OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2014 - June 2014 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Zeski/Bylinski v. Chrysler Group LLC, 2014-0164/TLH (Fla. NMVAB June 25, 2014)
The Consumers purchased a 2011 Dodge Ram 1500. The Manufacturer asserted the Consumers were not qualified for repurchase relief under the Lemon Law, because the vehicle was not sold in Florida, and as such, did not constitute a Amotor vehicle@ as defined by Florida's Lemon Law. The Manufacturer, through its representative, argued that the sale took place when the Consumers paid the dealer in full, and took delivery of the vehicle, all of which took place in Nebraska. He argued that, prior to the Consumers paying for the truck, no sale took place, because either party could have backed out of the deal at any point. He further argued that no paperwork was signed in Florida and no money was paid by the Consumers in Florida. The Consumers asserted that the vehicle was sold in Florida. Ms. Bylinski testified that Mr. Zeski performed an internet search for the subject vehicle from their Florida home. Once he found the subject vehicle, he contacted Casey Cruse, Sales Manager at Woodhouse Chrysler in Blair, Nebraska, whom the Consumers had dealt with in the past. Mr. Cruse located the vehicle and initially began negotiating unsuccessfully with the Consumers regarding the price. On February 29, 2012, Mr. Zeski, from his house in Florida, called Mr. Cruse to again negotiate a price for the truck. That night, the Consumers came to an agreement with Mr. Cruse that the Consumers would purchase the vehicle for $17,300.00. At that time, no paperwork was signed and no money was paid. The next night, Ms. Bylinski, who was already located in Nebraska, arrived at Woodhouse Chrysler. She visually inspected the outside of the truck and then gave Mr. Cruse full payment for the truck and took delivery. The Consumers paid all taxes, including sales tax, in Florida. In addition, the title issued was a Florida title and the vehicle was registered in Florida only. Upon consideration of the evidence presented, a majority of the Board concluded that, because no sale documents were signed in Florida, no money was paid from Florida and the Consumers took delivery of the vehicle in Nebraska, the vehicle was not sold in Florida; therefore, it did not constitute a motor vehicle under the statute and the Consumers' case was dismissed.

Brancoccio v. Chrysler Group LLC, 2014-0105/ORL (Fla. NMVAB June 27, 2014)
The Consumers purchased a 2012 Dodge Charger. The Buyer's Order executed by the Consumers on August 6, 2012, did not identify the vehicle as being purchased "new" or "used." At the hearing, the Consumer testified that he was the driver of the vehicle and when he purchased it, he was told by the owner of Platinum Leasing of Sorrento, Inc., that the vehicle was a "demonstrator." He additionally produced a loan document dated August 6, 2012, stating that the "Loan Type" was a "New Car Loan." The Manufacturer contended that the Consumers were not

qualified for relief under the Lemon Law, because the vehicle was "used" when the Consumers purchased it; therefore, it was not a “motor vehicle” as defined by the Lemon Law statute. In support, the Manufacturer’s representative testified that the vehicle was originally delivered by the factory to Beck Chrysler-Plymouth-Dodge-Jeep (Beck), a franchised Chrysler dealership. On June 11, 2012, Beck sold the vehicle at retail to Mr. John Lungris as a new vehicle and title to the vehicle passed to Mr. Lungris. The odometer reflected 134 miles at that time. Shortly thereafter, on July 6, 2012, Mr. Lungris traded in the subject vehicle to Beck Chrysler to purchase another vehicle. At that time, the odometer reflected 1,144 miles. On July 25, 2012, Beck sold the vehicle to Platinum Leasing of Sorrento. On August 6, 2012, Platinum Leasing sold the vehicle to the Consumers with 2,324 miles on the odometer.
Section 681.102 (14), Florida Statutes, defines a “motor vehicle,” to include a new or demonstrator vehicle. The statute does not otherwise define what is meant by a “new” vehicle; consequently, the Board looked to definitions in Section 320.60, Florida Statutes, for guidance.

Section 320.60, Florida Statutes provides in pertinent part at paragraphs (10) and (13):

> (10) "Motor Vehicle" means any automobile, motorcycle, or truck the legal or equitable title to which has never been transferred by a manufacturer, distributor, importer, or dealer to an ultimate purchaser.
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> (13) "Used motor vehicle" means any motor vehicle title to or possession of which has been transferred from the person who first acquired it from the manufacturer, distributor, importer or dealer and which is commonly known as secondhand within the ordinary meaning thereof.

The preponderance of the evidence, particularly the documents associated with the transactions: the prior sales transaction to Mr. Lungris; the trade in of the vehicle back to Beck; the sale to Platinum Leasing, and the subsequent sale of the vehicle to the Consumers, established that the vehicle was not sold to the Consumers as a new or demonstrator vehicle. Rather, when the original purchaser, Mr. Lungris, purchased the vehicle from the authorized Chrysler dealer title to the vehicle passed to him, making him the ultimate purchaser under Section 320.60(10), Florida Statutes. When the Consumers subsequently purchased the vehicle from Platinum Leasing, it was a used vehicle. Accordingly, the Board found that the vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, and the Consumers’ case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Parker v. Volkswagen/Audi of America Inc., 2014-0018/FTM (Fla. NMVAB May 20, 2014)
The Consumers complained of receiving poor gas mileage in their 2013 Volkswagen Jetta Hybrid. The Consumers purchased a hybrid vehicle specifically for fuel economy and environmental reasons. The vehicle’s advertised combined fuel economy was 45 miles per gallon; the advertised range was between 42 miles per gallon in the city, and 48 miles per gallon on the highway. According to the Consumers, their independent testing revealed that the vehicle had actually averaged 27-31 miles per gallon, initially, and more recently, 32-34 miles per gallon.

The Parkers contended that a Volkswagen rebate program related to gas mileage did not compensate them for the actual losses they were incurring for added fuel expense, in addition to the $5,000.00 premium they paid for purchasing a hybrid 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 he had never been involved with the vehicle, but he was "confident" that the vehicle was scanned with a guided fault finding diagnostic tool (GFF) and no faults were found in the Electric Control Module (ECM) computer. The Board found that the evidence established that the poor gas mileage problem substantially impaired the value of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. Accordingly, the Consumers were awarded a refund.

Wester v. General Motors LLC, 2014-0132/TLH (Fla. NMVAB June 2, 2014)
The Consumers' 2014 Chevrolet Silverado caught fire. Mr. Wester was at home and had started the truck, but left the engine idling for a few minutes while the truck was parked on a gravel driveway. When he returned, he saw flames coming from the engine compartment. He called 911, and the fire was put out by the local fire & rescue. He contacted the Manufacturer the next day to notify it of the fire, and the truck was towed to the Manufacturer's authorized service agent. The Manufacturer declined to cover the cost of the repairs to the vehicle, because the GM investigator failed to identify a specific GM part that was responsible for the fire. The Consumer authorized the necessary repairs to the vehicle, with the costs to be covered by his insurance company. At the time of the fire, the vehicle was covered by an unperformed GM recall for "a software glitch [that] could lead to overheating of exhaust components, potentially causing engine compartment fires." At hearing, the Manufacturer asserted the fire and damage to the subject vehicle was the result of an unauthorized modification or alteration of the motor vehicle; to wit: installation of an aftermarket leveling kit by the Manufacturer's authorized service agent, which was not covered by the Manufacturer's New Vehicle Limited Warranty, and therefore could not form the basis for a claim under the Florida Lemon Law. The Manufacturer offered the testimony of a Field Performance Assessment Engineer with General Motors, who testified at length regarding why, in her opinion, the authorized service agent's installation of the aftermarket leveling kit was responsible for the fire in the Consumers' vehicle. She also opined that the fire in the Consumers' vehicle was not a result of the problem covered in the recall, noting that all of the reported recall-related fires started in the engine compartment on the passenger side of the vehicle while outside temperatures were below zero degrees Fahrenheit; whereas, the fire in the Consumer's vehicle started on the driver's side of the engine compartment during more moderate outdoor weather.

Based on the premise that the leveling kit installed by the authorized service agent was the cause of the fire, the Manufacturer argued, through counsel, that because the aftermarket leveling kit was not covered under its written limited warranty, installation or operation of the kit could not form the basis for a claim under the Florida Lemon Law. Pointing to the definition of "warranty" set out in section 681.102(22), Florida Statutes, and the use of that term in various provisions in Chapter 681, counsel for the Manufacturer argued that the Florida Lemon Law covered only those items expressly included within a manufacturer's written limited warranty.

The Board concluded that the evidence established that the fire and resulting damage substantially impaired the value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Whether or not the fire

occurred as a result of the installation of the leveling kit by the Manufacturer's authorized service agent, the Manufacturer's legal argument was rejected, because the definition of "nonconformity" was not limited to defects covered by the Manufacturer's express limited warranty, and because that definition does not exclude modifications or alterations of the vehicle by the Manufacturer's authorized service agent. Accordingly, the Consumers were awarded a refund.

Dubrouskaya/Soriano v. Volkswagen/Audi of America Inc., 2013-0442/MIA (Fla. NMVAB April 11, 2014)

The Consumers complained that intermittently their 2012 Volkswagen Jetta emitted a very strong burning-rubber/musty/moldy odor from the air conditioner vents when the air conditioner was running, In addition, the right front passenger door was hard to close from both inside and outside the vehicle. The air conditioner odor became evident within the first 30 days after taking delivery of the vehicle. After the air conditioner filter was changed the odor was less intense for awhile, but then it had got progressively worse. If the air conditioner was manually turned to the re-circulate mode the odor was present; however, when the air re-circulated automatically, the odor was "very strong" and the Consumers had to lower the windows or stop and get out of the vehicle until the odor dissipated. The odor lasted from 30 seconds to a couple of minutes. The Manufacturer asserted the alleged nonconformities did not substantially impair the use, value or safety of the motor vehicle; alternatively, any alleged nonconformities were cured within a reasonable number of attempts. The Manufacturer's witness testified that Volkswagen issued a Technical Service Bulletin (TSB) regarding the odor emanating from the air conditioner; however, he did not believe the TSB applied to the Consumers' vehicle because their vehicle had less than 10,000 miles on the odometer, and he never had a vehicle with less than 10,000 miles come in with a complaint of an air conditioner odor. He testified that he did not remember going on a test drive of the vehicle, and he never looked at the passenger front door to see if it was difficult to close. The Board found that the intermittent air conditioner odor substantially impaired the use, value and safety of the motor vehicle, and the front passenger door being hard to close substantially impaired 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 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.

Farquharson v. Ford Motor Company, 2014-0122/ORL (Fla. NMVAB May 27, 2014)
The Consumer complained that the engine suddenly shut off without warning while she was driving her 2012 Ford Focus. The vehicle was presented to the Manufacturer's authorized service agent for repair of that complaint on December 13, 2012, and May 13, 2013, when no repairs were performed. 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 October 11, 2013. Pursuant to instruction by the Manufacturer, on November 5, 2013, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt, which was not concluded until November 18, 2013. The engine suddenly shutting off without warning continued to exist after that repair attempt and the Board found that condition to be a nonconformity. In addition, the Board concluded that this nonconformity was subjected to repair by the Manufacturer's service agent a total of three times, one such attempt occurring after the Manufacturer's receipt of written notification of the defect from the Consumer, and the nonconformity was not repaired. Under the circumstances of this case, the Board concluded that this was a reasonable number of attempts. The Manufacturer having failed to correct the nonconformity after a reasonable number of attempts, the Consumer was entitled to a refund under the Lemon Law.

Final Repair Attempt §681.104(1)(a), F.S.; §681.104(3)(a)1., F.S.

Perris v. American Honda Motor Company, 2014-0090/WPB (Fla. NMVAB June 23, 2014)
The Consumer complained of engine problems, including various warning lights that came on intermittently and the engine running rough in his 2014 Honda Odyssey Touring Elite. On January 31, 2014, 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 February 15, 2014. Thereafter, the Manufacturer left a message on the Consumer's telephone on February 20, 2014, for the Consumer to bring the vehicle to the Manufacturer's designated repair facility, Hendrick Honda Pompano Beach, for the final repair attempt. Instead, the Consumer presented the vehicle to Coral Springs Auto Mall on February 23, 2014, purportedly for the final repair attempt, but he did not inform Coral Springs Auto Mall that the reason the vehicle was there was for a final repair attempt. At that time, Coral Springs Auto Mall replaced the #1 ignition coil, in response to diagnostic fault codes; however, there was no direct involvement in the repair by the Manufacturer. According to the Manufacturer's representative at the hearing, the Consumer's Motor Vehicle Defect Notification form was referred to him on February 19, 2014. He spoke with Honda's mediation department and told them that he wanted Hendrick Honda Pompano Beach to be the designated repair facility for the final repair attempt. On February 20, 2014, this information was relayed to the Consumer via phone message. The Consumer was never told to take the vehicle to Coral Springs Honda, and there was no direct involvement by the Manufacturer in the repair that was performed at that repair facility on February 23-24, 2014. According to the representative, it was his practice to

meet directly with a consumer during the Manufacturer's statutory final repair attempt, so the consumer could demonstrate or describe the problems with the vehicle. The vehicle would not leave the designated repair facility until the problems were fixed. He stated that the Consumer told the Manufacturer that he was not going to allow a final repair attempt; that he had taken the vehicle to Coral Springs Honda on February 23, 2014, and that the dealer performed the final repair attempt.

The Board found the engine problems constituted a nonconformity and that the evidence established that the Manufacturer received the statutory written notification from the Consumer on February 15, 2014. "When a manufacturer responds to the written notification of a final repair opportunity set forth in Section 681.014(1)(a), F.S., the consumer must received such response within 10 days from the date the manufacturer received the written notification from the consumer." Rule 2-30.001(3), F.A.C. The evidence further established that the Manufacturer responded to the notification from the Consumer within the required 10 days on February 20, 2014, and directed the Consumer to take the vehicle to Hendrick Honda Pompano Beach for the final repair attempt. The Consumer, instead, took the vehicle to another authorized service agent, without notice to the Manufacturer thereby effectively denying the Manufacturer the opportunity to conduct a final repair attempt. The statute clearly contemplated that the Manufacturer designate the repair facility for the final repair attempt, conditioned upon the designated facility being reasonably accessible for the Consumer, and the repair appointment being within a reasonable time after the Consumer receives the Manufacturer's response. There was no evidence presented by the Consumer that the Manufacturer failed to meet the aforesaid statutory conditions. The Manufacturer has not yet had its direct opportunity for a final repair attempt; therefore, a reasonable number of attempts have not yet been undertaken. The Consumer was not qualified for the requested relief under the Lemon Law at that time and the case 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.

Headley v. Chrysler Group LLC, 2014-0087/STP (Fla. NMVAB April 23, 2014)
The Consumers complained of a "clunk" noise from the rear of their 2013 Jeep Grand Cherokee when it was driven at speeds of less than 25 miles per hour on some uneven surfaces. The noise could be heard only when the Jeep was driven over bumps, potholes and drainage grates. The Consumers were primarily concerned about the "value" of the vehicle; the performance of the vehicle was not affected. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness characterized the noise the Consumers were experiencing as "the operational transfer of sound within the suspension" when going over a bump in the road. According to the witness, this was not a defect or indicative of a problem in any component or in the suspension. The witness had fully inspected the vehicle chassis and concluded that the shocks were installed properly and the suspension was not loose. During the hearing, the Board inspected and test drove the vehicle in the presence of the Consumers and the Manufacturer. The vehicle was driven in the hearing parking lot and surrounding local roads for a total of three miles. It was driven over speed bumps,

uneven surfaces, potholes and drainage grates and no unusual noises were heard. The Board concluded that the evidence, including the inspection and test drive during the hearing, failed to establish that the "clunk" noise 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.

MISCELLANEOUS PROCEDURAL ISSUES:

Shantz & Lee v. Lotus Cars USA, Inc., 2014-0015/FTL (Fla. NMVAB April 21, 2014)
Paragraph (8), *Hearings before the Florida New Motor Vehicle Arbitration Board,* provides that the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. Although the Manufacturer in this instance received the Notice of Arbitration on February 19, 2014, it failed to file an Answer and Affirmative Defenses with the Board Administrator until March 17, 2014. Thus, the Answer and Affirmative Defenses were untimely filed. The hearing on this matter was held on March 26, 2014. The Board Administrator received the Manufacturer's Prehearing Information Sheet on March 21, 2014, identifying the Manufacturer's witnesses. Two days prior to the hearing, the Manufacturer filed additional documents it sought to have the Board consider. One day prior to the hearing, the Consumers filed additional documents they sought to have the Board consider. Paragraphs (10) and (22), *Hearings before the Florida New Motor Vehicle Arbitration Board,* provide that if a Prehearing Information Sheet or additional documents are not received five days before the hearing, witnesses may not be allowed to testify, and additional documents may not be considered, unless good cause is shown for the late filing. At hearing, the Manufacturer's representative explained that, due to the number of snow days in Atlanta, Georgia, Arnold Johnson of Lotus Cars USA, Inc., did not personally receive the Notice of Arbitration until February 25, 2014, even though the Notice was delivered to the Manufacturer's official address on February 19, 2014. The Manufacturer having failed to show good cause for not filing a timely Answer, Prehearing Information Sheet or documents, the Manufacturer's request to assert the defenses at the hearing was denied by the Board, the Manufacturer's witnesses were not permitted to testify and the late-filed documents were not considered. In addition, the Consumers failed to show good cause for their late filings; consequently, their late-filed documents were not considered.