OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2012 - December 2012 (4th Quarter)

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

George v. Hyundai Motor America, 2012-0279/TPA (Fla. NMVAB November 15, 2012)
The Consumer complained of failure of the "Blue Link" system in his 2012 Hyundai Sonata. The Consumer purchased the vehicle primarily because of this "Blue Link" system as he was concerned about his two under-21-year-old children and distracted driving. Additionally all four drivers relied on the navigation feature to get from place to place. At times the display would register "Blue Link error" or "internal system error" or "system unavailable." Sometimes the system would ring the audio and then disconnect. On one occasion, his daughter received an error message at night; the navigation feature was out of service and she could not find her way out of town. Every time he brought the vehicle in for the "Blue Link" failure, he was told that it could not be duplicated and that the problem was not with the vehicle, but with the server. He was additionally told that he would be called when "the issue was resolved." He was never called. Just since September 2012, the Blue Link did not work seven out of 10 times. Most recently, on September 11, 2012, the Consumer's wife went for four hours without service. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness had never seen the Consumer's vehicle or spoken with any of the technicians involved. According to him, the Blue Link system is satellite based and sometimes the system will not operate when the satellite view is obstructed. Additionally, there can be times when the satellite system was "down for maintenance." The Board found that the Blue Link system malfunction 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.:

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

MCQ Auto v. Rolls-Royce Motor Cars NA, Inc., 2012-0067/ORL (Fla. NMVAB October 5, 2012)
The 2011 Rolls-Royce Ghost had an electrical condition: the Car Access System module in one of the door handles malfunctioned and caused a constant draw on the battery, which eventually drained the battery. In addition, the windshield was broken while the vehicle was in the custody of the Manufacturer's authorized service agent. Both complaints were found to be

nonconformities by the Board. The vehicle was out of service by reason of repair of the nonconformities a total of 48 cumulative days. With respect to the broken windshield, the vehicle was presented to the service agent for repair of a "whistle" noise in the left area of the windshield. The authorized service agent was advised to "cut out the glass and look for a void" in the urethane, and the windshield was broken by the service agent when taking it out. The replacement windshield had to be shipped from England, resulting in the vehicle remaining out of service for 25 days. None of this information was stated in the written repair order prepared by the service agent. Moreover, for the first time at the hearing, the Manufacturer, through Counsel, asserted that the time it took for the service agent to repair the broken windshield should not be considered as out-of-service days, because the vehicle was not brought in for repair of a nonconformity at the time the windshield was broken.

The Board declined to accept the Manufacturer's contention that the time the vehicle was out of service for repair of the broken windshield nonconformity should not be considered "days out of service" under the statute. Such an interpretation was contrary to the plain meaning of the statute and if adopted would have led to an absurd result. The definition of "nonconformity" excludes only those defects or conditions that result 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. The undisputed evidence established that the windshield nonconformity resulted from an accident by the authorized service agent. This was admitted by the Manufacturer's witness. The fact that repair work performed by the authorized service agent created a nonconformity where none may have existed before did not take the case outside the coverage of the Lemon Law, and clearly, since the accident was by the authorized service agent, it specifically was not excluded from the statutory definition of nonconformity. Addition of the 23 days out of service for repair of the electrical nonconformity resulted in a total of 48 days out of service. 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.

Herren v. Toyota Motor Sales USA, Inc., 2012-0217/TPA (Fla. NMVAB October 15, 2012) The Consumer complained of poor gas mileage in his 2012 Toyota Camry. He measured the vehicle's fuel consumption by keeping a log of the number of gallons of fuel it took to fill the gas tank and dividing that by the number of miles driven during that time. By his calculations, the vehicle was getting in the range of 18.9 to 19.7 miles per gallon in the city. The Consumer believed that "something had to be wrong with the engine," because the gas mileage did not fall within the Environmental Protection Agency (EPA) fuel economy estimates set forth on the Monroney sticker that was attached to the vehicle at the time of purchase (25 mpg City and 35 mpg Highway, with an "expected range for most drivers" of 20-30 mpg in the city and between 29-41 mpg on the highway). The Manufacturer asserted that 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 and found the tires were in good condition, and the tailpipe showed only normal, light-grey output. Using

"Techstream" diagnostic software, he found no diagnostic trouble codes, and all on-board monitors were "within parameters." He took the vehicle for a 75-mile test drive and did not notice any "drivability concerns" and found nothing wrong with the vehicle's fuel management. He averaged 32 miles per gallon during his test drive, which included both city and highway driving. In his view, if a part had malfunctioned and affected the fuel economy, he would expect this to show up on Techstream, but he found no malfunction or defective condition in the fuel system. He pointed out that the EPA sticker stated that "actual mileage will vary depending on how you drive and maintain your vehicle," and stated that the EPA information was provided for consumers to be able to compare model to model, not as a guarantee of the mileage a consumer will get while driving that vehicle. The Board found the evidence presented by both parties did not reveal the existence of a defect or condition that 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 case was dismissed.

Dungey v. Kia Motors America Inc., 2012-0211/TPA (Fla. NMVAB October 17, 2012)
The Consumer complained of poor gas mileage in his 2012 Kia Sorrento. His only complaint was that the highway mileage was overstated on the window sticker at 32 miles per gallon and he was not attaining the "advertised" highway miles based on the representation by the salesman that he would be "getting 35 miles per gallon or better" at "highway" speeds. In his opinion "highway" speeds were the stated speed limit; for example, on Interstate 75 near his home, the speed limit is 70 miles per hour and that is what he normally drives. He did acknowledge that there was nothing wrong with the operation of the vehicle or the estimated "around town" mileage. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified the Environmental Protection Agency sticker for the vehicle indicated the "average" miles per gallon for city driving was 22 and the "average" miles per gallon for highway driving was 32. According to him, "actual" mileage achieved was based on the way a vehicle was driven and the load contained; there was a range listed on each sticker. The range for "highway" driving on the subject vehicle was 26 through 38 miles per gallon. He additionally stated that the optimum method for testing highway miles per gallon, pursuant to the federal government, was to drive at least 10 miles and attain speeds of between 48 and 60 miles per hour. Once you exceed 60 miles per hour, the vehicle responds to more "kinetic energy" and the mileage will drop down. If the vehicle were not operating properly, the engine would register a trouble code, according to the witness. Computer diagnostics revealed no fault or trouble codes on this vehicle. The Board found that the evidence failed to establish that the poor fuel mileage 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 case was dismissed.

Benson v. Toyota Motor Sales USA, Inc., 2012-0249/JAX (Fla. NMVAB November 16, 2012)
The Consumer complained of poor fuel mileage in his 2011 Toyota RAV4. According to him, the 2011 RAV4 he traded in for the 2011 RAV4 which was the subject of the case had been getting 27.4 miles per gallon. He asserted that the subject vehicle, however, was getting only 25.4 miles to the gallon. While he acknowledged that the mileage he claimed to be getting on the subject vehicle was within the fuel economy estimates published by the Environmental Protection Agency ("EPA") for the vehicle, he felt that it was wrong for the vehicle to get lower mileage

than the vehicle he used as a trade-in. He also noted that the vehicle was not attaining the 33 highway miles per gallon that he believed the selling dealer represented he would get from the vehicle. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, "because the vehicle was operating properly and as designed;" and the gas mileage asserted by the Consumer did not reflect the actual gas mileage of the vehicle. The Manufacturer's representative testified that the gas mileage figure asserted by the Consumer could not be considered reliable, because the method used by the Consumer to calculate that mileage rendered the Consumer's number unreliable. As background, he noted that the EPA's gas mileage estimates for the Consumer's vehicle were 18 to 26 miles per gallon for city driving, and 23 to 33 miles per gallon for highway driving. He explained that the EPA's gas mileage estimates are obtained under carefully controlled laboratory conditions that were impossible to duplicate in the field. However, when he tested the Consumer's vehicle to check its gas mileage, he took a number of steps to assure that his figures would be as accurate as possible, steps which had not been taken by the Consumer. Those steps included using the same gas station and gas pump when filling and refilling the vehicle (because the calibration of the pump shut-off valves may differ between stations and pumps), "filling to the 'second click'" of the shut-off valve in order to eliminate any "false fill" issues, and facing the vehicle in the same direction when filling up, in case the pavement at the pump is not level. He testified that, using that methodology, the gas mileage of the vehicle on his two test drives was 26.88 miles per gallon at the final repair attempt, and 28.1 miles per gallon at the prehearing inspection. He further testified that he also checked the Consumer's vehicle for any diagnostic codes that would indicate problems, and checked the vehicle's brakes to make sure there was no drag on the wheels. No problems were found. The Board found the evidence failed to establish that the poor fuel mileage complaint made 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 case was dismissed.

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

Wachs v. Nissan Motor Corporation USA, 2012-0215/WPB (Fla. NMVAB October 15, 2012) The Consumers complained of an unintended acceleration in their 2011 Infiniti G25. The Consumer testified that, once in February 2012, and the second time in June 2012, when he was a passenger in the vehicle and his wife was driving, the vehicle suddenly accelerated. The first time this happened heavy application of the brake pedal stopped the vehicle, but only after the vehicle crossed Federal Highway and "T-boned" another vehicle. The second time the unintended acceleration happened, it was raining heavily and his wife was about to valet their vehicle when it suddenly accelerated. She turned the steering wheel so she would not hit the valet, and the vehicle hit the building instead. In its Answer filed prior to the hearing, the Manufacturer asserted the defense of driver error. The Manufacturer's representative explained all Nissan and Infiniti vehicles incorporate a "brake override" system; that is, if the brake pedal and accelerator pedal are both depressed, the brake pedal will "override" the accelerator pedal and the vehicle will come to a stop. The Consumers did not bring the vehicle to a Manufacturer authorized service agent after either accident, and while there was no information regarding the first mishap, because the airbag deployed after the second mishap, they were able to obtain data from the airbag sensor.

Whenever an airbag deploys, the Event Data Recorder (EDR) stores information related to airbag deployment for seven seconds before and seven seconds after an accident in the vehicle's on-board computer. Another Manufacturer's witness testified that, after the second accident, the vehicle's diagnostic unit was replaced, but he was able to retrieve the original diagnostic unit from the body shop. The data revealed the brake pedal was released prior to, during and after the point of impact; and the accelerator pedal position showed that it was depressed lightly three seconds before impact, and depressed heavily two seconds before impact. The Manufacturer's position was that the Consumer unintentionally pressed the accelerator pedal when she intended to depress the brake pedal, and the vehicle responded to driver input, rather than the cause being any defect in the vehicle. The evidence failed to establish that the problem complained of by the Consumers was a defect or condition that substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute; rather, the Board found the evidence was more persuasive that the complaint resulted from the actions of the driver. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Garcia v. BMW of North America LLC, 2012-0220/ORL (Fla. NMVAB November 5, 2012) The Consumer's 2011 BMW 535i was deemed a "lemon" by the Board. At the hearing, the Consumer presented the testimony of Robert Richardson, Automotive Litigation Consultants, LLC, who testified as an expert. The Consumer requested reimbursement of $1,580.00 for expert fees associated with the evaluation of the vehicle by Mr. Richardson and his attendance at the arbitration hearing as an incidental charge. The Manufacturer, through counsel, objected to any reimbursement for expert fees, asserting it was not necessary for a consumer to present expert testimony at a Lemon Law hearing and that such fees do not qualify for reimbursement under the statutory definition of "incidental charge." The Board awarded $790.00 as a reasonable amount for the expert's evaluation of the vehicle and attendance at the hearing. The Manufacturer's objection to reimbursement for the expert's fees was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Jenson v. Toyota Motor Sales USA, Inc., 2012-0262/ORL (Fla. NMVAB November 21, 2012) At the beginning of the hearing, the Consumer's local counsel advised the Board that, neither the Consumer's Attorney of record, nor the Consumer, had received any of the Manufacturer's Exhibits listed on the Index to Case File. Upon inquiry, the Manufacturer's representative, who had no personal knowledge of the transmission of the documents to the Consumer's Attorney, produced an email that was sent on behalf of the Manufacturer to the Consumer's Attorney; however, the email contained only one attachment: the prehearing information sheet. Pursuant to paragraphs (10) and (22), *Hearings Before the Florida New Motor Vehicle Arbitration Board,* all documents 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 "unless good cause is shown for the failure to comply." The Manufacturer having failed to show good cause for the failure to comply with the time requirements in the rules, the documents were not considered by the Board.