OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2019 - June 2019 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.

Palov v. Hyundai Motor America, 2018-0532/FTL (Fla. NMVAB April 4, 2019)

The Consumer complained of an intermittent inability to fill the fuel tank in her 2017 Hyundai Santa Fe. The Consumer testified that the first time she noticed the inability to fill her vehicle's fuel tank was in January 2018, when she had received a late-night telephone call informing her that her son was being taken to the hospital in Gainesville. She rushed out the door to drive to Gainesville to be with her son. She realized that she needed gasoline and stopped at a turnpike service station to attempt to fill her vehicle with fuel. She was only able to put a gallon or two in the tank before the pump clicked off. After trying multiple times, she moved her vehicle to a different pump but was still unable to fill her fuel tank. She had found that when the problem occurred, it did not make a difference if she held the handle of the pump herself or if she used the self-filling mechanism found at many pumps; the pump clicks off as though the tank was already full after generally only a gallon or two of gasoline had been pumped, although she noted that, on occasion, she had been able to put up to four gallons of fuel in the tank before the pump clicks off. She explained that because the problem was intermittent, she never knew when the problem would occur and didn't feel safe in the vehicle. Due to the intermittent inability to fill her fuel tank she now kept her gas tank between a half and a quarter of a tank as she was afraid that she would run out of gas and be unable to fill the tank. She stated that as a result of the problem she will not take her vehicle on long road trips. As an example of the severity of the problem, she recounted that on November 16, 2018, she went to six different gas stations and attempted to put fuel in her tank but was unable to fill the gas tank. The inability to fill her fuel tank went away for several months after the first repair attempt, but it returned in July 2018 and continued to the hearing day.

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 involved in the final repair attempt in October and that he had no difficulty putting fuel in the vehicle. He also explained that he scanned the vehicle for codes at that time but did not find any codes. He advised that the vehicle's fuel tank held approximately 14 gallons, and he acknowledged that the tank should be full before causing the pump to shut off. On cross-examination, he admitted that he did not attempt to fully fill the fuel tank during the final repair attempt, but that he pumped gasoline into the vehicle on two separate occasions for a total of 6.4 gallons. He opined that if the inability to fill the fuel tank existed at the time, it was not a substantial defect or condition as it was intermittent.

The Board found that the evidence established that the intermittent inability to fill the fuel tank 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.

Mohyuddin v. American Honda Motor Company, 2018-0557/TLH (Fla. NMVAB May 28, 2019)

The Consumer complained that the rear sliding doors intermittently reopened after failing to fully close in his 2018 Honda Odyssey. The Consumer testified that the vehicle was purchased for his wife. He explained that initially the left rear sliding doors were reopening before fully closing. However, after the first two repair attempts, the right rear sliding doors also began to exhibit the same malfunction. He testified that the reopening of the rear sliding doors before fully closing occurs both when using the remote and when pushing the button inside the vehicle. The Consumer's wife explained that at times she has had to turn off the rear sliding doors' automatic function and close the doors manually to get the rear sliding doors to stay closed. Both the Consumer and his wife explained that they have two young grandchildren who often ride in the rear of the vehicle and that the rear sliding doors malfunction causes them concern for the safety of their grandchildren.

The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent reopening of the rear sliding doors after failing to fully close on the following dates: April 30, 2018, when the vehicle was found to be operating at factory specifications; July 10, 2018, when dirt in a rear sliding door track was removed; August 7, 2018, when the Consumer complained of the rear sliding doors malfunctioning, but no work was performed; August 13, 2018, when the left side pinch sensor was found to be deformed and was replaced; August 23, 2018, when the rear sliding doors were found to be operating per design and no repairs were performed; September 12, 2018 when the left side power sliding door motor was replaced; and, October 1, 2018, when the right side power sliding door motor was replaced, which corrected the problem. The vehicle was presented to the Manufacturer's authorized service agent for repair of the malfunction of the of the power locking system for the vehicle's two front doors on August 23, 2018, when both front door lock actuators were replaced, which corrected the problem.

On December 6, 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 December 11, 2018. The Manufacturer stipulated that on January 24, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, no problem was found, and no repairs were performed for the intermittent reopening of the rear sliding doors.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, and any nonconformities were repaired within a reasonable number of repair attempts. In support of the Manufacturer's defense, the Manufacturer's representative testified that he inspected the Consumer's vehicle on April 2, 2019, at which time he verified that all the features of the rear sliding doors were operating correctly. He further explained that if the rear sliding doors failed to latch correctly, or opened while driving, an error code would be recorded and that he did not find any error codes. He stated that in his opinion, the vehicle was repaired at the October 1, 2018 repair attempt.

The Board found that the evidence established that the intermittent reopening of the rear sliding doors after failing to fully close 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 evidence established that the nonconformity was subjected to repair by the Manufacturer's authorized service agent a total of seven times prior to notice to the Manufacturer. 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 that the evidence established that the nonconformity appears to have been corrected at the seventh repair attempt for the problem on October 1, 2018, when the right side power sliding door motor 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 January 24, 2019. However, based on the repair history, the Board concludes that the Manufacturer, through its authorized service agent, 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 and was awarded a replacement vehicle.

Rodriguez v. Volkswagen/Audi of America, Inc., 2018-0409/MIA (Fla. NMVAB June 10, 2019)

The Consumers complained of condition in which the front assistance and lane assistance features did not work properly in their 2018 Volkswagen Atlas. The vehicle was presented to the Manufacturer's authorized service agent for repair of the nonconformity on May 19-21, 2018, when no repairs were performed. On June 23, 2018, the Consumers 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 16, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the technician took a test drive but did not perform any repairs to the vehicle. The condition in which the front assistance and lane assistance features did not work properly continued to exist after the final repair attempt.

A majority of the Board found that complaint substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity. The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformity. The evidence established that the nonconformity was presented for repair on only *one* occasion, on May 19, 2018, prior to sending written notification to the Manufacturer. As such, the condition in which the front assistance and lane assistance features did not work properly had not been subject to a

reasonable number of repair attempts, and did not entitle the Consumers to the requested relief under the Lemon Law at the time.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair§681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

Block v. American Honda Motor Company, 2018-0556/WPB (Fla. NMVAB April 12, 2019)

The Consumer complained of a defective fuel tank and brake light, as evidenced by a recall, an oil leak, and a wind noise in his 2017 Acura NSX. The Board found the complaints to be nonconformities that were out of service by reason of repair for a total of 32 cumulative out-of-service days. On November 30, 2018, the Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification on December 5, 2018. On December 13, 2018, the Consumer was put on notice that the Manufacturer requested to perform a post-notice inspection or repair of his vehicle on December 20, 2018. The Consumer testified that he was unable to do the inspection on that date because of his work schedule. As a result, he attempted to contact the Manufacturer's representative that requested the inspection. According to the Consumer, he attempted to contact the representative through numerous telephone calls for which he had to leave voice mails, as well as through a written letter sent prior to the scheduled date by certified mail and fax, to try and reschedule the inspection. He testified that he never heard back from the representative until he received a letter from her dated December 28, 2018, informing him that he had missed the inspection appointment and that they assumed the matter had been resolved.

The Manufacturer asserted that they were not afforded a post-notice inspection or repair. The Manufacturer's representative acknowledged that the Manufacturer received the motor vehicle defect notification form from the Consumer on December 5, 2018. As result, she testified that she arranged for the post-notice inspection or repair to take place on December 20, 2018, and sent a Manufacturer's representative to the inspection site that day. She testified that she was unaware of any attempts made by the Consumer to try and reschedule the inspection until she received a letter from him dated January 3, 2019.

The Board found that the evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the required written notification was sent to the Manufacturer. The Board found that the evidence established that the Consumer attempted, through numerous telephone calls/voice mails, and a written letter sent by both certified mail and fax, to reschedule the post-notice inspection or repair scheduled by the Manufacturer for December 20, 2018. The Board further found that the Manufacturer failed to respond to any of the Consumer's requests to reschedule the inspection. The Board found that under the circumstances of the case, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. Accordingly, the Consumer was awarded a refund.

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

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

London v. Subaru of America, Inc., 2019-0076/WPB (Fla. NMVAB May 22, 2019)

The Consumer complained of outside debris entering the engine compartment of his 2019 Subaru Impreza. The Consumer testified that outside debris, including twigs, branches, leaves and acorns, was coming into the engine through the opening in the hood of the vehicle. He explained that outside debris got stuck on the socket that held the windshield wipers and "slides right in" through the opening, especially in weather conditions of excess rain or wind. The Consumer stated that the dealership advised him to drive on the highway, which would allow debris to clear from the vehicle, and to avoid parking under trees. He explained that as a disabled veteran, he had no choice but to park under trees that surround handicapped parking spots and had no option other than to park under trees at his residence. He acknowledged that he had not experienced any drivability issues with 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 outside debris on the vehicle, such as leaves, did not impair the use or safety of the vehicle. He explained that the engine cabin was not sealed, and the owner's manual instructed the Consumer to keep the front ventilation inlet grill free of debris. He argued that there were no mechanical defects or safety concerns with the vehicle and concluded that the vehicle was operating as designed.

During the hearing, the Board inspected the vehicle. Upon opening the hood of the vehicle, the Board members noticed leaves and twigs on the shock absorber pillars. The Board members observed that the vehicle was designed in a way that the weather stripping under the hood did not extend all the way to the end, which created an opening.

The Board found that the evidence failed to establish that the outside debris entering the engine compartment, as complained of by the Consumer, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Govea v. General Motors, LLC, 2019-0072/MIA (Fla. NMVAB June 17, 2019)

The Consumer's 2017 Chevrolet Traverse was declared a "Lemon" by the Board. The Consumer requested and was awarded $375.00 for translator's services as an incidental charge for a translator who performed translating duties for him and his witness at the hearing.

Prieto v. Toyota Motor Sales, USA, Inc., 2018-0433/MIA (Fla. NMVAB April 1, 2019)

The Consumer's 2018 Lexus LC500 was declared a "Lemon" by the Board. The Consumer requested reimbursement of $600.00 for witness testimony from Richard Metzger of Lyon Investigations, Inc., as an incidental charge. The Manufacturer objected to the request. The Board found that $600.00 for witness testimony of Richard Metzger was an incidental charge and awarded that amount to the Consumer.

Kay v. Mercedes-Benz USA, LLC, 2018-0514/WPB (Fla. NMVAB May 22, 2019)

The Consumer's 2017 Mercedes Benz S-Class AMG S63 was declared a "Lemon" by the Board. The Consumer requested reimbursement of $10.00 for parking the day of the hearing; $27.45 for postage to send the Motor Vehicle Defect Notification form by express/overnight mail to the Manufacturer on November 29, 2018; $49.40 to send two sets of hearing documents by express/two-day mail; $14.70 to send two sets of hearing documents on February 14, 2019; $56.00 to send two sets of hearing documents by express/overnight mail on April 17, 2019; and $32.97 for an Uber rental to pick up the vehicle from the authorized service agent on December 21, 2018 as incidental charges. The Manufacturer objected to all postage costs other than the cost to send the Motor Vehicle Defect Notification form to the Manufacturer, as there was no statutory requirement to send other documents by means of an express, trackable method, and objected to the Uber rental cost, asserting that the authorized service agent would have picked up the Consumer and transported him to retrieve his vehicle. No evidence as to the latter objection was provided. The Manufacturer's objections were denied by the Board and the Consumer was awarded all incidental charges that were requested.

MISCELLANEOUS PROCEDURAL ISSUES:

Prieto v. Toyota Motor Sales, USA, Inc., 2018-0433/MIA (Fla. NMVAB April 1, 2019)

The Consumer sought to introduce the testimony of a witness, but did not list his name on the *Amended* Prehearing Information Sheet filed on March 1, 2019. The Consumer's witness had been previously listed on the Prehearing Information Sheet filed on February 25, 2019. The Manufacturer objected to testimony by the Consumer's witness. Pursuant to paragraph (6), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, a witness may not be allowed to testify if a party fails to send a Prehearing Information Sheet, listing the name of a witness, to the Board Administrator and opposing party no later than five days before the scheduled hearing. Upon consideration, the Board ruled that the Consumer's witness was permitted to testify.

Alford v. Ford Motor Company, 2019-0118/ORL (Fla. NMVAB June 7, 2019)

During the hearing, the Consumer sought to introduce screenshots from his cell phone of notifications that he had received from the Manufacturer and text messages that he had received from the Manufacturer's authorized service agent, to demonstrate the occurrence of a repair that was not documented; however, the screenshots had been submitted to the Board and the Manufacturer less than five days prior to the hearing. Pursuant to paragraphs (6), (10), and (22),

Hearings Before the Florida New Motor Vehicle Arbitration Board, all documents or other evidence a party intends to present for consideration by the Board must be received by the Board Administrator and the opposing party no later than five days before the hearing. Failure to do so may result in the Board declining to consider the documents or other evidence "unless good cause is shown for [the] failure to comply." The Manufacturer objected to the Board considering the screenshots, as they were not submitted timely in accordance with the Board's Rules. Upon consideration, the Board denied the request to consider the screenshots.