OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2015 - December 2015 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Siriphanthong v. Volkswagen/Audi of America Inc., 2015-0423/FTM (Fla. NMVAB December 7, 2015)

The parties stipulated that the Consumer purchased a 2012 Audi A4 in Florida. In the Request for Arbitration, the Consumer indicated that the vehicle was purchased as "new." At hearing, the Consumer pointed out that the heading on the purchase agreement was "New Vehicle Buyer's Order." The Consumer's husband explained that they had requested a CARFAX report from the dealership because the vehicle had over 7,000 miles on it. The Consumer acknowledged that the CARFAX report she received indicated that there had been a previous owner, but asserted that her salesperson told her the previous owner was the dealership itself, and that the car was listed as having a previous owner because the vehicle was an "executive car/demo car." The Consumer also acknowledged that she later requested another CARFAX report, which listed Lease Plan USA as a previous owner.

The Manufacturer asserted that the Consumer was not qualified for relief under the Lemon Law because the vehicle was "used" when the Consumer purchased it; therefore, it was not a "motor vehicle" as defined by the Lemon Law statute. In support of its position, the Manufacturer provided a document showing a title was issued for the subject vehicle to "Owner, Lease Plan USA, 3847 Taussig Avenue, Bridgeton, Missouri 63044-1216," on August 2, 2012. Lease Plan USA then leased the subject vehicle to Suncoast Motorsports, which used the vehicle as a loaner vehicle for customers who were getting their vehicles serviced at their dealership. On July 8, 2013, the vehicle was sold to the Consumer, with an indication on the purchase agreement that the vehicle was "USED." The Manufacturer also pointed out that on the State of Florida Application for Vehicle/Vessel Certificate of Title, which was submitted following the sale of the subject vehicle to the Consumer, the box indicating the vehicle was "Used" was checked off.

In order for the Consumer to qualify for refund/replacement relief under Chapter 681, Florida Statutes, the vehicle which was the subject of the claim must meet the statutory definition in Section 681.102 (14), Florida Statutes, which defines a "motor vehicle" as:

> a <u>new vehicle</u>, propelled by power other than muscular power, which is sold in this state to transport persons or property ….

The statutory definition of "motor vehicle" does not otherwise define what is meant by a "new" vehicle. The definitions of "motor vehicle" and "used motor vehicle" contained in Section

320.60, Florida Statutes, which is the motor vehicle licensing statute, while not governing, provide some guidance with regard to the distinction between "new" and "used" motor vehicles. Section 320.60, Florida Statutes, provides:

> (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 the title to which has been transferred, at least once, by a manufacturer, distributor, importer, or dealer to an ultimate purchaser.
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A majority of the Board concluded that the preponderance of the evidence supported the Manufacturer's contention that the subject vehicle was purchased by the Consumer as a "used" motor vehicle. When the original purchaser, Lease Plan USA, purchased the vehicle, the title passed to Lease Plan USA, making it the ultimate purchaser under Section 320.60(10), Florida Statutes. The evidence showing prior titling of the vehicle to Lease Plan USA, as well as the purchase documents and application for registration, which identify the vehicle as "used" when it was purchased by the Consumer, further supported that conclusion. Accordingly, the vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, and the Consumer's case was dismissed.

NONCONFORMITY 681.102(15), F.S. (2015)

Anderson v. FCA US LLC, 2015-0324/FTL (Fla. NMVAB November 25, 2015)

The Consumer complained of an electrical problem in which the Tire Pressure Monitoring System (TPMS) warning light was constantly illuminated in her 2014 Jeep Wrangler. The Consumer testified that the constant illumination of the TPMS warning light had continued to occur, despite several repair visits. As a result, she had restricted her use of the vehicle and did not take it on the highway anymore because she did not feel safe driving it. The Consumer's witness, an ASE Certified Master Technician, testified that the condition of the rims on the Consumer's vehicle belied the Manufacturer's assertion that it had replaced the two rear TPMS sensors on the Consumer's vehicle. He explained that if, indeed, those sensors had been replaced, the technician would have had to also balance the tires, but the repair orders do not indicate that balancing was done. According to him, the tires on the Consumer's vehicle were chopped, but not worn, which he opined would not cause the TPMS warning light to illuminate.

The Manufacturer's representative explained that the authorized service agent made several good faith repairs to try and identify the problem involving the TPMS system. When those measures failed, they put stock tires on the vehicle which did not trigger illumination of the TPMS warning light. Noting that the tires on the vehicle were exhibiting a chopped tire wear pattern, they concluded that the tires were causing the problem. Consequently, they advised the

Consumer that she needed to replace her tires. He further explained that tire maintenance and replacement are the Consumer's responsibility.

During the hearing, the Board inspected the vehicle. The tires were visually inspected, and the Board noted that the front tires appeared to show more wear and signs of chopping than the back tires. When the engine was started, the Board members observed that the TPMS warning light was illuminated. A majority of the Board found that the evidence established that the electrical problem in which the TPMS warning light was constantly illuminated substantially impaired the use, value or safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion that the Consumer was negligent for not replacing the tires was rejected. Accordingly, the Consumer was awarded a refund.

Moore v. General Motors LLC, 2015-0251/TPA (Fla. NMVAB October 10, 2015)

The Consumer complained of an offensive smell and leak condition in her 2014 GMC Sierra 1500. The Consumer testified that prior to the first repair attempt on July 25, 2014, she noticed that the black molding around the sunroof was "falling down" and blocking the sunroof from closing. She returned the vehicle to the authorized service agent on October 18, 2014, after observing a leak from the front passenger A pillar, a mold smell inside and outside the vehicle, wet carpet on the front passenger side after a rain, and the sunroof molding "falling down" again. On November 8, 2014, the vehicle was brought in again for the musty smell. At that time the carpets were shampooed, and the left and right pillar moldings were replaced; however, she believed the musty smell was still present, as well as a new, strong chemical smell. She took the vehicle to another Manufacturer's authorized service agent on December 4, 2014, to have the front carpet replaced. After the carpet was replaced, however, she still smelled a musty/chemical odor on the drive home. The Consumer, her husband, and her son have all experienced burning eyes and a scratchy throat when riding in the subject vehicle, especially on longer trips with the seat heaters on.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he looked at the vehicle and talked to the Service Advisor at Eagle Buick GMC, at the February 2015, repair. According to him, the only discernible smell at the time was a "propane" smell, which he testified could easily come from other vehicles on the road if the air conditioner vents were left on fresh air rather than in the recirculation mode. He took the vehicle on a 13 mile test drive, in stop-and-go traffic, and experienced no unusual odors other than a new carpet smell. He acknowledged that he never talked to the Consumer or her husband about what they were experiencing.

During the hearing, the Board inspected the vehicle and a musty smell was experienced outside of the vehicle and the strong smell of new carpet was detected inside the vehicle. The Board found that the evidence, including the vehicle inspection, established that the offensive smell and leak condition 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.

Brenneka v. Toyota Motor Sales USA, INC., 2015-0291/FTL (Fla. NMVAB November 13, 2015)

The Consumer complained that his 2013 Toyota Tundra pulled to the right, causing premature and uneven tire wear. The Consumer testified that, shortly after buying the vehicle, he started noticing a strong pull to the right when he was driving. That had caused uneven and premature wearing of the tires, with the first set of tires requiring replacement at approximately 10,000 miles. The Consumer testified that the vehicle continued to strongly pull right, and that the current tires on the vehicle were also showing uneven wear.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor. The Manufacturer's representative testified that when he inspected the Consumer's vehicle, he observed the drift but it was very slight and consistent with the crown of the road. Another Manufacturer's representative reiterated that observation, and further testified that the drift was comparable to another like vehicle that he also test drove.

During the hearing, the Board inspected and test drove the vehicle and reported that the vehicle pulled to the right during the drive, and observed wear to the outer edges of the tires. The Board found that the evidence established that the pull to the right, causing premature and uneven tire wear, 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 replacement vehicle.

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.

Soto v. FCA US LLC, 2015-0343/STP (Fla. NMVAB October 26, 2015)

The Consumer complained of a transmission condition causing the transmission to intermittently fail to go into gear in his 2015 Chrysler 200. The vehicle was presented to the Manufacturer's authorized service agent for repair of the transmission condition on April 3 - 8, 2015, and May 16 - June 4, 2015. On June 10, 2014, counsel for the Consumer sent a one-page letter, dated June 4, 2014, to the Manufacturer, along with a Motor Vehicle Defect Notification form. The documents were sent to "Chrysler Group LLC, 100 Chrysler Drive, Auburn Hills MI 48326-2766."

The Manufacturer asserted the Consumer failed to allow FCA US LLC a final opportunity to cure any alleged defects as required by Section 681.104(1)(a), Florida Statutes. The Manufacturer's representative testified that, as required by law, consumers are notified in their owner's manual of the address they are to use for the purpose of notifying the Manufacturer of its opportunity for a final repair attempt. In this case, the address set out in the Consumer's owner's manual is "FCA US LLC Customer Center, P.O. Box 21-8004, Auburn Hills, MI 48321-8004." According to the Manufacturer, the address used by the Consumer's counsel to send the letter and Motor Vehicle Defect Notification was the Manufacturer's corporate office. Although the Motor Vehicle Defect Notification form eventually reached the proper office, it was not until after the documents had been routed through two other offices, and well past the ten days from receipt of the form that the Manufacturer had in which to request the final repair attempt.

Moreover, the Manufacturer asserted that the letter itself was a general customer dissatisfaction letter, and not a Motor Vehicle Defect Notification or appropriate request for final repair attempt under the Florida Lemon Law statute, since the letter also asserted rights under the Magnuson-Moss Warranty Protection Act and The Deceptive and Unfair Trade Practices Act.

Section 681.104(1)(a), Florida Statutes, requires that:

> [a]fter three attempts have been made to repair the same nonconformity, the consumer shall give written notification, by registered or express mail, to the manufacturer, of the need to repair the nonconformity to allow the manufacturer a final attempt to cure the nonconformity. The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the consumer's receipt of the response. … If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

Pursuant to section 681.103(2), Florida Statutes, manufacturers are required to "provide to … consumers conspicuous notice of the address and phone number for its zone, district, or regional office for this state in the written warranty or owner's manual."

Based on the evidence presented, the Board found that the written notification was not sent to the Manufacturer at the address provided to the Consumer for that purpose. As such, the Consumer had not yet provided the Manufacturer with the opportunity for a "final attempt to cure the nonconformity," as required under Section 681.104(1)(a), Florida Statutes. Accordingly, the Consumer's 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.

Baird v. Ford Motor Company, 2015-0318/WPB (Fla. NMVAB October 28, 2015)

The Consumer complained of rust on the underbody of his 2015 Ford F-150. The Consumer testified that three days after purchasing the vehicle, he found a significant amount of rust on the underbody of the vehicle. He contacted the authorized service agent, who inspected the vehicle and offered to either provide him a replacement vehicle or to treat the affected area. However, because the proffered vehicle was not in his desired color, and because he was advised by an out-of-state "Millwright" that the problem could not be effectively treated, he did not accept either offer.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle because surface rust was normal and beneficial to the components in question. The Manufacturer's witness testified that he inspected the vehicle the one time that the Consumer brought it back to the dealership. His inspection revealed that there

was surface rust on the "non-paint, non-appearance" surfaces that were routinely given no finish coating, and he testified that rust in these areas was normal. He explained that even if left untreated, this rust will not cause damage; however, for customer satisfaction he offered to apply an acid-based cleaner and to paint the area. He stated that he has never seen a vehicle come back with a rust complaint after this acid-based treatment has been applied. The Manufacturer's representative testified that he had seen this type of surface rust on many vehicles with heavy-duty underbody components that were not treated. He explained that those components are left untreated by the Manufacturer with the intention that surface rust develops, because it created a protective coating which was a normal, intended characteristic for that vehicle.

Upon consideration of the evidence presented, a majority of the Board found that the evidence failed to establish that the rust on the underbody of the vehicle, as 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 Consumer's case was dismissed.

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

Busch Pharmacy LLC and Patel v. Mercedes-Benz USA LLC, 2015-0407/TPA (Fla. NMVAB November 12, 2015)

The Consumer complained that the left front wheel "flew off" while driving his 2014 Mercedes GL450. The Consumer testified that he was sitting in the rear of the vehicle while one of his assistants was driving. When the speed reached approximately 60 miles per hour, the right front wheel suddenly came off the vehicle and hit the vehicle's front fender. The Consumer was concerned and frustrated that the vehicle had been at the Manufacturer's authorized service agent since May 29, 2015. The authorized service agent has been waiting for a fender from the Manufacturer, which has been on national backorder. He additionally acknowledged that in approximately February or March of 2015, he had a nail in that same tire and took it to Firestone to have the tire plugged. He stated that his vehicle was never put on the lift and he did not believe that the tire was patched at that time. He was unable to provide any paperwork from Firestone stating what was done to the tire.

The Manufacturer asserted the alleged nonconformity was the result of an accident or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer contended that there was no manufacturing defect or condition; rather, the wheel came off the vehicle because the lug nuts were left loose when the tire at issue was patched, prior to the incident. The Manufacturer's witness testified that on May 29, 2015, while putting the vehicle's original tire on a new rim after the accident, he observed a patch on the inside of the tire. According to him, the only way to apply a patch to the inside of a tire was to completely remove the tire from the vehicle, necessitating removal of the lug nuts. In his opinion, the wheel lugs had been left loose when the tire was patched and placed back on the vehicle, and if wheel lugs were left loose, they will back all the way off the stems, leaving the wheel free to come off the vehicle. He further stated that, prior to the wheel falling off, the last time the vehicle was seen by any Manufacturer's authorized service agent was December 17, 2014, when the vehicle came in for an oil change and no work was done to the tires. Approximately two weeks prior to hearing, he inspected the vehicle and took photographs which showed a plug on the exterior of the tire and a patch on the interior of the

tire. In his opinion, the tire had to have been taken off the wheel and lug nuts loosened at some point between December 17, 2014 and the wheel incident.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the left front wheel suddenly flying off while driving complained of by the Consumer was the result of an accident or unauthorized modifications or alterations of the motor vehicle by persons other then the manufacturer or its authorized service agent. Accordingly, the Consumers' complaint of the left front wheel suddenly flying off while driving did not constitute a nonconformity within the meaning of the law, and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

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

Moore v. General Motors LLC, 2015-0251/TPA (Fla. NMVAB October 10, 2015)

The Consumer's vehicle was declared a "lemon" by the Board as described under the "Nonconformity" section above. Prior to the hearing, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by General Motors. The procedure declined to consider the Consumer's complaint on the grounds that it was without jurisdiction to do so. Subsequently, the Consumer requested arbitration by this Board, seeking a refund.

During the refund calculation, the Board voted, without objection from the Manufacturer, to freeze the Consumer's mileage as of the date she filed her claim with the BBB, resulting in the mileage attributable to the Consumer being 23,661 miles (23,850 odometer miles as of the date of filing, reduced by 11 miles at delivery and 178 other miles not attributable to the Consumer).

MISCELLANEOUS PROCEDURAL ISSUES:

Endrizzi v. Mercedes-Benz USA LLC, 2015-0279/ORL (Fla. NMVAB October 13, 2015)

One day prior to the hearing, the Board Administrator received two photographs from the Manufacturer by U.S. Mail. Pursuant to paragraphs (6) 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." Although Counsel for the Manufacturer asserted the photographs had been timely-emailed to the Consumer, the Consumer stated she had not received them five days before the hearing, and objected to the photographs as not being timely-provided to her. She additionally asserted that, had she timely received the two photographs, she would have submitted photographs of her own in response to these new photographs.

Upon consideration by the Board, the late-filed photographs were not considered at the hearing.