OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2012 - June 2012 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.. (2012)

Peterson and George v. Kia Motors America, Inc., 2012-0022/TPA (Fla. NMVAB April 19, 2012)

The Consumers complained of a pull to the right in their 2011 Kia Sorrento. The Consumer testified that, as a former race car driver, he had owned more than 200 vehicles; none pulled in either direction as drastically as the subject vehicle. According to him, the pull to the right was so severe, that if he was driving on a three lane highway in the left lane, the vehicle pulled across the other two lanes, in a matter of "seconds." The Manufacturer argued that the pull to the right did not substantially impair the use, value or safety of the motor vehicle; alternatively, the pull was repaired before the final repair attempt, within a reasonable number of attempts. The Manufacturer's witness testified that there are many "environmental factors" that can cause a vehicle to "drift"; for example, road crown, puddles in the road, and different air pressures in the front tires. He opined what the Consumers were experiencing was "torque steer," which is "normal for a unibody, front wheel drive, McPherson suspension vehicle." He explained that Kia designed a longer axle on the right side of this vehicle so when the driver accelerates rapidly, there is bound to be normal "torque steer" to the right. A driver can still get "torque steer" while using the cruise control because it is based on operating tension rather than foot motion. He further opined that torque steer was a "physics" dynamic, which can't be changed; consequently, "nothing more can be done" to the vehicle. During the hearing, the Board inspected and test drove the vehicle in the presence of the parties. A test drive was performed for a total of 17 miles on local roads and highways at speeds of 45-60 miles per hour. A stop watch was used to denote how long a pull or drift would last. A severe sudden pull to the right was experienced, causing the driver to "fight" the vehicle, especially at higher speeds. The pull was so quick that the stop watch was unable to be employed. The Board found the evidence presented by the parties, including the test drive performed during the hearing, established that the pull to the right substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The nonconformity continued to exist after the final repair attempt. 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.

Trovato and Towle v. Nissan Motor Corporation USA, 2012-0074/TPA (Fla. NMVAB June 5, 2012)
The Consumers complained that the steering wheel was off center; the motor of the power window on the passenger side made a "scraping" or "grinding" noise when the window moved up or down; and the passenger seat frame was cracked and moving at the seat track weld joints, which was coupled with damage to the passenger door, in their 2011 Nissan Pathfinder.
The Board found these problems to be nonconformities for which there were a total of 29 cumulative out-of-service days. A majority of the Board concluded that, under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumers were awarded a refund.

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Gavcovich v. BMW of North America LLC, 2012-0086/MIA (Fla. NMVAB June 21, 2012)
The Consumers asserted that their 2010 BMW Mini Cooper stalled while driving. After presenting the vehicle to the Manufacturer's authorized service agent for repair of the above problem at least three times, the Consumers sent a two-page letter, dated March 3, 2012, addressed to the Manufacturer's authorized service agent at "Braman Service Department" in Miami, Florida. The letter indicated that copies were furnished to "Mini Financial Services, Customer Service" and to "Mini USA" via email. By letter dated March 19, 2012, Mini Financial Services responded, acknowledging receipt of the Consumers' letter and stating that, "We have addressed your letter and concern to the manufacturer, MINI USA, to advise them of your correspondence." Ultimately, a copy of the letter was received by the "Mini USA Customer Relations Department in Ohio," according to an affidavit by an employee of BMW of North America, LLC (BMWNA), the parent company of Mini USA, and the Manufacturer in this case. At the hearing, the Manufacturer, through counsel, stipulated to receipt of a copy of the Consumers' March 3, 2012, letter; therefore, BMWNA's receipt of the letter was not at issue.

The Consumer's two-page letter to the service agent began with this statement: "I am writing this letter to inform you of my dissatisfaction with the service we have received and our Mini Cooper in general." The letter went on to recount the repair history of the vehicle, giving the dates of repair, outlining what occurred each of the four times the vehicle was brought to Braman BMW for a complaint of stalling, and expressing concern with the vehicle's performance. According to the Affidavit of the BMWNA employee:

> Since said letter was a customer dissatisfaction letter and not a Motor Vehicle Defect Notification or request for final repair attempt under the Florida Lemon Law statute, said letter was not forwarded to Mini USA Customer Relations

Department in New Jersey, which deals with Lemon Law issues such as Motor Vehicle Defect Notifications.

The Affidavit went on to state that, had the letter been a notification of a final repair opportunity, it would have been forwarded to the New Jersey office as part of "routine protocol" and a BMW/Mini field technical specialist would have been contacted to schedule a final repair attempt; however, this did not happen and BMWNA did not have a final repair attempt. The Field Technical Specialist for BMWNA, testified that, normally, he is only sent by BMWNA to perform a final repair attempt if a Motor Vehicle Defect Notification form is received. If a letter is received, he works an appointment to review the vehicle into his regular schedule. His research and diagnostics are more detailed when there is a final repair attempt. The Manufacturer, through counsel, contended that, while it received a copy of the Consumer's letter, for the reasons set forth in the Affidavit, the content of the letter was not sufficient to constitute the written notification of a final repair opportunity required by Section 681.104(1)(a), Florida Statutes, and since the Manufacturer did not have the final repair opportunity, the claim should be dismissed. The Board noted that the Consumers were not required to use the "Motor Vehicle Defect Notification" form in order meet the statutory notification requirement, because the statute does not require that a consumer's written notification be in any particular form, except in writing. However, upon review of the content of the letter in conjunction with the statutory requirement, the affidavit from the BMWNA employee, and the fact that the Manufacturer did not perform a final repair attempt, the Board concluded that the March 3, 2012, letter was not sufficient to give the Manufacturer the statutory opportunity for a final repair. Accordingly, the claim was dismissed.

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.

Brundidge v. Chrysler Group LLC, 2012-0047/ORL (Fla. NMVAB April 30, 2012)
The Consumers complained of a steering wheel vibration at highway speeds in their 2011 Jeep Cherokee. According to the Consumer, the vibration was an intermittent occurrence that happened for couple of seconds when the vehicle was being driven at speeds of 70 miles per hour and above, and then it went away. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative test drove the vehicle with the Consumer at the Manufacturer's prehearing inspection. The Consumer told him that he both felt the vibration and saw it. The Manufacturer's representative did see the passenger seat "quiver a little," but all he felt was "road feel," and in his view, the Consumer was simply "feeling the road" in the steering wheel. A majority of the Board concluded that the evidence failed to establish that the intermittent steering wheel vibration at highway speeds complained of by the Consumers 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 Consumers' case was dismissed.

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

Kashtan v. Toyota Motor Sales USA Inc, 2012-0072/STP (Fla. NMVAB May 24, 2012)
The Consumers asserted that their 2011 Toyota Camry suddenly and unexpectedly accelerated, which propelled the vehicle through some bushes and resulted in damage to the front end of the vehicle. The Consumer testified that she was pulling into a parking place at approximately five miles per hour, with her foot still on the brake, when the vehicle suddenly accelerated out of control. According to her, even though she was braking the whole time, the vehicle continued to go forward, and after she went through the bushes, she crossed a sidewalk and grass, and then entered the outer lane of a busy street, whereupon the vehicle gave a little "jerk" and came to a stop. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, because the Consumers' accident did not result from a nonconformity. The Manufacturer's representative testified that his inspection revealed no evidence of a sticky accelerator pedal nor of floor mat entrapment, and he pointed out that the Consumers' vehicle was equipped with the improvements developed as countermeasures against unintended acceleration. Since a driver cannot accelerate by depressing the brake pedal, in order for the scenario described by the Consumers to have occurred, both the throttle and the brake, two independent systems within the vehicle, would have had to have failed at the same time. However, there was no evidence of any mechanical or electronic failure of any system within the Consumers' vehicle. In the Manufacturer's view, the only reasonable explanation for the vehicle to have accelerated as it did, was that the Consumer thought she was pressing the brake pedal when, in fact, she was inadvertently pressing the accelerator pedal. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the sudden acceleration complained of by the Consumers was caused by an accident by persons other than the Manufacturer or its authorized service agent, to-wit: the Consumer inadvertently pressing the accelerator instead of the brake pedal. Accordingly, the Consumers' case was dismissed.

Timeliness of filing of the Request for Arbitration §681.109(4), F.S.

Nwaokoh v. Nissan Motor Corporation USA, 2012-0041/FTL (Fla. NMVAB May 31, 2012)
The parties stipulated that, on December 10, 2009, the Consumer purchased a 2010 Nissan Armada in Florida. On November 30, 2011, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Nissan. The procedure rendered a decision denying the claim. That decision was mailed to the Consumer, along with a letter dated January 4, 2012, which informed the Consumer he had the option to accept or reject the decision, and had 14 days from the date of the letter for the BBB to receive the enclosed form indicating which option he had chosen. The letter also informed the Consumer that if the form was not received at the CBBB office within 14 days from the date of the cover letter, the decision would be considered rejected and the manufacturer would be notified. The Consumer was not satisfied with that decision and on February 9, 2012, requested arbitration by the New Motor Vehicle Arbitration 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 maintained that the Consumer

purchased the vehicle on December 9, 2009, and that 60 days after the expiration of the Lemon Law rights period was February 7, 2012. The Manufacturer further maintained the certified program's January 4, 2012, letter should be considered the date of the program's "final action" for purposes of calculating the timeliness of the Consumer's request for arbitration, and that 30 days after the date of final action was February 3, 2012. The Manufacturer thus asserted that the Consumer's Request for Arbitration, which was filed on February 9, 2012, was untimely, as it should have been filed no later than February 7, 2012. 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 with the Board is set forth in Section 681.109(4), Florida Statutes, which states:

> (4) 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 of Legal Affairs, a copy of each settlement approved by the procedure or each decision made by a decisionmaker 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 the Consumer took delivery of the vehicle on December 10, 2009. The Lemon Law rights period expired 24 months later on or about December 10, 2011. The final action of the certified procedure was January 18, 2012 (the date of the January 4, 2012, letter plus 14 days to accept or reject the decision.). In this case, the period 30 days after the certified procedure's final action was the later of the relevant time periods. Thus, the Consumer's Request for Arbitration, filed on February 9, 2012, was timely. The Manufacturer's assertion was rejected by the Board. The case was dismissed on other grounds (nonconformity corrected within a reasonable number of attempts).

REFUND §681.104(2)(a)(b), F.S.:

Careers USA Inc. v. Land Rover of North America, 2012-0095/WPB (Fla. NMVAB June 1, 2012) At the hearing, the Manufacturer, through counsel, stipulated that the Consumer's 2010 Land Rover Range Rover was a "lemon." The Consumer requested that the Board award a replacement vehicle. Prior to the hearing, Counsel for the Manufacturer submitted a document titled "Land Rover North America's Arbitration Memorandum of Law Regarding the Consumer's Entitlement to Elect a Refund Only." It was the Manufacturer's contention that there was no statutory authority for the Consumer to choose, or for the Board to award, a replacement vehicle; rather, the Consumer could only choose a refund if the Manufacturer offered a replacement vehicle and the Consumer did not want a replacement. The Consumer, through counsel, maintained that the statute was clear that the Consumer has the right to choose between the statutory remedies, with an "unconditional right" to choose a refund. The Board rejected the Manufacturer's contention that the Board lacked the authority to award the replacement vehicle remedy to the Consumer.

Chapter 681.101, Florida Statutes, states that "it is the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter." In addition, Section 681.104(2)(a), clearly provides that, once the remedy becomes mandatory, the choice of remedy rests with the Consumer. *See, King v. King Motor Company of Fort Lauderdale et. al*, 780 So. 2d 937 (Fla. 4 DCA 2001) ("For a nonconforming vehicle that the manufacturer cannot conform to the warranty, the primary statutory remedy is either a replacement vehicle or a refund, at the consumer's option." Citing §681.104(2)(a), Fla. Stat.). Considering the statute as a whole, the Board found no authority for the Manufacturer's position. The Consumer was awarded a replacement motor vehicle.

Incidental Charges §681.102(8), F.S.

Careers USA Inc. v. Land Rover of North America, 2012-0095/WPB (Fla. NMVAB June 1, 2012)
At the hearing, the Manufacturer, through counsel, stipulated that the Consumer's 2010 Land Rover Range Rover was a "lemon." The Consumer requested reimbursement of $3,237.00 paid for rental car charges incurred while the vehicle was out of service by reason of repair of the nonconformity from February 1, 2012, through April 30, 2012, plus any additional rental car charges the Consumers would incur up to the date of compliance. The Board awarded the $3,237.00 in rental car charges requested, plus any additional rental car charges incurred up to the date the vehicle is replaced.

Collateral Charges §681.102(3), F.S.

Corporate Debtication Inc. v. BMW of North America LLC, 2011-0303/WPB (Fla. NMVAB April 12, 2012)
The Consumer's 2010 BMW 750Li was declared a "lemon" by the Board. The Consumer requested reimbursement of $147.00 for window tinting as a collateral charge. The Manufacturer objected because the Consumer did not produce a receipt to substantiate payment. The Board awarded the $147.00 for window tinting as a reasonable collateral charge.

MISCELLANEOUS PROCEDURAL ISSUES:

Falco v. Hyundai Motor America, 2012-0063/STP (Fla. NMVAB May 9, 2012)
During the hearing, the Manufacturer sought to assert the following statutory affirmative defense not timely raised in its Manufacturer's Answer or any Amended Answer: the alleged nonconformity does not substantially impair the use, value or safety of the motor vehicle. Paragraph (8*), Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer and filed within the prescribed time periods may not be raised at the hearing, except as otherwise provided in the rules or as permitted by the Board. The Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration. In this case, the Manufacturer's Answer was filed 30 days after receipt of the Notice of Arbitration. The Manufacturer's representative stated that he had recently been appointed to this case and had

no explanation regarding the late filing of the Answer. The Consumer objected to the Manufacturer's request. Upon consideration by the Board, the Manufacturer was not permitted to raise the untimely asserted affirmative defenses at the hearing.