OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2018 - September 2018 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4) F.S.

Grant v. Kia Motors America, Inc., 2017-0494/TLH (Fla. NMVAB August 17, 2018)

The Manufacturer asserted the Consumer did not have standing to request relief as she was a co-owner of the motor vehicle and not everyone with an ownership interest in the motor vehicle was a party to this matter. In support of that defense, the Manufacturer, in closing argument, asserted that the Consumer did not have standing to independently pursue her arbitration claim because the co-owner of the vehicle, her husband Delano Grant, was not included as a party. The Manufacturer did not dispute that Alicia Grant was a purchaser, and owner, of the vehicle. The Manufacturer asserted that the Consumer did not have standing to pursue this arbitration claim without adding her husband, the co-purchaser of the vehicle, as a party to the proceeding.

Chapter 681, Florida Statutes, does not set forth any requirement that all owners of a motor vehicle be named parties to an arbitration. Rather, 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 shown to 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 Manufacturer did not contest that Ms. Grant met the definition of a "consumer"; rather, the Manufacturer insisted that all individuals who meet the definition of "consumer" for a particular vehicle must be party to any Lemon Law arbitration for that vehicle. Chapter 681 imposes no such requirement. Section 681.104(2)(a), Florida Statutes, does require, in the event a consumer is successful at hearing, that "clear title to and possession of the motor vehicle" be transferred to the manufacturer. This language protects the manufacturer's legitimate interest in acquiring clear title to a reacquired vehicle. In the present case, the evidence established that Ms. Grant was a "consumer" under section 681.102(4), Florida Statutes, and had standing to pursue this arbitration. The Manufacturer's assertion that the Consumer did not have standing to request this relief solely because of the absence from the arbitration of a co-owner of the motor vehicle was rejected by the Board. Ultimately, the Consumer was awarded a refund.

Epic Global Management and Lamash v. Mercedes-Benz USA, LLC., 2018-0143/FTL (Fla. NMVAB July 11, 2018)

Prior to the start of testimony, the Manufacturer moved to dismiss the Consumers' claim, arguing that Epic Global Management could not be a "consumer" under Florida Lemon Law as it was not a "person." Noting that both Epic Global Management and Victor Lamash were listed as lessees on the lease agreement as well as the Request for Arbitration, and that Victor Lamash was clearly a person who had the authority to enforce the vehicle's warranty, the Board ruled that there was no need to rule on the argument presented. The Manufacturer's Motion to Dismiss was denied.

Ogden v. BMW of North America, LLC., 2018-0211/FTL (Fla. NMVAB September 26, 2018)

The Manufacturer argued that the Consumer was not qualified for relief under the Lemon Law, because the Consumer no longer met the definition of "Consumer," as defined by the statute. More specifically, the Manufacturer asserted that the Consumer no longer had possession of the vehicle and was not eligible to regain possession of the vehicle because the vehicle was repossessed on August 20, 2018 by the lessor, BMW Financial Services. Counsel for the Manufacturer proffered that he received an electronic message (e-mail) from BMW Financial Services informing him that the vehicle had been repossessed because the Consumer had not made a payment for approximately seven months. Counsel also proffered that in a previous telephone call between himself and the Consumer, the Consumer acknowledged that the vehicle had been repossessed. The Manufacturer argued that, if the Board were to make a finding that the vehicle was a "lemon" and subsequently ordered the Manufacturer to repurchase the vehicle, the Consumer could not comply with the statute requiring him to deliver possession to the Manufacturer.

The Consumer acknowledged that he had not made a monthly payment to the lessor, BMW Financial Services, since November 2017. He admitted that on August 20, 2018, the vehicle was towed from his residence, and assumed it was towed to the Manufacturer's authorized service agent. He also acknowledged that he had seen, in the Manufacturer's Amended Answer, the Manufacturer's assertion that the vehicle had been repossessed. In response to the Board's question as to whether he had made any effort to contact the Manufacturer or the lessor since the vehicle was towed from his residence, he confirmed that he has never contacted the Manufacturer or the lessor to inquire about his vehicle.

Section 681.104(2)(a), Florida Statute, provides:

> If the manufacturer or its authorized service agent, cannot conform the motor vehicle to the warranty by repairing or correcting any nonconformity after a reasonable number of attempts, the manufacturer . . . shall repurchase the motor vehicle and refund the full purchase price to the consumer, less a reasonable offset for use, or, in consideration of its receipt of payments from the consumer of a reasonable offset for use, replace the motor vehicle with a replacement motor vehicle acceptable to the consumer. . . . Upon receipt of such refund or replacement, the consumer, lienholder, or

> lessor shall refurnish to the manufacturer clear title to and possession of the motor vehicle.

In order to be eligible for the refund or replacement remedies set forth in 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.

If the Consumer were to prevail in the arbitration hearing, the Consumer must deliver possession of the vehicle to the Manufacturer upon the Manufacturer's compliance with the Board's decision. This requirement necessarily contemplates that the Consumer will be in possession of the vehicle or otherwise capable of delivering the vehicle to the Manufacturer at the time compliance occurs. As the Consumer acknowledged in his testimony, he was no longer in possession of the vehicle, and was no longer capable of delivering possession of the vehicle to the Manufacturer. Since the Consumer is no longer in lawful possession of the vehicle, the Consumer no longer stood in the position of lessee, and was not entitled to enforce the obligations of the warranty. Consequently, the Consumer no longer met the definition of a Consumer under the statute, and does not qualify for the refund/replacement remedies of the statute. Accordingly, the Consumer's claim must be dismissed.

Warranty §681.102(22)F.S.

Christiani v. Nissan Motor Corporation, USA, 2018-0218/JAX (Fla. NMVAB August 2, 2018)

The Consumer complained of excessive rust in the undercarriage of her 2017 Nissan Rogue. The Manufacturer asserted the alleged defect was not covered by the Manufacturer's Warranty. The Board unanimously rejected the Manufacturer's argument that the Consumer was not entitled to relief under the Lemon Law on the ground that her complaint was not covered under the Manufacturer's warranty. Chapter 681, Florida Statutes, Florida's "Lemon Law" or "Motor Vehicle Warranty Enforcement Act," was created to provide consumers with relief "for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter." §681.101, Fla. Stat. [emphasis added]. Under Chapter 681, a manufacturer has a duty to conform a motor vehicle to the warranty provided for in Chapter 681 if the problem is first reported by the consumer to the manufacturer or its authorized service agent during the Lemon Law rights period. §681.103(1), Fla. Stat. The "Lemon Law rights period" is defined as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." §681.102(9), Fla. Stat. The evidence established that the Consumer took delivery of the subject vehicle on January 11, 2018, and the complained-of rust concern was first reported on February 21, 2018, well within the rights period. Therefore, the vehicle was not excluded from coverage under the Lemon Law.

NONCONFORMITY 681.102(15), F.S. (2018)

Cowin v. Jaguar Land Rover North America, LLC, 2018-0168/ORL (Fla. NMVAB July 2, 2018)

The Consumer complained that the Bluetooth system was not operating properly in his 2017 Jaguar XF. The Consumer testified that his vehicle had a Bluetooth system that should of allowed him to push a button and speak a command to make or take a telephone call, and if music was playing at the time, the audio system was supposed to stop playing music and shift over to the phone call. However, while he was in the middle of a phone call, the radio would suddenly start playing. When that happened, the phone call was not disconnected, and he could not get back to the call, even by using his hand-held phone. He explained that he made sure his Blackberry smart phone would be compatible with the vehicle before he leased it because he used his time in the car to make patient and pharmacy calls, as well as calls to his family. According to him, the dealership had reviewed information from his phone and confirmed that the phone should be compatible. Because of the problem, he said he did not use the hands-free Bluetooth system if he had to make an important call; rather, he would pull off the road, unpair his phone and then hold it while making the call. He stated that he was given a loaner vehicle during the time his vehicle was in for repair in April. The authorized service agent called and asked him to see if his phone worked in the loaner, so he paired his phone with the vehicle and found that he had no problem using his phone with the Bluetooth system in that vehicle from April 3, 2018 through April 10, 2018, when he picked up his vehicle. Although he was told the radio had been replaced in his vehicle, he had continued to experience the same problem with the Bluetooth system, with the most recent occurrence being the day before the hearing.

The uncontroverted evidence established that the Bluetooth system not operating properly 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.

Finley v. Toyota Motor Sales, USA, Inc., 2018-0198/FTM (Fla. NMVAB September 17, 2018)

The Consumers complained of a severe hesitation upon acceleration in their 2016 Lexus IS 200t. One Consumer testified that she was afraid to drive the vehicle because, at least three or four times per week, the vehicle would severely lag or hesitate while she was trying to accelerate, both at low and high speeds. She explained that the hesitation occurred mostly while accelerating onto the interstate or when passing another vehicle. She first experienced the hesitation less than one month after taking delivery of the vehicle, and the problem had persisted without improvement despite the Consumers' usage of premium fuel in the vehicle, as recommended by the authorized service agent, and despite the replacement of the vacuum regulator valve at the August 2017 repair visit. Additionally, the other Consumer testified that he drove the vehicle to the hearing, and felt the vehicle hesitate three times during the drive, including while accelerating from 55 to 65 miles per hour to pass a semi-truck.

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 inspected the vehicle at the final repair attempt on November 18-20, 2017, including test-driving the vehicle 19 miles on city streets and in stop-and-go traffic reaching a maximum speed of 45 miles per

hour, and using a diagnostic tool to monitor the engine control and transmission control computers. He stated that he never experienced the "turbo lag" or "hesitation" complained of by the Consumers; however, he acknowledged that he did not test drive the vehicle at high speeds on the interstate. He confirmed that the vehicle was running with premium fuel, as recommended by the Manufacturer, based upon the "knock learn value" that he recorded during his inspection.

During the hearing, the Board inspected and test drove the vehicle. The parties waived their right to be present in the vehicle during the test drive. The Board drove the vehicle five miles on local roads, including performing accelerations at various speeds and reaching a maximum speed of 55 miles per hour, to replicate the Consumers' complaint. The Board experienced the hesitation complained of by the Consumers several times during the test drive. When the Board slowed the vehicle to 20 miles per hour, then pressed the gas to the floor to accelerate, the Board felt a definite hesitation before the vehicle accelerated and took off; that was tried three different times and the hesitation was observed all three times. Additionally, when the Board accelerated the vehicle at 40 miles per hour, to simulate passing another vehicle, the Board felt a hesitation that was even more pronounced; one Board member opined that there was a "definitive lag" between the time that the gas was pressed to the floor and the time that the vehicle took off. Another Board member described the hesitation experienced as "pretty severe," and noted that it could be felt when accelerating hard.

The Board found that the evidence established that the severe hesitation upon acceleration substantially impaired the use 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.

Jones v. FCA US LLC, 2018-0150/ORL (Fla. NMVAB July 20, 2018)

The Consumer complained of an engine condition that manifested itself as excessive oil consumption and the vehicle stalling in her 2016 Chrysler 200, in which the Board found 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 on April 25, 2016, when the stored codes were cleared, the vehicle was test driven, and no repairs were performed; July 16, 2016, when a Power Control Module (PCM) software update and a Transmission Control Module (TCM) software update were performed; November 22-23, 2016, when the PCM software was reprogrammed and the oil was changed; January 30-31, 2018, when the oil was changed, an oil consumption test was started documenting the oil level, and no repairs were performed; and March 15-24, 2018, when leak-down and compression tests were performed and the engine long block was replaced, correcting the problem. On March 30, 2018, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer stipulated that it received the notification on April 6, 2018. The

Manufacturer also stipulated that it was afforded a final opportunity to repair the vehicle on April 23, 2018. At that time, the vehicle was inspected, road tested for four miles, and no repairs were performed.

The Board found the evidence established that the nonconformity was subjected to repair by the Manufacturer's authorized service agent a total of five times. 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 Board found the evidence established that the nonconformity appears to have been corrected at the fifth repair attempt for the problem on March 15-24, 2018, when leak-down and compression tests were performed and the engine long block was replaced, which was prior to the Consumer sending written notification to the Manufacturer and prior to the Manufacturer's final opportunity to repair the vehicle on April 23, 2018. However, in light of the fact that the Consumer first presented the stalling complaint to the authorized service agent approximately two months after purchasing the vehicle; the fact that the vehicle displayed low oil at several repair visits, even though the Consumer testified to having timely oil changes performed; and the fact that it appeared from the evidence that the excessive oil consumption issue was not investigated until the fourth repair visit, a majority of the Board concluded that the Manufacturer failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law. The Consumer was therefore qualified for the requested relief under the Lemon Law and a refund was awarded.

Campbell v. Kia Motors America, Inc., 2018-0106/WPB (Fla. NMVAB August 28, 2018)

The Consumer complained of the engine shutting off while the vehicle was stopped or parked in her 2016 Kia Optima. The Consumer testified that, on an intermittent basis, when she pushed the button next to the steering wheel to start the engine, the engine started but immediately "cuts off." She stated that when she subsequently pushed the start button, the engine would start again. She explained that the problem could also happen when she stopped at a light; the vehicle started to shake and then "cuts off." The Consumer testified that she had reported the problem to the authorized service agent since mid 2017. The Consumer showed a video to the Board, which depicted an incident when the vehicle "cut off." Three of the Consumer's family members testified that they experienced at least one incident when the vehicle "cut off." The Consumer added that the problem last occurred the Wednesday prior to the arbitration hearing. The vehicle was presented to the Manufacturer's authorized service agent for repair of the engine shutting off on December 4-6, 2017, when the vehicle was test driven but no repairs were performed; and February 16, 2018, when the vehicle was test driven but no repairs were performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On March 8, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was test driven in stop-and-go traffic but no repairs were performed. The engine shutting off while vehicle was stopped or parked continued to exist after the final repair attempt.

The evidence established that the engine shutting off while the vehicle was stopped or parked 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 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 presented for repair to the Manufacturer's authorized service agent, and documented on the repair order, on two occasions, December 4, 2017, and February 16, 2018, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on March 8, 2018. The engine shutting off while the vehicle was stopped or parked nonconformity continued to exist after the final repair attempt. The evidence also established that the Consumer had complained of this same nonconformity on other occasions when she brought the vehicle to the authorized service agent, prior to December 2017, but the complaint was not documented on the repair orders. Under the circumstances of this 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 a refund was awarded.

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

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

Kovacs v. Mercedes-Benz USA, LLC., 2018-0280/FTL (Fla. NMVAB August 11, 2018)

The Consumer complained of defective rear transaxle, defective air conditioning system, and defective brakes in his 2018 Mercedes Benz AMG GT. The Consumer also complained that the "race start" was inoperable at the January 23, 2018, repair attempt, but early in his testimony said he did not know how to perform a race start and claimed that he was not able to describe a race start for the Board. Later in the hearing, he admitted that he had performed race starts with the AMG technician. Additionally, he confessed that he started driving the vehicle on the Palm Beach race track in April 2018, at speeds of over 100 miles per hour, but asserted that he had never "raced" the vehicle.

The Manufacturer asserted the alleged nonconformity was the result of abuse of the motor vehicle by persons other than the Manufacturer or its authorized service agent. The Manufacturer's witness testified that he rode in the passenger seat during a test drive with the Consumer at the February 19, 2018, repair visit, at which time the Consumer drove on Interstate 95 at speeds in excess of 100 miles per hour. He explained that they continued to a vacant parking lot, where the Consumer seamlessly demonstrated a "race start," which occurred when the Consumer turned a knob in the vehicle to the "race start" position and the vehicle launched at its optimal performance point of 4000 rotations per minute (RPM) with extreme acceleration. During the test drive, he discovered that the Consumer was improperly performing "race starts" in the vehicle's race mode, which caused the rear differential to "lock out" and triggered the illumination of the rear differential lock warning light. He confirmed that the owner's manual expressly stated that the vehicle's race mode was not intended for any kind of street use. He explained that he was able to duplicate the problem with the rear differential after learning that the Consumer was performing "race starts" in the vehicle's race mode, and determined that the

transaxle assembly needed to be replaced. He stated that at some point during or after the replacement of the transaxle assembly, the Consumer admitted to him that he "tracks" the vehicle and "runs it on the road course." He explained that if a Consumer races a vehicle, replacement of consumables such as brakes and tires become the Consumer's financial responsibility. Additionally, he advised the Consumer that after the transaxle assembly was replaced, he would need to drive the vehicle more conservatively for the next 1,000 miles, and instructed the Board that the Consumer failed to comply with the 1,000 mile break-in procedure because the Consumer admitted that he started racing the vehicle in April 2018, soon after the transaxle assembly had been replaced. He added that when the Consumer brought the vehicle to the dealership in Delray Beach two to three months ago where it currently remained, the technicians observed that the air conditioning compressor was blown for the second time, the vehicle's second set of tires was spent, and the brakes were worn, rusted and discolored. He explained that the blown AC compressor was found to have two adjacent holes at the bottom, which in his experience only happens when the air conditioning is kept on while racing the vehicle at high RPMs for a long period of time. He further explained that replacement of original tires typically doesn't occur until the vehicle has been driven 8,000-10,000 miles, and this vehicle's tires had already been replaced at only 2,000 miles. He also explained that the discoloration of the brakes was caused by excessive heat, and this level of heat can only be generated from consistent hard braking or racing. He concluded that the vehicle's problems resulted from racing the vehicle, which had caused excessive wear and tear on the vehicle's rear transaxle, air conditioning system and braking system.

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) Upon consideration of the evidence presented, a majority of the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the defective rear transaxle, defective air conditioning system, and defective brakes were the result of abuse of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, none of the problems complained of by the Consumer constituted a "nonconformity" as defined by the statute, and the Consumer was therefore 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.

Rashford v. Jaguar Land Rover North America, LLC, 2018-0223/FTM (Fla. NMVAB September 19, 2018)

The Consumer's 2018 Land Rover Range Rover was declared a "Lemon" by the Board at a hearing on September 11, 2018. The Consumer requested reimbursement of $743.78, as an incidental charge, for a vehicle storage fee from May 2018 through September 2018 because the Consumer testified that he did not feel safe operating the vehicle, had not operated the vehicle since May 1, 2018, needed a place to store the vehicle, and was not comfortable leaving the

vehicle outside in the Florida climate. Upon consideration of the evidence presented, the Board found that reimbursement of $500.00 towards the vehicle storage fee from May 2018 through September 2018 was reasonable. §681.102(7), Fla. Stat.

Libro v. Jaguar Land Rover North America, LLC, 2018-0183/STP (Fla. NMVAB August 6, 2018)

The Consumer's 2018 Land Rover Range Rover Velar was declared a "Lemon" by the Board. Before the hearing, the Consumer filed a "Consumer's Trade-In Allowance Form," indicating that the net trade-in allowance reflected in his purchase agreement was not acceptable to him, and requesting that the Manufacturer send him a copy of the applicable pages of the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of his trade-in. The Manufacturer did not do so. At the hearing, the Consumer stated that he would purchase online the NADA Guide value for his trade-in vehicle. The Board instructed the Consumer to obtain the NADA information within five days of the hearing and unanimously voted to include in the Consumer's refund the cost he incurred to purchase the NADA information. The Consumer provided the requested NADA information and purchase receipt, and the Manufacturer stipulated to the amounts provided, which was $55.00.

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

Govic Capital LLC and Govic v. Tesla Motors Inc., 2018-0241/TLH (Fla. NMVAB August 16, 2018)

The Consumers' 2017 Tesla Model X was declared a "Lemon" by the Board. The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $121,750.00. Mileage attributable to the Consumers up to the date of the National Center for Dispute Settlement (NCDS) hearing was 12,905 miles (13,376 odometer miles reduced by 50 miles at delivery, and 421 other miles not attributable to the Consumers). Application of the statutory formula resulted in a reasonable offset for use of $13,093.20. The Manufacturer objected to cutting off the mileage as of the date of the NCDS hearing, arguing that it would give the Consumers "a windfall" because it was not a state-certified procedure, and that it was a "documents only" hearing so there was no inconvenience for the Consumers. The Manufacturer's objection to using the mileage attributable to the Consumers as of the date of the NCDS hearing was denied by the Board. §681.102(19), Fla. Stat.