OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2019 - March 2019 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Patel v. Volkswagen/Audi of America, Inc., 2018-0419/WPB (Fla. NMVAB January 10, 2019)

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. The Manufacturer's representative argued that the Consumer leased the vehicle from a dealership in New Jersey and traveled to Boston, Massachusetts to sign the lease, which was drafted in accordance with New Jersey law. The representative asserted that the lease did not reflect that Florida's Lemon Law fee was assessed on the transaction and did not reflect payment of any sales tax to the State of Florida. As such, the Manufacturer urged the Board to find that the motor vehicle at issue in the case was not "sold in this state," and was therefore not a "motor vehicle" under the Florida Lemon Law.

The Consumer asserted that the vehicle was sold in this state, and that his vehicle was therefore a "motor vehicle" under the Lemon Law. The Consumer testified that he performed an online search and located the subject vehicle at Audi Toms River in Toms River, New Jersey. He acknowledged that in mid May 2017, he traveled to Boston, Massachusetts and met with a representative from the dealership to sign the lease. He said that when he returned to Florida, he signed and faxed an updated lease correcting a scrivener's error regarding the value of his trade-in vehicle to the dealership, and subsequently wired the $5,000 due at lease signing. He claimed that a representative from the dealership in New Jersey informed him that all fees assessed in the lease agreement were based on Florida law. He alleged that the dealership in New Jersey paid for the cost to ship the vehicle from New Jersey to Florida, and assumed all liability for the vehicle during the transport to Florida.

Upon consideration of the totality of the evidence presented, including that (1) the Consumer traveled outside Florida to sign the lease in Boston, Massachusetts; (2) there was no evidence presented that the Consumer paid the Florida Lemon Law fee; (3) there was no evidence presented of any sales tax offset remitted to the state of Florida; (4) there was no evidence presented that the Consumer paid *any* taxes or fees to the state of Florida; and (5) there was no evidence presented that the Consumer took delivery of the vehicle in Florida, as he failed to provide documentation that the dealership paid for the cost to ship the vehicle from New Jersey to Florida, and failed to provide documentation that the dealership assumed liability for damage during the vehicle's transport to Florida, the Board found that the motor vehicle was not "sold in

this state" and therefore did not constitute a "motor vehicle" under the statute. The Consumer was therefore not qualified for the relief requested and the case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Gonzalez and Padilla v. Toyota Motor Sales, USA, Inc., 2018-0391/FTL (Fla. NMVAB January 23, 2019)

The Consumers complained of defective brakes in their 2017 Toyota Yaris IA. One Consumer testified that beginning in January 2018, when driving between 25-40 miles per hour, he would hear a "big noise" upon applying pressure to the brake pedal. He informed the authorized service agent that when he applied the brake, the vehicle made a high-pitched squeak and grinding noise. He stated that the noise happened every time he pressed the brake pedal and last occurred on his way to the arbitration hearing. He added that he no longer felt safe when driving the vehicle. The other Consumer testified that she heard the noise every time she drove the vehicle and specifically pointed out that she heard the noise upon stopping at a light. She added that she felt unsafe in the vehicle and did not feel comfortable driving long distances.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative acknowledged that he had never inspected the vehicle but did review the repair orders. He said that the first repair order indicated that the only repair performed was for out-of-round front rotors, which would not have caused a brake noise. He also acknowledged that none of the repairs performed at the first three repair attempts would have addressed the Consumers' brake noise complaint. After reviewing the repair order from the final repair attempt, he noted that, according to the document, the brake noise had been duplicated for the Field Technical Specialist (FTS) while in the dealership's parking lot, and that upon inspection of the brakes at that time, the FTS found an accumulation of foreign debris in the brake system. He acknowledged that he had never spoken to the FTS who performed the final repair attempt and was not able to provide any further detail about what type of foreign debris was observed. He explained that according to the repair order, the foreign material was embedded in the brake pads and/or shoes, and was rubbing against the drum and/or rotors. He further explained that the FTS observed score marks directly lined up with the foreign debris in the brake shoes and drums, which could be caused by a foreign material such as a rock. He said that at the final repair attempt, the FTS replaced the brake pads and rotors in an attempt to eliminate the brake noise, but acknowledged that the FTS did not replace the brake shims, which can also be a source of brake noise. He also acknowledged that at the time the Consumers first reported the brake noise and at the subsequent two repairs, the technicians did not find any foreign debris in the brake system. Additionally, he stated that the FTS observed the Consumer applying the emergency brake upon exiting the vehicle after the test drive. He noted that driving with the emergency brake engaged could also cause a problem with the brakes; however, he acknowledged that the condition of the Consumers' brake pads was not consistent with a vehicle that was driven long distances with the emergency brake engaged. He also acknowledged that the technicians never explored any other potential cause of a brake noise and specifically, never looked for a mechanical problem in the brake or drive system that could be causing the noise. He speculated that new debris in the brake system may have caused the brake noise that the

Consumers continued to experience, but conceded that it was possible that the brake noise was coming from an area of the vehicle other than the brake system.

During the hearing, the Board inspected and test drove the vehicle. During an inspection, two Board members checked the front rotors, but did not observe any abnormalities in the rotors. Upon looking under the wheels and tires, one Board member did not see any abnormal dust or debris, and also found the rear drums to be in normal condition. The Board members then applied the brakes after slowly accelerating and reversing the vehicle in the parking lot, and noticed a slight squealing noise when the emergency brake was partially engaged.

The Board found that the evidence established that the defective brakes 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 Consumers were awarded a refund.

Kassam v. Nissan Motor Corporation, USA, 2018-0499/STP (Fla. NMVAB February 22, 2019)

The Consumers complained of a noise condition characterized by various rattling, ticking, fluttering and clicking noises emanating from the air conditioner vents, dashboard, and front doors in their 2017 Nissan Murano. The Consumers testified that they first began hearing abnormal noises in August 2017 as they were driving back from an out-of-state trip. At that time, the Consumers heard a fluttering-type noise from the left side of the dashboard and a ticking noise from the right side of the dashboard, as well as a fluttering noise from the air conditioner vents. In addition to those noises, the Consumers subsequently began hearing noises from both of the front doors. According to them, the noises usually occurred when the weather was hot and the vehicle has been parked for a while in an unshaded area. Although the authorized service agent made some repairs, the Consumers asserted that the problem continued to occur.

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 was not able to duplicate the noises during the test drive that he took at the final repair attempt. He acknowledged that he was not present for any of the repair attempts before the final repair attempt and offered no evidence to dispute that the authorized service agent was able to duplicate the Consumers' complaints at several of the repair visits, as reflected in the written repair orders, merely noting that "noises are very subjective," and stating that the "dealership did its best to deal with the noises for 'customer satisfaction.'"

The Board concluded that the evidence established that the noise condition characterized by various rattling, ticking, fluttering and clicking noises intermittently emanating from the air conditioner vents, dashboard, and front doors substantially impairs the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a replacement vehicle.

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

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

Lechowska v. Toyota Motor Sales U.S.A., Inc., 2018-0483/TPA (Fla. NMVAB February 28, 2019)

The Consumer complained that the passenger-side airbags deployed while driving her 2017 Lexus NX 200t. The Consumer testified that while she was driving to lunch on April 20, 2018, with her six-week old baby in a car seat installed on the rear passenger-side, the front and rear passenger-side curtain airbags malfunctioned and deployed "out of nowhere." According to her, when the airbags deployed, she was driving between 35 and 45 miles per hour in the left lane with two lanes of traffic to her right, approaching a traffic light. She testified that she "did not hit anything" in the road, stating that it was a sunny day, traffic was light, the road was "smooth," and there was no construction in the area. She explained that, immediately after the airbags deployed, she pulled over to the median on the left-side of the road and was contacted by the vehicle's SOS call system. She stated the operator from the SOS call system inquired as to whether she was just involved in an accident and she told the operator that she was not involved in an accident but that the airbags had just deployed on their own. She said the operator called the police to the scene and an ambulance for the baby because she was concerned about her baby's hearing since the airbags deploying created a very loud noise. She said she left to ride in the ambulance with her baby to the hospital while the police remained at the scene with the vehicle. She said later that day the authorized service agent called her to tell her that the vehicle had been towed to the authorized service agent for inspection.

The Manufacturer asserted that, based upon forces encountered by the vehicle, the supplemental restraint system deployed the airbags for occupant safety; and that the alleged nonconformity was the result of an accident of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that he analyzed the Event Data Recorder (EDR) information retrieved from the vehicle concerning the April 20, 2018 incident, including the pre-crash data showing the vehicle's activity during the five seconds before the airbags deployed, and he also inspected the vehicle on July 24, 2018. He testified that both the EDR information and his inspection findings support that the right front tire struck a curb, a significant pothole, or other object causing the airbags to deploy. He explained that a side impact crash typically occurs in 30 milliseconds, about a tenth of the time it takes to blink an eye; therefore, the airbag system was a "predictive system" and must decide whether to deploy the airbags in a matter of milliseconds. He stated the system's sensors were constantly scanning the vehicle for predictors and using algorithms to measure the "rate of change of acceleration." He explained that when the rate of change of acceleration measurements registered by the sensors do not match any normal driving pattern, the system will command the airbags to deploy. He stated two airbags deployed in the case: the passenger-side curtain shield airbag that was one continuous airbag running along the passenger-side; and the front torso airbag in the front passenger seat. He testified that the airbags were "properly commanded to deploy" because two independent sensors located in different locations within the vehicle, and electrically separate from each other, both registered the same "side impact." He described the two sensors involved in this case: a front side impact sensor located within the front passenger door; and a "safing

sensor" on the floor that acted as double check for the side impact sensor. He noted that if one of the sensors had failed there would have been evidence of a diagnostic trouble code, but no codes were present.

He further explained that the pre-crash data from the EDR evidenced that, approximately 1.5 seconds before the airbags were triggered to deploy, the Consumer was driving 49.1 miles per hour and took her foot off the gas pedal, as the accelerator pedal percentage measurement changed from 23.0 to 0.0. Then, at 0.5 seconds before deployment, the Consumer lightly applied the brakes because the service brake came on and the longitudinal acceleration measurement was -1.005, which signified slowed down and corresponded with the braking occurring. However, according to him, when the airbags were triggered to deploy, the speed of the vehicle was 47.2 miles per hour and the longitudinal acceleration measurement jumped from -1.005 to -3.661, a significant slowdown of the vehicle, evidencing that the Consumer "struck something that impeded her forward motion" He explained that the vehicle had a "discontinuity in its acceleration" because the significant deceleration that the vehicle experienced did not match the braking occurring. He also explained that the lateral, or side-to-side, acceleration measurements registered by the two sensors, as shown in the EDR, evidenced a side impact of "more than 86 g's," or 80 times the force of gravity, first up 30 g's to the left side at five milliseconds prior to deployment of the airbags and then down 50 g's to the right side when the airbags deployed. According to him, when the sensors registered "more than 86 g's" that was about "100 times what the vehicle can experience under normal driving" conditions. He testified that since both sensors separately registered these accelerations that were equivalent to the "same force or g wave" as if the vehicle struck another vehicle, the airbags were then commanded to deploy. He testified that the airbag system operated as designed and made the determination to deploy the airbags within five milliseconds of striking the object. He explained that when the Consumer struck the object the airbags were in essence being deployed at the same time, so the deployment may have occurred before the Consumer even knew that she hit something. He also testified that he observed, during his inspection on July 24, 2018, and the photographs admitted into evidence portray, damage to the right front suspension because the front stabilizer bar had been moved slightly and a rubber piece on the bar had separated, indicating that the right front tire was struck and the right front suspension absorbed the impact. He explained, using photographs admitted into evidence to depict, that he measured the gaps in front of and behind each tire and calculated that the right front wheel had moved backwards one quarter of an inch and the bottom of the right front wheel had moved outwards, supporting that the right front tire was struck. Additionally, he testified that the alignment report also evidenced that the right front tire was struck because the right front caster angle was reduced and not measuring within the Manufacturer's specifications, and the right front camber was measuring "negative" meaning that the top of the right front tire was tilting inward and not sitting straight up and down; however, the left front caster angle measured within specifications and the left front camber was not measuring negative and sitting straight up and down.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>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</u>." §681.102(15), Fla. Stat. 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 deployment of the passenger-side airbags while driving was the result of an accident of the motor vehicle by persons other than the Manufacturer or its authorized service agent, specifically the right front tire striking an object and causing the deployment of the airbags. Accordingly, the complained-of defect did not constitute a "nonconformity" as defined by the statute, and the Consumer was therefore not qualified for repurchase relief under the Lemon Law.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Brodsky v. Volvo Cars of North America, 2018-0466/WPB (Fla. NMVAB February 14, 2019)

The Consumer's 2016 Volvo XC90 was declared a "Lemon" by the Board due to a hesitation upon acceleration. The Consumer requested, as an incidental charge, reimbursement of $1,850.00 for 70 hours of "driver for hire" expense that the Consumer incurred when, due to her low vision, she had to hire a driver for the loaner vehicle because her teenage children were not eligible to transport her in the loaner vehicle and occasionally, the driver had to use his own vehicle when a loaner vehicle was not available for him to drive. The Manufacturer objected to 50 of the 70 hours of "driver for hire" expense. A majority of the Board awarded the Consumer the entire $1,850.00 for 70 hours of "driver for hire" expense that the Consumer incurred as an incidental charge. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Tiller v. Mercedes-Benz USA, LLC., 2018-0415/ORL (Fla. NMVAB January 14, 2019)

The Consumer's 2018 Mercedes-Benz E63s was declared a "Lemon" by the Board. In order to purchase the vehicle, the Consumer paid $146,244.34 in cash. The Consumer obtained a personal loan in the principal amount of $150,000.00 from First Bank & Trust Company to purchase the vehicle (hereinafter referred to as the "Personal Loan"). At the hearing, the Consumer sought reimbursement of $7,441.60, which was the interest paid by the Consumer, through November 13, 2018, on the Personal Loan; in addition, the Consumer also sought reimbursement of $998.02, which was the accrued unpaid interest on the Personal Loan, through the January 8, 2019 hearing date (hereinafter collectively referred to as the "Interest Amounts"). The Manufacturer's representative objected to the payment of the Interest Amounts, arguing that there was no lienholder of record; the vehicle was purchased with cash, so the Manufacturer was treating the transaction as a "cash purchase buyback"; the Personal Loan was obtained prior to the purchase of the vehicle; and the vehicle was not utilized as security for the Personal Loan.

With respect to the Consumer's request for reimbursement of the Interest Amounts, the Board concluded that the Interest Amounts satisfy the definition of "collateral charges" under the Lemon Law. The Manufacturer's assertions to the contrary were rejected. "Collateral charges" are defined as "those additional charges to a consumer wholly incurred as a result of the acquisition of the motor vehicle. For the purposes of this chapter, collateral charges include, but

are not limited to, manufacturer-installed or agent-installed items or service charges, earned finance charges, sales taxes, and title charges." §681.102(3), Fla. Stat. The Board found, and the evidence otherwise established, that the principal amount of the Personal Loan obtained by the Consumer was utilized by the Consumer for the acquisition of the vehicle. Therefore, the Board concluded that the award shall include reimbursement of $7,441.60 for the interest paid by the Consumer, through November 13, 2018, on the Personal Loan; and $998.02 for the accrued unpaid interest on the Personal Loan, through the January 8, 2019 hearing date, as reasonable collateral charges.

Net Trade-in Allowance §681.102(18), F.S.

Gorin v. Rolls-Royce Motor Cars NA, LLC., 2018-0203/MIA (Fla. NMVAB January 4, 2019)

The Consumer's 2017 Rolls-Royce Wraith was declared a "Lemon" by the Board. In order to lease the vehicle, the Consumer traded in a used 2017 Audi R8 encumbered by debt in the amount of $165,407.04. The lease agreement reflected a trade-in allowance of $150,000.00, but did not reflect a trade-in deficit or negative net trade in allowance, resulting in a net trade-in allowance reflected in the lease agreement of $0.00. The Manufacturer argued that the net trade-in allowance used by the Board must reflect the pay-off of the debt in its entirety, regardless of the amounts reflected in the lease agreement.

The net trade-in allowance reflected in the lease agreement was not acceptable to the Consumer. Pursuant to Section 681.102(18), Florida Statutes, the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. According to the NADA Guide, there was no sales data available for the trade-in, leaving the Board to utilize, pursuant to 681.102(18), Florida Statutes, "the net trade-in allowance as reflected in the … lease agreement" in calculating of the Consumer's refund. Accordingly, the Consumer was entitled to a refund of $0.00 for the net trade-in allowance as reflected in the lease agreement.

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

Torres v. Toyota Motor Sales U.S.A., Inc., 2018-0505/TPA (Fla. NMVAB March 5, 2019)

The Consumer's 2018 Toyota Camry was declared a "Lemon" by the Board. For the purpose of calculating the statutory reasonable offset for use, the Buyer's Order reflected that the vehicle had 11 miles on the odometer at the time of purchase; however, the Consumer testified that the vehicle actually had 90 miles on the odometer at the time he took delivery and requested that the Board utilize that mileage for calculating the reasonable offset for use. The Manufacturer objected and noted that two different documents in the file, the Buyer's Order and Odometer Disclosure Statement, reflected that the vehicle had 11 miles on it at delivery, and requested that the Board only subtract 11 miles to reflect mileage at delivery when calculating the offset. The Board subtracted 90 miles as reflected in the Consumer's testimony, and the Manufacturer's objection was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Stewart v. Mercedes-Benz USA, LLC., 2018-0291/MIA (Fla. NMVAB February 5, 2019)

At the commencement of the hearing, the Manufacturer asserted that MBM Repair LLC, a third-party repair shop, should have been joined to the proceedings. The Manufacturer argued that MBM Repair LLC performed modifications to the vehicle, and the Consumer's alleged complaints were all related to the modifications made by MBM Repair LLC. The Manufacturer requested that the hearing be continued so that MBM Repair LLC could be joined to the proceedings. The Consumer stated that when he purchased the vehicle from Mercedes-Benz of Cutler Bay, most of the conversion work had already been completed, and the Consumer had not been provided with any information about the conversion company. He also stated that he never took the vehicle to MBM Repair LLC or any other third-party shop for repairs. Upon consideration of the Manufacturer's request, the Board ruled that the hearing should proceed and ultimately, the Consumer was awarded a refund.