OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2013 - December 2013 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Waggoner v. Ford Motor Company, 2013-0263/ORL (Fla. NMVAB November 22, 2013)
On June 27, 2011, Sandra Waggoner purchased a 2012 Ford Focus. On April 24, 2013, the vehicle was repossessed by the lienholder. Ms. Waggoner's estate was subsequently notified that the vehicle could be redeemed upon payment of the debt by a date certain. On July 12, 2013, the Estate was notified that, since the vehicle was not redeemed, the lienholder would retain the collateral in satisfaction of the debt owed on the vehicle. David Waggoner acknowledged at the hearing that the vehicle had been repossessed. The Manufacturer, through counsel, sought dismissal of the claim. 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," as defined in Section 681.102(4), Florida Statutes. The Board found that the vehicle which was the subject of the Request for Arbitration was repossessed by lienholder. As a result, Sandra Waggoner was no longer entitled to enforce the obligations of the warranty and did not otherwise meet the statutory definition of a "consumer." Consequently, the claim was outside the scope of the Board's authority and the case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Tavarez v. American Honda Motor Company, 2013-0286/MIA (Fla. NMVAB December 6, 2013)
The Consumer complained that, when the vehicle was being driven, very loud wind/road/ambient noise could be heard inside his 2013 Honda Accord. The Consumer leased the vehicle for his wife but, about one month after taking delivery, she complained of excessive noise filtering into the vehicle from the outside. He then drove the vehicle and he too heard a lot of noise. According to the Consumer, it sounded as if a window or windows were open. When he took the vehicle to the Manufacturer's authorized service agent, he was initially told the vehicle had the "sound of the factory." The next time he brought the vehicle in for the noise complaint, he was told it was the "regular sound of the vehicle," and he should not bring the vehicle in again for the noise complaint. The Consumer played the radio very loud to help drown out the noise. The noise was usually heard when the vehicle was being driven at speeds of 40 miles per hour or more, but it could also be heard at speeds as low as 20 miles per hour. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative inspected and test drove the vehicle on two occasions. The only noise he claimed he heard was "normal tire noise" which

changed with the type of surface on which the vehicle was being driven. The Board concluded that the loud wind/road/ambient noise substantially impaired the use 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.

Palm Investments of Miami Inc. v. Toyota Motor Sales USA Inc., 2013-0233/MIA (Fla. NMVAB October 14, 2013)
Elio Guerrero, President of Palm Investments, was the primary driver of the 2013 Toyota Tacoma truck with a loud engine noise. Shortly before the first service was due on the vehicle, Mr. Guerrero began to hear a loud noise coming from the engine area, especially when the transmission was shifting between second and third gears. The longer the vehicle was driven and the hotter the engine, the louder the noise. The first time he brought the vehicle to the Manufacturer's authorized service agent, Mr. Guerrero was told to come back, because the service agent had to call the Manufacturer and open a "technical assistance case." The second time, the mechanic heard the noise and attributed it to carbon build-up on the pistons. The third time in for repair, Mr. Guerrero was told the Manufacturer did not have a fix and he would be called when a solution was found. At the hearing, the Consumer presented the testimony of an expert witness who had inspected the vehicle and rendered the opinion that the truck was experiencing "pre-ignition spark knock," which would eventually cause damage to the motor.
The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Customer Retention Specialist for Southeast Toyota Distributors, acknowledged the engine had a "ping"; however, she maintained it was a "characteristic" of the vehicle and was not a defect. She agreed if the engine exhibited "spark knock 100 percent" of the time it would cause damage to the engine and stated the Manufacturer was working on a software update to address the noise, but software updates take time and there was no update at present. The Board concluded that the loud engine noise substantially impaired the use and value 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.

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.

Aviles v. General Motors – Chevrolet Division, 2013-0319/FTM (Fla. NMVAB December 2, 2013)
The Consumer complained of receiving poor gas mileage in her 2011 Chevrolet Malibu LTZ. The Consumer's husband testified that "the car drives beautifully," and stated that their "only complaint with the car was with the gas mileage." He said the estimated gas mileage for his vehicle was 22 miles per gallon in the city, 33 miles per gallon on the highway, with an average of 26 miles per gallon. He stated that he did most of his driving in city traffic and, when he checked his gas mileage on the computer information system in the vehicle, his gas mileage was much lower than these estimates. In addition, when he drove the vehicle to Tampa on I-75, he got only 20 miles per gallon; therefore, he thought "something has to be wrong" for him to be getting the mileage he was getting.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. In addition, the Manufacturer asserted that, although the U.S. Environmental Protection Agency (EPA) requires the Manufacturer to post a label indicating fuel economy, such disclosure did not create a warranty that a certain fuel economy will be achieved. The Manufacturer's witness testified that the service agent never found anything wrong during testing of the Consumer's vehicle. The last time he saw the vehicle it arrived at the dealership showing an average gas mileage of 17.2 miles per gallon and an average speed of 20 miles per hour on the driver information center computer. In addition, the tire pressure was low at 27/28 psi. After the tire pressure was set at 30 psi, the fuel tank was filled to full from a pump on the lot, and the computer was reset, the vehicle was test-driven with the Consumer in a combination of city and highway driving. Upon returning to the lot, the tank was refilled with 2.2 gallons, and the driver information center showed the distance driven at 68.8 miles, with gas mileage of 28.3 at an average speed of 38 miles per hour. The gas mileage was also manually calculated by dividing the test-drive miles of 68.8 by the 2.2 gallons of fuel used to fill the tank, for a total of 31.2 miles per gallon. The witness concluded this calculation illustrated the "optimum mpg for test drive conditions," and the vehicle was deemed to be "operating as designed." He testified that the lower gas mileage experienced by the Consumer was not abnormal, because the conditions under which the vehicle was being driven affected the gas mileage. He noted that the computer in the vehicle showed the average gas mileage on a previous visit was 16.8 miles per gallon, and that the average speed at which the vehicle was being driven was 18 to 19 miles per hour, which was very low.

The Board found that the poor gas mileage complained of by the Consumer did not substantially impair 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.:

Collateral Charges §681.102(3), F.S.

Prandi v. Rolls-Royce Motor Cars NA LLC, 2013-0227/WPB (Fla. NMVAB December 6, 2013) The Consumer's 2011 Rolls Royce Ghost was declared a "lemon" by the Board. The Consumer requested reimbursement of $10,050.92 for oversized tires and wheels as a collateral charge. The Manufacturer objected to the Consumer being reimbursed for the cost of the oversized tires and wheels, arguing that they were not the authorized size for the vehicle. The Manufacturer's objection was granted in part. The Board award included reimbursement of $8,653.84 for wheels, but excluded the amount paid for the tires.

Incidental Charges §681.102(8), F.S.

Shook v. Toyota Motor Sales USA Inc., 2013-0117/WPB (Fla. NMVAB December 16, 2013) The Consumer's 2011 Toyota Scion XB was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,350.00 for an expert witness fee as an incidental charge. The Board granted the request and awarded $1,350.00 for the expert witness fee.

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

Wappman v. American Honda Motor Company, 2013-0274/TPA (Fla. NMVAB November 6, 2013)
The Consumer's 2012 Honda Odyssey was declared a "lemon" by the Board. Prior to requesting arbitration with this Board, the Consumer filed a claim with the Better Business Bureau Autoline program, a private, alternative dispute resolution procedure sponsored by American Honda, which conducted an arbitration hearing. The Manufacturer argued the mileage used to calculate the offset should be the miles attributable to the Consumer "as of" the date of the hearing before the New Motor Vehicle Arbitration Board; whereas, the Consumer requested that mileage up to the Better Business Bureau Autoline hearing be utilized. The Board agreed with the Consumer and used mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing for purposes of calculating the reasonable offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Mejia v. Kia Motors America Inc., 2013-0323/ORL (Fla. NMVAB November 21, 2013)
At the start of the hearing, the Board considered the Manufacturer's Motion to dismiss the case, which asserted that the Board lacked jurisdiction to hear the claim. The Manufacturer argued that because the Consumer's claim was premised on "personal injuries," matters relating to damages suffered as a result of personal injuries were not covered under Chapter 681 Florida Statutes. However, pursuant to Section 681.1095(8), Florida Statutes (2012), "The Board shall grant relief, if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities." The Request for Arbitration filed by the Consumer requested the Board to determine whether the complained of defect(s) constituted a "nonconformity," as defined by the statute, and whether a reasonable number of repair attempts were undertaken, all of which was well within the Board's jurisdiction. The Manufacturer's Motion to dismiss the case for no jurisdiction was denied and the case was heard on the merits.

Baran v. American Honda Motor Company, 2013-0345/STP (Fla. NMVAB November 27, 2013)
Prior to the hearing, the Manufacturer filed a "Motion to Dismiss Consumers' Request for Arbitration," stating as grounds the Consumers' failure to first resort to the National Center for Dispute Settlement (NCDS), an informal dispute resolution procedure sponsored by American Honda. The Manufacturer argued that, because American Honda Motor Company's (AMH) warranty manual contained language requiring consumers to participate in the NCDS warranty program, the Consumers had failed to satisfy the statutory prior resort requirement contained in Section 681.108(1), Florida Statutes (2013). The Manufacturer's assertion was not accompanied by any evidence that its dispute resolution procedure was certified by the Department of Legal Affairs, as is required by Section 681.108(1), in order to trigger the prior resort requirement. The Board found that the Consumer was not required to resort to the Manufacturer-sponsored NCDS program, because it was not a state-certified informal dispute resolution procedure for American Honda Motor Company. Accordingly, the Consumer was properly before the Board and the Manufacturer's request for dismissal was denied.