily, however, and as it had after initially purchasing the vehicle, the noise began again and steadily increased in frequency until the brake pads, rotors and guide pins were replaced in July 2017, this repair again occurring after approximately 8,000 more miles were put on the vehicle. According to the Consumer, the noise in question could be heard whether the vehicle's convertible top was up or down, and could also be heard when the radio was playing. In addressing the current noise level, the Consumer testified that the vehicle has accumulated less than 8,000 miles since the July 2017 final repair attempt, so the noise was not currently at its worst; however, it has been steadily increasing since that repair, and he was certain that it would continue to worsen as it consistently had in the past. The Consumer played two videos for the Board which demonstrated the noise. According to the Consumer, the videos were taken on July 16, 2017, with 17,551 miles on the vehicle, and on December 14, 2017, with 21,716 miles on the vehicle. The Consumer stated that he was concerned for his safety because he has always understood that a brake noise was indicative of a need to change the brake pads and/or rotors; therefore, to continue driving the vehicle when it had a brake noise was not safe.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that he personally was never able to reproduce the noise. He acknowledged that, according to the repair orders, another service consultant did reproduce the noise. A second Manufacturer's witness testified that the brake pads and rotors were replaced as a "goodwill" gesture.

The Board found that the evidence established that the intermittent brake noise 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.

Moncada v. Mercedes-Benz USA, LLC, 2017-0461/WPB (Fla. NMVAB February 5, 2018)

The Consumers complained of a brake squeal in their 2017 Mercedes-Benz GLC-CL. Mr. Moncada testified that the brakes intermittently squealed when he applied pressure to the brake pedal, and said the problem occurred at least once each time he drove the vehicle. He noted that the brake squeal would initially subside after each repair visit, but would eventually return and progressively get louder after each successive repair. He added that he has limited his use of the vehicle due to his concerns for his safety. He acknowledged that the problem continued to exist and occurred on the day of the hearing.

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 it is

not uncommon for a consumer to hear a brake squeal when a consumer brakes for the first time each time the vehicle was being driven. He testified that he was able to duplicate the brake squeal during a test drive at the final repair attempt but did not find any problems with the functionality of the brakes or detect any safety concerns with the vehicle. He stated that the vehicle drives in a similar manner to other like models. He noted that two local information bulletins, which were created by the Manufacturer to address known consumer concerns, were performed on the vehicle multiple times to reduce the brake noise.

A majority of the Board found that the evidence established that the brake squeal substantially impaired the use 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.

Lyndaker v. Mercedes-Benz USA, LLC, 2017-0528/MIA (Fla. NMVAB February 22, 2018)

The Consumer complained of a malfunctioning information display system in his 2017 Mercedes Benz E300W. The Consumer testified that shortly after he leased the vehicle, he experienced a problem with the information display system, which encompassed the digital instrument cluster above the steering wheel and the command screen in the center of the front dashboard. He explained that the digital instrument cluster, which displayed the odometer and gas gauge, and the command screen, which displayed the radio and temperature controls, would flicker off for two to three seconds and then automatically turn back on. He stated that in September 2017, the digital instrument cluster went completely black and would not turn back on. He testified that after the first repair attempt, the digital instrument cluster was working properly but the command screen continued to flicker on and off. He explained that the command screen continued to flicker, that it occurred every third time that the vehicle was driven, and that it last occurred two days prior to the hearing. He admitted that he drove the vehicle less frequently and no longer used features like self driving because he did not feel safe in the vehicle.

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 never conducted a physical examination of the vehicle, but confirmed that the dealership replaced the digital instrument cluster at the September-October 2017 repair attempt. He acknowledged that the vehicle remained at the authorized service agent for so long because the replacement part was not delivered to the dealership until October 27, 2017. He stated that the dealership was never able to duplicate the concern with the command screen, and asserted that even if the Consumer was experiencing a flickering of the command screen, the Consumer still had physical control over the features displayed within the command screen. He also noted that the Consumer can adjust the settings of the radio and temperature controls with manual knobs, and even has the option of turning off the command screen entirely.

The Board found that the evidence established that the malfunctioning information display system substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was 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.

Zumarraga v. American Honda Motor Company, 2017-0417/MIA (Fla. NMVAB March 20, 2018)

The Consumer complained of a vibration at idle while in gear and a hesitation/shudder upon acceleration from a stop in her 2015 Honda CR-V. The evidence established that the vibration at idle while in gear and the hesitation/shudder upon acceleration from a stop substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. With regard to the hesitation/shudder upon acceleration from a stop, the vehicle was presented to the Manufacturer's authorized service agent for repair on January 26, 2017, when no repairs were performed, and May 4, 2017, when no repairs were performed. On August 15, 2017, 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 August 22, 2017. On August 29, 2017, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. The Manufacturer's representative stated that during the final repair attempt, he performed one of two countermeasures available for complaints regarding vibrations that occurred when the vehicle registered 1,000-1,200 RPM at takeoff. He acknowledged that he did not perform the second countermeasure, a software update, because the Consumer declined to sign a waiver acknowledging that the software update may decrease fuel economy. The vibration at idle while in gear and the hesitation/shudder upon acceleration from a stop continued to exist after the final repair attempt.

While section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, a consumer is not required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law; the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. With regard to the hesitation/shudder upon acceleration from a stop, a majority of the Board found that the evidence established that the nonconformity was presented for repair to the Manufacturer's authorized service agent on two occasions, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt. The hesitation/shudder upon acceleration from a stop continued to exist after the final repair attempt. Since the Manufacturer did not perform the software update, and there was no alternative repair option offered by the Manufacturer for the hesitation/shudder upon acceleration from a stop nonconformity, it would have been pointless for the Consumer to bring the vehicle back to the authorized service agent for additional repairs beyond the two visits that occurred prior to the final repair attempt. A majority of the Board found that under the circumstances of the case, the Manufacturer had been afforded a reasonable number of attempts to correct the nonconformity, and had failed to do so. Accordingly, the Consumer was awarded a refund.

Quintana v. Toyota Motor Sales, USA, Inc., 2017-0495/MIA (Fla. NMVAB February 14, 2018)

The Consumer complained of a pull to the right in her 2017 Lexus GX460. The evidence established that the pull to the right substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The vehicle was presented to the Manufacturer's authorized service agent for repair of the pull to the right on June 6-8, 2017. In addition, the Consumer also took the vehicle to the authorized service agent complaining of the pull to the right on August 2-7, 2017, and August 14-15, 2017, at which time the authorized service agent road tested the vehicle, but performed no repairs. On July 6, 2017, 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 July 10, 2017. On October 16, 2017, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, a four wheel computer alignment was performed and a new set of tires were installed on the vehicle. The Consumer then test drove the vehicle and continued to experience a pull to the right so the original tires were reinstalled on the vehicle. The pull to the right continued to exist after the final repair attempt.

The Lemon Law 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 presented for repair to the Manufacturer's authorized service agent on one occasion, June 6, 2017, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on October 16, 2017. The pull to the right nonconformity continued to exist after the final repair attempt. Following the June 6, 2017 repair, the authorized service agent told the Consumer not to bring the vehicle back to the dealer for additional repairs and provided the Consumer with a copy of the Consumer Guide to the Florida Lemon Law. Even though the Consumer was told not to seek additional repairs by the authorized service agent, the Consumer provided the Manufacturer's authorized service agent with two additional repair attempts, on August 2, 2017, and August 14, 2017, before the final repair attempt was conducted. Under the circumstances of the case, the Board concluded that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Having failed to do so, the Consumer was qualified for the requested relief under the Lemon Law and was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

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

Lamoureux v. Kia Motors America, Inc., 2017-0356/FTL (Fla. NMVAB March 27, 2018)

The Consumers complained of sludge build-up in the engine resulting in exhaust smoke in their 2015 Kia Optima. The Consumer's daughter testified that she was the primary driver of the vehicle in question, and that when the vehicle was taken to the authorized service agent on February 16, 2017, there were large clouds of white smoke coming from the vehicle. She received a phone call shortly after leaving the vehicle, and was told that it needed a new engine. She testified that she was not concerned, since the vehicle was under warranty, and that she passed the information along to her father; once she had passed the information along, the matter was "out of her hands at that point." With regard to the vehicle's oil changes, she testified that her father performed the oil changes on almost all of the family's vehicles, including the subject vehicle. She testified that she had seen him under the car while it was jacked up in the driveway, that her father kept a log of the oil changes he performed on the vehicle and that she trusted that her father changed the oil correctly. With regard to the reason that the vehicle was taken to Pep Boys for an oil change on February 16, 2017, the same day the vehicle was taken to the authorized service agent, instead of the oil being changed by her father, she testified that her parents were going out of town, "they were under time constraints," and they had a coupon for a free oil change. She acknowledged that she had been seeing white smoke coming from the vehicle's exhaust by that time, and that Pep Boys told her there was sludge in the engine and that the engine needed to be replaced. The Consumer testified that her husband purchased the materials he used to perform oil changes at Pep Boys, and she acknowledged that no receipts for the materials were provided to their attorney for submission at hearing. With regard to the out-of-town trip that was the driving factor in taking the vehicle to Pep Boys for an oil change on February 16, 2017, and why her husband didn't simply change the oil when they returned, she acknowledged that it was not an extended trip – perhaps a long weekend – and testified that other than the coupon they had, there was "no reasoning, that's just the way it worked out."

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. The Manufacturer's representative testified that oil performs many functions in an engine. It cools the engine, lubricates its parts, and provides hydraulic pressure to its components. However, over time, engine oil accumulates soot or carbon dust from the burning gasoline, and needs to be periodically changed to keep it clean; if the oil is not periodically changed, soot accumulations will build to a point where the oil becomes a paste or "sludgy" substance. He testified that he inspected the subject vehicle in June of 2017. He test drove the vehicle, and while the engine started without problem, he observed greyish blue smoke coming from the tailpipe. He then pulled the vehicle into the shop, and verified that the oil level was full, consistent with the oil having just been changed by Pep Boys. He also inspected the valve train photos that the authorized service agent had previously taken, which showed sludge. The vehicle was put on a lift and the oil pan was removed, revealing sludge deposits. He also, in scanning the vehicle for codes, discovered a misfire code in the vehicle history that was consistent with a vehicle that was burning oil, although the vehicle was

not misfiring at the time of his inspection. With regard to why the engine would be burning oil, he explained that the amount of sludge found in this engine would clog up the oil control rings; as a piston moves up and down inside a cylinder, there are two compression rings at the top to seal air, and there was an oil control ring at the bottom to release oil out of the bottom of the cylinder. However, if oil becomes sludge, it could not pass through the oil control ring and was trapped in the cylinder, where it would burn. He opined that was what was occurring in this engine. Returning to the details of his inspection, he noted that, consistent with the recent Pep Boys oil change, the oil in the vehicle was clean, but there were sludge deposits coating the surface areas of the engine components. Specifically, he testified that there was sludge throughout the drive train, and through the bottom of the engine, consistent with a lack of maintenance. In his opinion, the engine oil in this vehicle was not properly maintained. As for the maintenance log submitted by the Consumers to document oil changes performed by them, he testified that the document was not provided to the Manufacturer during their investigation, when information about the maintenance of the vehicle had been sought, and was not submitted as evidence at the Better Business Bureau hearing. The Manufacturer's witness testified that he was involved with the vehicle when it was brought in to the authorized service agent on February 16, 2017. According to him, the engine valve cover was removed and the initial finding was that the engine was "sludged," resulting in smoke coming from the engine. In his experience, this was a result of lack of maintenance. After observing the condition of the engine, he testified that he had the service advisor contact the owner to request the maintenance records for the vehicle. According to him, the service maintenance log submitted into evidence at hearing by the Consumers was never provided to the authorized service agent.

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. (emphasis added). The evidence established that the sludge build-up in the engine resulting in exhaust smoke was the result of neglect, specifically a failure to perform regular oil changes on the vehicle. The complained of defect did not constitute a "nonconformity" as defined by the statute; therefore the Consumers' case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Navitsky v. General Motors, LLC, 2017-0515/ORL (Fla. NMVAB March 23, 2018)

The Consumer's 2016 Chevrolet Cruze was declared a "Lemon" by the Board, because of a water leak that substantially impaired the use, value and safety of the vehicle. The Consumer requested reimbursement of the following as incidental charges: $6.50 for postage to send written notification to the Manufacturer; $100.00 to have the vehicle professionally detailed; $130.59 for a replacement tire; and $143.00 for Do-It-Yourself pest control products. The Manufacturer objected to reimbursement of the detailing and pest control costs, arguing that the physical condition of the vehicle was due to the way the Consumer kept her car, not to any

nonconformity. The Consumer's request for reimbursement for $100.00 to have the vehicle professionally detailed; $130.59 for a replacement tire; and $143.00 for Do-It-Yourself pest control products as incidental charges were denied as the charges were not directly caused by a nonconformity. §681.102(7), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Quintana v. Toyota Motor Sales, USA, Inc., 2017-0495/MIA (Fla. NMVAB February 14, 2018)

The Manufacturer's Answer in this case was due to be filed on December 31, 2017, but was not filed until January 4, 2018. 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, counsel for the Manufacturer asserted that the Manufacturer's untimely answer was due to excusable neglect. The Manufacturer's Lemon Law and Arbitration Administrator, Lexus Southern Area Office, submitted an affidavit in which she claimed that the untimely answer was the result of unintentional oversight due to a heavy workload and holiday office closure. The Consumer objected to the untimely Answer being considered by the Board. Upon consideration, a majority of the Board declined to admit the Manufacturer's Answer, and the Manufacturer was not permitted to present evidence in support of its defenses.

Alvarez-Sang v. Hyundai Motor America, 2017-0222/TPA (Fla. NMVAB January 1, 2018)

Six days before the hearing, counsel for the Consumer emailed videos purporting to demonstrate the alleged nonconformity occurring to the Board's eFiling box. Pursuant to the Board's eFiling requirements, "[r]eadable text documents in .pdf format ONLY" may be filed electronically; therefore, the videos were returned to Counsel with the notification that the videos had not been accepted for filing. The videos were not again submitted until the day of hearing, at which time counsel for the Consumer advised the Board that the testimony of the Consumer and her two witnesses "would bring out the issue," and the videos would only be used to highlight and help the Board see exactly what the witnesses were describing. Upon consideration, the Board declined to accept the videos into evidence.