OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2015 - September 2015 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4) F.S.

Gerald v. Volkswagen/Audi of America Inc., 2015-0101/STP (Fla. NMVAB July 1, 2015)

The Consumer leased a 2014 Volkswagen Jetta. On the date the final repair attempt was scheduled to take place, the Consumer testified that she took her vehicle to the dealership and left it there because she did not want to drive the vehicle "and will not take the vehicle back." At the hearing, the Consumer testified that the lease agreement on the vehicle was still in effect, that she was still making payments under the lease agreement, and that she could pick up the vehicle from the dealership if she wanted to do so.

The Manufacturer asserted "Claimant not a 'consumer' as defined by Lemon Law," alleging that the Consumer cannot enforce the obligations of the warranty on the vehicle because she has admitted she does not possess the vehicle, which she has abandoned by leaving it at the dealership.

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." Section 681.102(4), Florida Statutes, defines a "Consumer" as:

> [T]he purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

The evidence established that the vehicle which was the subject of the Request for Arbitration, even though parked at the dealership at the time of hearing, was still under lease to the Consumer. The Consumer had continued to make her monthly lease payments. No evidence was provided that would indicate she could not immediately take possession of the vehicle, if she so desired. Accordingly, she met the statutory definition of a "consumer" and was entitled to enforce the obligations of the warranty. The Manufacturer's assertion to the contrary was rejected by the Board.

Motor Vehicle §681.102(14), F.S.

Schneider v. Ford Motor Company, 2015-0229/ORL (Fla. NMVAB August 5, 2015)

The Consumers complained of a vibration or "hop" that occurred in their 2013 Ford F350 when the vehicle was being driven in the range of 47 to 52 miles per hour. With respect to the gross vehicle weight of the vehicle, the Consumer testified that the gross vehicle weight (GVW) reflected on the registration issued December 2, 2014, had been corrected, and a new registration was issued on April 29, 2015, reflecting the vehicle's GVW to be 7,999 pounds. The net weight reflected on that registration was 7,434 pounds. The Consumer stated this truck was not used as a work truck for hauling on their ranch because they have other vehicles they use for that, and was not used for "5th wheeling." There was normally just one person traveling in the vehicle, and the truck has been used to tow an 18-foot flats boat on a trailer less than one time per month.

The Manufacturer asserted that the case should be dismissed because the Consumer's vehicle was "not a motor vehicle because it was a truck in excess of 10,000 pounds gross vehicle weight." Specifically, the Manufacturer pointed to the Florida Vehicle Registration, issued December 2, 2014, that reflected a gross vehicle weight of 11,500 pounds.

Section 681.102 (14), Florida Statutes, defines a "motor vehicle," in pertinent part, as:

> a new vehicle, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a recreational vehicle or a vehicle used as a demonstrator or leased vehicle if a manufacturer's warranty was issued as a condition of sale, or the lessee is responsible for repairs, but <u>does not include</u> vehicles run only upon tracks, off-road vehicles, <u>trucks over 10,000 pounds gross vehicle weight</u>, motorcycles, mopeds or the living facilities of recreational vehicles.

Florida Administrative Code Rule 2-30.001(2)(d) defines "gross vehicle weight" as "the net, curb or actual weight of the truck, plus the weight of the load normally carried in it, including normal occupant(s), fuel and cargo."

In order for a consumer to qualify for relief under the Lemon Law, the vehicle which was the subject of the claim must be a "motor vehicle" as defined in the statute. A preponderance of the evidence, including the net weight reflected on both of the registration forms provided to the Board, together with the testimony that the truck was not normally used for carrying a load or towing, the weight of the normal occupants carried in the vehicle and fuel, supports a conclusion that the gross vehicle weight of the subject truck did not exceed the 10,000 pound limit set forth in the statute; therefore, it was concluded that the truck was a "motor vehicle" as defined by the statute. Accordingly, the Manufacturer's Motion to Dismiss was denied by the Board.

Pantera v. Volkswagen/Audi of America Inc., 2015-0189/TLH (Fla. NMVAB August 26, 2015)

The Consumer purchased a 2014 Volkswagen EOS through a dealership in Naples, Florida. The Consumer testified that she wanted this particular model, with accessories, and was only able to find it in Florida, after an internet search. The Consumer's son, a North Carolina resident, testified that he contacted the dealership where the vehicle was located, Volkswagen of Naples, in Naples, Florida, via telephone from his home in North Carolina. During the course of

his contact, a price was agreed upon and the method for completing the transaction was discussed. Thereafter, he flew to Florida, was picked up at the airport by personnel from Volkswagen of Naples, and was taken to the dealership on October 21, 2014. He testified that, at that time, he was shown the car in question, confirmed the pricing, completed the purchase paperwork, handed the dealership the check for the remaining balance of the vehicle, and took delivery of the vehicle. The vehicle was then driven by him to North Carolina.

The Manufacturer argued that the Consumer's vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, because the vehicle was not sold in Florida. The Manufacturer's counsel asserted that the lemon law exists to protect "our [Florida] citizens," and because the Consumer was not a resident of Florida, and did not pay Florida sales tax or, in particular, the $2.00 Florida Lemon Law fee, the purchase should be considered a North Carolina sale. Counsel further asserted that "[Florida] benefited in no way from the [Consumer's] purchase of this vehicle," and "there was nothing that tied [the Consumer's] vehicle to the State of Florida in terms of … being a Florida sale …."

A majority of the Board, based on the totality of the circumstances, found that the Consumer's vehicle was "sold in this state" and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. With regard to the Manufacturer's assertion that the failure to pay the $2.00 Lemon Law fee should be a litmus test for whether a vehicle was considered to have been sold in Florida, it was noted first, that Section 681.117, Florida Statutes, appears to require the collection of the fee for new motor vehicles being removed from the State for titling and registration, as was the case for the Consumer's vehicle, and second, that adherence to the Manufacturer's position would allow dealerships, who are responsible for collection of the Lemon Law fee under Section 681.117, Florida Statutes, to make the determination of whether a vehicle could be considered to have been sold in Florida.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

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

Subock v. Kia Motors America, 2015-0091/WPB (Fla. NMVAB September 28, 2015)

The Consumer complained of a radio, seatbelt, brake and window problems in her 2014 Kia Sedona. On June 20, 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 June 23, 2014. The Manufacturer had an opportunity to either inspect or repair the vehicle after receipt of the notice, but declined to do so.

The Manufacturer asserted the Consumer had not afforded the Manufacturer an opportunity to conduct a final repair attempt. Specifically, the Manufacturer argued that the correspondence sent on behalf of the Consumer was insufficient to satisfy the requirements of Section 681.104, Florida Statutes, because it was not a Motor Vehicle Defect Notification form and did not clearly state that the Consumer was asserting rights under Chapter 681, Florida Statutes.

The Board found the evidence established that the Consumer did mail the required written notification to the Manufacturer. The Manufacturer's contention that the correspondence sent on behalf of the Consumer were insufficient to place it on notice of a potential Lemon Law claim was rejected.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Wilson v. Ford Motor Company, 2015-0177/JAX (Fla. NMVAB July 1, 2015)

The Consumer's 2014 Ford Focus was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as incidental charges: $11.75 for mailing the defect notification form to the BBB/Autoline Program; $5.75 for mailing the defect notification form to the Office of the Attorney General; $6.00 for mailing the defect notification form to the Manufacturer; $3.30 for mailing the Customer Claim form to the BBB/Autoline Program; $12.00 for mailing the Request for Arbitration form to the Office of the Attorney General; $50.77 for the cost of issuing and mailing three witness subpoenas; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office; $206.23 for a rental car from February 27, 2015 through March 3, 2015, which the Consumer rented in order to visit a sick family member in Missouri, because the Consumer did not feel safe taking the vehicle on a long trip; $176.95 for a rental car during the May 29, 2015 repair attempt; $60.00 for the co-pay for three doctor visits the Consumer testified were as a result of her being diagnosed with trigger finger, which she alleged was caused by the steering nonconformity; and $27.15 for the cost of a doctor co-pay at Care Spot and corresponding medication purchased at Walgreens as a result of injuries to her knee and back caused by pushing the vehicle ¾ of a mile on May 29, 2015 after it broke down.

The Manufacturer objected to reimbursement of the following: $11.75 for mailing the defect notification form to the BBB/Autoline Program and $5.75 for mailing the defect notification form to the Office of the Attorney General, because the law only requires that form to be mailed to the Manufacturer; $31.58 for the cost of issuing and mailing two of the three witness subpoenas, asserting that two of the witnesses were listed on the Manufacturer's prehearing information sheet and would have been at the hearing anyway; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office because the documents could have been emailed for free; $206.23 for a rental car from February 27, 2015 through March 3, 2015 because the Consumer could have used her vehicle, or could have arranged for alternative transportation by borrowing a vehicle or flying; and both the $60.00 co-pay for three doctor visits where the Consumer was diagnosed with trigger finger, and the $27.15 for the doctor co-pay and medication from Walgreens that resulted from the Consumer pushing her vehicle ¾ of a mile on May 29, 2015, arguing that those costs were outside the purview of the Board's authority and could only be recovered in court through an action in tort.

The Board awarded reimbursement of the following as reasonable incidental charges: $5.75 for mailing the defect notification form to the Office of the Attorney General; $6.00 for mailing the defect notification form to the Manufacturer; $3.30 for mailing the Customer Claim form to the BBB/Autoline Program; $12.00 for mailing the Request for Arbitration form to the

Office of the Attorney General; $50.77 for the cost of issuing and mailing three witness subpoenas; $19.99 for mailing hearing documents to the Manufacturer's Attorney's office; $176.95 for a rental car during the May 29, 2015 repair attempt; $27.15 for the cost of a doctor co-pay to Care Spot and corresponding medication purchased at Walgreens as a result of the Consumer having to push her vehicle ¾ of a mile on May 29, 2015, after the vehicle broke down. The Manufacturer's arguments to the contrary were rejected by the Board. The Consumer's request for reimbursement of $11.75 for mailing the defect notification form to the BBB/Autoline Program; $206.23 for a rental car from February 27, 2015 through March 3, 2015; and $60.00 for the co-pay for three doctor visits, were denied by the Board.

Sciarratta v. Volkswagen/Audi of America Inc., 2015-0220/FTL (Fla. NMVAB August 28, 2015)

The Consumer's 2013 Volkswagen EOS was declared a "lemon" by the Board due to a "no start" condition, which was characterized by the Consumer as the vehicle stopping while being driven, and/or not starting. The Consumer requested reimbursement of the following as incidental charges: a total of $2,104.78 for the cost of rental vehicles for the following dates: March 24-April 14, 2015 ($561.97); May 20–June 3, 2015 ($293.85); June 3–17, 2015 ($224.61); June 17– July 15, 2015 ($534.04); August 5–8, 2015 ($52.11); and August 8–19, 2015 ($203.20); plus an additional 2 weeks of rental charges that the Consumer will incur following the hearing but prior to receipt of the refund awarded by the Board ($235.00). The Consumer explained that she incurred the rental costs because she was scared to drive the vehicle on the highway, or to drive it when she had her granddaughter with her.

The Manufacturer objected to the rental charges incurred prior to June 9, 2015, on the basis they were unreasonable because prior to that time she did not know that the repairs performed would be unsuccessful.

The Board awarded the Consumer everything that was requested above. The Manufacturer's objection to the rental charges incurred prior to June 9, 2015 was denied.

Yesbick and Soogrim v. General Motors, LLC, 2015-0157/WPB (Fla. NMVAB July 15, 2015)

The Consumers' 2013 Chevrolet Tahoe was declared a "lemon" by the Board. The Consumers requested reimbursement as an incidental charge of $221.51 toward a car rental for a family trip, because the Consumer did not feel safe using the subject vehicle. The Consumer's request was awarded by the Board.

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

McMurray v. American Honda Motor Company, 2015-0265/TPA (Fla. NMVAB September 4, 2015)

The agreed upon value of the Consumer's vehicle, for the purpose of calculating the statutory reasonable offset for use, was $40,759.02 ($41,259.02 reduced by a manufacturer rebate of $500.00). Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing was 5,430 miles (5,495 odometer miles reduced by 18

miles at delivery, and 47 other miles not attributable to the Consumer). The Manufacturer objected to cutting off the mileage as of the date of the NCDS hearing, arguing that the Consumer was not required to resort to that procedure because the mechanism was not state-certified under Section 681.108, Florida Statutes. However, according to the Consumer, she filed a claim with NCDS because the Manufacturer's documentation presented this as a requirement, and she did not find out until after that process was completed that it was, in fact, not required. The Board found that the Manufacturer was entitled to a reasonable offset for use of $1,844.35. The Manufacturer's objection to cutting off the mileage as of the date of the NCDS hearing was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Dream Development LLC and Dadario v. Maserati North America, Inc., 2015-0179/FTL (Fla. NMVAB July 6, 2015)

Prior the hearing, the Manufacturer filed a "Motion to Dismiss," asserting that the Consumer had failed to afford the Manufacturer the presumptive repair attempts provided by Chapter 681, Florida Statutes, and was therefore not eligible for relief. Paragraph (24), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, recognizes that motions seeking dismissal "are not preferred as a matter of practice before the Board, and the Board does not have the authority to grant summary judgments." Upon consideration, the Board noted the existence of possible factual issues thus precluding the granting of the motion at a preliminary stage of the proceedings, whereupon it was denied without prejudice to be reconsidered at the conclusion of the case. At the conclusion of the case, the motion was reconsidered by the Board and denied.