OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2018 - December 2018 (4th Quarter)

JURISDICTION:

Frieson v. Kia Motors America, Inc., 2018-0269/ORL (Fla. NMVAB December 28, 2018)

The parties stipulated that, on March 29, 2016, the Consumer purchased a 2016 Kia Forte. On April 27, 2018, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Kia Motors. The procedure rendered a decision denying the claim on May 14, 2018. On May 16, 2018, the BBB sent the decision to the Consumer, along with an "Acceptance or Rejection of Decision" form that was to be returned to the BBB within 14 days. The form advised the Consumer that rejection of the BBB arbitration means: "this will end Better Business Bureau involvement in my case." The Consumer rejected the BBB decision on May 23, 2018. Because the Consumer was not satisfied with the BBB decision, on June 15, 2018, he requested arbitration by the Board, seeking either a refund or a replacement vehicle.

The Manufacturer asserted that the Request for Arbitration was not filed within 60 days after the expiration of the Lemon Law rights period, or 30 days after the final action of a certified procedure, whichever date occurred later. The Manufacturer also filed a "Notice of Filing Authority in Support of Affirmative Defenses" in which the Manufacturer asserted that the Consumer's claim should be dismissed because it was not filed within the timeframes required by the statute. The Manufacturer argued that the final action of the BBB occurred on May 14, 2018, the date of the BBB decision, and that the Consumer therefore had until June 13, 2018, to file his Request for Arbitration. The Manufacturer maintained that the Consumer was not eligible to seek relief under the Lemon Law since he did not file his request for arbitration until June 15, 2018, which was more than 30 days after the final action of the certified procedure.

Section 681.102(9), Florida Statutes, establishes the "Lemon Law rights period" as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." The time for filing a Request for Arbitration before this Board is set forth in Section 681.109(4), Florida Statutes, which provides:

> A consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later.

In addition, Section 681.108(3), Florida Statutes, provides that every certified procedure shall submit to the department, a copy of each settlement approved by the procedure or each decision made by a decision maker within 30 days after the settlement is reached or the decision is

rendered. "The decision or settlement must contain at a minimum the … statement of whether the decision was accepted or rejected by the consumer." §681.108(3)(h), Fla. Stat.

The evidence established that the Consumer took delivery of the vehicle on March 29, 2016. The Consumer filed his Request for Arbitration on June 15, 2018, which was more than 60 days after the expiration of the Lemon Law rights period. Accordingly, in order for the Request for Arbitration to be timely-filed, it must have been filed no later than 30 days after the final action of the BBB, the Manufacturer's certified procedure. The term "final action" is not defined in Chapter 681. The Consumer was informed in the letter dated May 14, 2018, that he had 14 days from that date within which to notify the BBB of his acceptance or rejection of the program's decision or the decision would be considered rejected and the Manufacturer would be notified. The Board found that, based on the evidence presented in the case, the final action of the certified procedure occurred on May 23, 2018, when the Consumer signed the BBB's "Acceptance or Rejection of Decision" form, rejecting the BBB decision and ending the BBB's involvement in the case. The Consumer filed the Request for Arbitration on June 15, 2018, which was well within 30 days after the final action of the certified procedure. Accordingly, the Request for Arbitration was filed within the time required by the statute, and the Manufacturer's request to dismiss the Consumer's claim was denied.

Consumer §681.102(4) F.S.

Partidas v. Mitsubishi Motors North America, Inc., 2018-0374/MIA (Fla. NMVAB December 19, 2018)

The Manufacturer filed a "Motion to Dismiss," on October 10, 2018, asserting that the Consumer was not qualified for relief under the Lemon Law because the vehicle was used primarily for commercial or business purposes. The Manufacturer alleged that the Consumer was an Uber drive who was utilizing his vehicle "to commercially transport occupants from one location to another."

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:

> [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 presented no evidence showing the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat. Upon consideration, the Board denied the Manufacturer's Motion to Dismiss.

NONCONFORMITY 681.102(15), F.S.

Bandemer v. Subaru of America, Inc., 2018-0381/WPB (Fla. NMVAB December 11, 2018)

The Consumer complained of a Bluetooth incompatibility between the phone and the radio in his 2018 Subaru Forester. The Consumer testified that upon leaving the dealership after purchasing the vehicle, he attempted to make a Bluetooth phone call, by saying a contact in the order of first name, last name, as he had done when using Bluetooth in other vehicles, but the vehicle's Bluetooth was not able to locate the contact. After taking the vehicle to the authorized service agent for repair, the dealership informed him that the system in his particular vehicle was designed with a Bluetooth set up which required him to say a contact's name in the order of last name, first name when placing a call. The Consumer explained that he lists the name of contacts in his phone in the order of first name, last name and said that when making calls through Bluetooth, it was necessary that he be able to say the name of the contact in this particular order because he did not have last names associated with many of the contacts in his phone. He opined that with the current Bluetooth set-up of last name, first name, he would never be able to call any of the contacts in his phone that do not list a last name, which would impair his use of the vehicle. He stated that when driving a loaner vehicle of the same model but with an upgraded radio, he was able to use the Bluetooth as expected, by placing a call in the order of first name, last name. He also testified that the first time that he received an incoming call through Bluetooth, he observed that the display showed a phone number instead of the name of a caller. He lamented that he would miss important phone calls, such as phone calls from his elderly mother, if Bluetooth did not list the name of the caller, due to the abundance of robo and marketing calls.

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. He confirmed that in the Consumer's vehicle, like in all base like model vehicles that have a Clarion radio, the Consumer must say a contact's name in the order of last name, first name when placing a Bluetooth call with his Apple iPhone 6s. He confirmed that the 6s was on the Manufacturer's list of compatible phones but cautioned that it only meant that a particular phone could be paired to the vehicle's Bluetooth. He stated that at the time of the final repair attempt, he paired his personal Apple iPhone 7s plus to the vehicle's Bluetooth and unlike the 6s, he was able to make a phone call by saying a contact's name in the order of first name, last name. He said that he also paired a Samsung Galaxy Note 8 to the vehicle's Bluetooth, and just like the Apple iPhone 6s, he could only place a phone call by saying a contact's name in the order of last name, first name. He also confirmed that both the Apple iPhone 7s plus and the Samsung Galaxy Note 8 are on the Manufacturer's list of compatible phones. He testified that the base model vehicle has an inconsistency in Bluetooth setup between different phones on the Manufacturer's compatibility list, due to the Clarion radio installed in the base model. Upon being asked by the Board to explain why the Consumer has to say a contact's name in the order of last name, first name with the Apple iPhone 6s, as opposed to first name, last name with the Apple iPhone 7s plus, the Manufacturer could not provide an explanation, much to the Board's dissatisfaction, other than suggesting that a particular phone on the Manufacturer's compatibility list may not necessarily be compatible with every feature of the vehicle's Bluetooth. He also explained that the Consumer's loaner vehicle was an upgrade from the base model, and was equipped with an upgraded radio that enabled a Bluetooth setup of first name, last name when placing a phone call. Additionally, he could not provide an explanation as to why a

different radio in the upgraded model caused the Bluetooth in the upgraded model to operate differently than the Bluetooth in the base model. He also noted that the name of the caller appearing on the Bluetooth display during an incoming call was not a feature of the Clarion radio in the base model. He asserted that the Consumer simply didn't like the way the Bluetooth operated in the base model, and alleged that the vehicle was operating as designed.

The Board found that the evidence established that the Bluetooth incompatibility between the phone and the radio substantially impaired the use and safety 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 and the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes a Reasonable Number of Attempts §§681.104, 681.1095(8), F.S.

All Moving Services, Inc., and Brown v. Ford Motor Company, 2018-0325/FTL (Fla. NMVAB December 26, 2018)

The Consumers complained of a knocking noise in the engine of their 2017 Ford F250. The vehicle was presented to the Manufacturer's authorized service agent for repair of that complaint on November 24, 2017, when no repair attempt was performed, and December 18, 2017, when no repair attempt was performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumers. On February 5, 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 for a mile from a cold start, and a check for diagnostic trouble codes was performed, with no codes found. The knocking noise in the engine continued to exist after the final repair attempt.

The Board found that the evidence established that the knocking noise in the engine substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformities. While section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number; 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 knocking noise in the engine nonconformity was subjected to repair by the Manufacturer's service agent a total of two times. The authorized service agent told the Consumers on November 24, 2017, at the first repair attempt, that there was no way to repair the vehicle at this time and that there *might* be a solution to repair the vehicle at some unknown point in the future for this problem. Under the circumstances, the Board found that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. The Consumer was qualified for the requested relief under the Lemon Law for the nonconformity and a refund was awarded.

Final Repair Attempt §§681.104(1)(a), 681.104(3)(a)1., F.S.

Kurth v. Nissan Motor Corporation, USA, 2018-0293/FTL (Fla. NMVAB October 3, 2018)

The Consumer complained of a display control unit malfunction that manifested itself through electrical problems with the backup camera and Bluetooth system in his 2018 Infinity Q50S. On May 2, 2018, 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 May 7, 2018. On May 25, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. When the Consumer arrived on that day, the Manufacturer told the Consumer that it was canceling the final repair attempt because there was no solution to repair the display control unit malfunction, and asked him to reschedule the final repair attempt for August 2018, when they expected to have a solution.

Section 681.104(1)(a), Florida Statutes, requires that:

> After three attempts have been made to repair the same nonconformity, the consumer shall give written notification, by registered or express mail, to the manufacturer, of the need to repair the nonconformity to allow the manufacturer a final attempt to cure the nonconformity. The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility *within a reasonable time* after the consumer's receipt of the response. The manufacturer shall have 10 days, ... commencing upon the delivery of the motor vehicle to the designated repair facility by the consumer, to conform the motor vehicle to the warranty. If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

The evidence established that the Manufacturer received the statutory written notification from the Consumer after four unsuccessful repair attempts. Upon receiving written notification, the Manufacturer must "give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility *within a reasonable amount of time* after the consumer's receipt of the response. The evidence established that the Manufacturer canceled the scheduled May 25, 2018 repair attempt upon the Consumer's arrival. The evidence further established that the Manufacturer asked the Consumer to reschedule the final repair attempt for August 2018, when the Manufacturer expected to have a solution for the display control unit malfunction. The Board found that the Manufacturer's attempt to reschedule the final repair attempt from May 25, 2018 to August 2018 did not fulfill the statutory requirement that the Manufacturer provide a final repair opportunity "*within a reasonable time* after the consumer's receipt of the [Manufacturer's] response." Therefore, the requirement that the Manufacturer be given a final repair attempt to cure the nonconformity did not apply. Ultimately, the Consumer was awarded a refund.

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

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

Fuentes and Sanchez v. Toyota Motor Sales, USA, Inc., 2018-0318/TPA (Fla. NMVAB October 24, 2018)

The Consumers complained of a four-wheel drive condition in their 2017 Toyota 4Runner. The four-wheel drive condition manifested itself by the vehicle locking in four-wheel drive "low speed," vibrating, shuddering, making a clunking noise, leaking fluids, and the steering wheel being difficult to turn, as well as failure of the transfer case assembly and the transfer case actuator. The Consumer stated that immediately after taking delivery of the vehicle, she felt a vibration in the seat and steering wheel when driving between approximately 40 and 45 miles per hour. She testified that, on February 1, 2018, while driving on the highway between 40 and 55 miles per hour, she first experienced the vibration and then the vehicle began to shudder, made a clunking noise, the engine "revved" high, she smelled a burning odor, and the "four-wheel drive low" warning light began to flash. She pulled the vehicle to the side of the road and found the steering wheel difficult to turn, even just enough to change lanes. She brought the vehicle to the authorized service agent for repair that day and was told that the vehicle was stuck in four-wheel drive "low speed" and the transfer case actuator was replaced at that repair visit. She testified that on February 10, 2018, she and the other Consumer experienced the same problems that had occurred on February 1, 2018. They took the vehicle that day to the authorized service agent for repair and at that repair visit the transfer case assembly was replaced. She explained that they experienced the same problems again on February 18, 2018 and brought the vehicle that day to a nearby Toyota dealership. She stated that no repairs were performed by that dealership, other than fluids being added, and that on February 22, 2018, at the Manufacturer's direction, the vehicle was towed to Sun Toyota where all the previous repairs to the vehicle had been done. She testified that the vehicle was presently "inoperable" and they therefore had the vehicle towed to the hearing on a flatbed truck. Both Consumers testified that they are the only drivers of the vehicle; they have never placed or driven the vehicle in four-wheel drive; they have only driven the vehicle in two-wheel drive; they have never taken the vehicle off-road or driven the vehicle in a manner that would lead to damage underneath the vehicle; and only Toyota has ever performed any work on the vehicle.

The Manufacturer asserted the alleged nonconformity was the result of abuse or neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that at the February 1-7, 2018 repair visit, the vehicle arrived at the authorized service agent locked in four-wheel drive "low speed." He also explained that the vehicle was again locked in four-wheel drive "low speed" when it arrived at the authorized service agent for repair on February 10, 2018. He acknowledged that the transfer case actuator was replaced during the February 1-7, 2018 repair visit and that the transfer case assembly was replaced during the February 10-15, 2018 repair visit. He explained that the transfer case assembly was necessary to shift the vehicle from two-wheel drive to four-wheel drive and stated that he inspected the vehicle on February 23, 2018, at which time he examined the transfer case assembly, including the actuator, and observed that the transfer case was again locked in four-wheel drive "low speed." He explained that the transfer case being locked in four-wheel drive "low speed" was indicative that the vehicle was previously operating in four-wheel

drive "low speed." He testified that "it is an impossibility" for the transfer case assembly to place itself into four-wheel drive "low speed." He explained that, in order for the transfer case actuator to move into four-wheel drive "low speed," the vehicle required "deliberate input" for the gears to "mesh." He further explained that the vehicle must be stopped, placed in neutral gear, and the electric switch for four-wheel drive "low speed," located under the console, must be pressed to properly lock the lower gears in place.

He further testified that he reviewed the Vehicle Control History Report, sometimes referred to as the vehicle's "black box," which set forth behavioral statistics generated based upon certain driver activity. He stated that he retrieved actual data from specified dates and time intervals from the report. He explained that according to the data in the Vehicle Control History Report, just prior to the Consumers taking the vehicle to the authorized service agent for repair on February 1, 2018 and February 10, 2018, the vehicle was being revved at high engine RPMs and then shifted from neutral into gear, either drive or reverse, and vice versa, numerous times over a period of just a few seconds. He explained that this type of driving was indicative of the vehicle being "stuck in something" or the vehicle being driven in a manner that would specifically "inflict damage." He opined that the type of aggressive driving reflected in the Vehicle Control History Report demonstrated abuse or neglect in the operation of the vehicle, and that such usage of the vehicle caused damage to the transfer case. During his inspection, he observed physical damage to the transfer case, as well as fluid leaking from the transfer case actuator which was also indicative of damage.

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]. A "condition" is defined as "a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." Rule 2-30.001(2)(a), F.A.C. The Board found that the evidence established that the four-wheel drive condition was the result of abuse or neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent, specifically the vehicle was used in such a manner that inflicted damage to the transfer case. The complained of defect or condition did not constitute a "nonconformity" as defined by the statute; therefore, the Consumers were not qualified for repurchase relief under the Lemon Law and the case was dismissed.

Cruz v. BMW of North America, LLC, 2018-0352/MIA (Fla. NMVAB December 19, 2018)

The Consumer complained of a malfunction in the SOS call system in his 2017 BMW X6-M. The Consumer testified that two months after he purchased the vehicle, the SOS malfunction light illuminated on the dashboard. He said that the SOS malfunction light indicated that there was a communication error in the SOS call system, a system that allows the driver to contact BMW for roadside assistance or emergency services. The Consumer stated that when he picked up the vehicle from the first repair, the SOS malfunction light was gone, but reappeared one month later and has continued to reappear after each subsequent repair. He explained that at the July 2018 repair visit, the dealership informed him that the Manufacturer would no longer authorize warranty repairs to the vehicle because the Manufacturer had determined that the aftermarket wrap, which the Consumer had installed on the vehicle back in January 2017, had

caused the SOS malfunction. The Consumer added that the SOS malfunction light was currently illuminated, and the Consumer was concerned that in the event he had a car accident, he would not be able to contact emergency services via the SOS call system.

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. The Manufacturer's representative testified that at the July 2018 repair, he diagnosed a short, or fault, in the Telematics Control Unit (TCU), which caused a communication error in the SOS call system and resulted in the illumination of the SOS malfunction light. He stated that the Telecommunications Box (TCB) Module was mounted under the shark fin antenna, which sat atop the vehicle and was enclosed by a seal. He explained that during the installation of the aftermarket wrap, the seal that enclosed the shark fin antenna was cut when the installer was cutting the wrap to position it around the antenna. He explained that moisture was able to enter the TCB module through the damaged seal, causing corrosion within the TCB module, which then triggered the illumination of the SOS malfunction light. He explained that the Consumer's first complaint regarding the SOS malfunction did not occur until January 24, 2017, which was just 19 days after the aftermarket wrap was installed on January 5, 2017. He concluded that the malfunction in the SOS call system resulted from corrosion in the TCB module, which was caused by the installation of the aftermarket wrap.

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. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the malfunction in the SOS call system was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the problem 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.

Gyllenberg v. Ford Motor Company, 2018-0326/WPB (Fla. NMVAB November 8, 2018)

The Consumer's 2016 Ford Edge was declared a "Lemon" by the Board due to a vibration. The Consumer requested reimbursement of $64.20 for reimbursement of an invoice from New Age Automotive for diagnosing the vibration, as an incidental charge. The Manufacturer objected because the Manufacturer alleged that the Consumer took his vehicle to New Age Automotive after he filed his request for arbitration, in preparation for the arbitration hearing. The Board awarded the Consumer the $64.20 as an incidental charge and the Manufacturer's objection was denied. §681.102(7), Fla. Stat.

Yu v. Mercedes-Benz, USA, LLC, 2018-0311/MIA (Fla. NMVAB November 15, 2018)

The Consumer's 2018 Mercedes-Benz GLE350W was declared a "Lemon" by the Board on October 9, 2018, due to a defective steering rack. The Consumer stated that she took the vehicle to the authorized service agent on April 27, 2018, and the technician advised her that a code was found that indicated a steering wheel malfunction had occurred. She left her vehicle at the authorized service agent and stated that on May 3, 2018, the technician texted her and advised her that the Manufacturer had approved the repairs under warranty, so the authorized service agent would begin the repairs and provide a loaner vehicle while the vehicle was being repaired. However, after being told that repairs had begun on her vehicle, the Consumer received a text message from the authorized service agent on June 20, 2018, requesting that she pick up her vehicle and return the loaner vehicle because the Manufacturer now declined to complete any repairs on the vehicle. The Consumer requested $390.00 for towing costs from April 26, 2018, when the vehicle was towed from the Consumer's house to the authorized service agent and October 9, 2018, when the vehicle was towed from the Consumer's house to the arbitration hearing; and $4,474.64 for vehicle rental charges between April 26, 2018 and October 9, 2018 as incidental charges. The Manufacturer objected to reimbursement of the towing costs and vehicle rental charges. The Board found that the award shall include reimbursement of $390.00 for towing costs from April 26, 2018, when the vehicle was towed from the Consumer's house to the authorized service agent, and October 9, 2018, when the vehicle was towed from the Consumer's house to the arbitration hearing; and $4,474.64 for vehicle rental charges between April 26, 2018, and October 9, 2018, as reasonable incidental charges.

MISCELLANEOUS PROCEDURAL ISSUES:

McMaster and Carter-McMaster v. Nissan Motor Corporation, USA, 2018-0255/ORL (Fla. NMVAB November 3, 2018)

Prior to the hearing, the Manufacturer filed a "Motion to Dismiss," asserting that the Consumers had entered into a "Settlement Agreement and Release" on February 20, 2018, in which the Consumers "released the claims they are bringing before this Board," in exchange for $5,500.00. According to the Manufacturer, that agreement precluded the Consumers from bringing a Lemon Law case against the Manufacturer. Relying on the plain language of section 681.115, Florida Statutes, which provides that "any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this chapter ... is void as contrary to public policy," the Board denied the Motion to Dismiss, and the hearing proceeded.