OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2016 - June 2016 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Dalton v. Ford Motor Company, 2016-0036/ORL (Fla. NMVAB May 23, 2016)

The Consumer purchased a 2014 Ford Focus in Jacksonville, Florida. The Consumer testified that while she was a resident of Orange Park, Florida, she went to Autonation Ford, a local dealership, selected the subject Ford Focus, traded in a 2007 Mercury, completed all of the purchase and finance documents for the subject vehicle, paid the down payment with funds from a local Florida bank, and took delivery of the subject vehicle at that dealership. The Consumer acknowledged that her intention when she purchased the vehicle was to title and register it in Virginia, but stated that it was several weeks before she actually moved there and, during that time, she drove the vehicle with a temporary tag issued by the State of Florida.

The Manufacturer asserted the vehicle was not eligible for Florida Lemon Law because it was not "sold in this state." The Manufacturer argued that the Consumer was not entitled to relief under the Florida Lemon Law because the Consumer did not pay Florida sales tax or the Florida Lemon Law fee, according to the purchase contract. In addition, the Manufacturer's Certificate of Origin shows a Virginia address for the Consumer and, by her own testimony, the Consumer's original intent was to title, register, and use the vehicle in Virginia.

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 does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds or the living facilities of recreational vehicles....

In order for a Consumer to qualify for relief under the Lemon Law, the vehicle which is the subject of the claim must be a "motor vehicle" as defined above. Based on the totality of the circumstances, under the plain meaning of the statute, the Board finds the Consumer's vehicle was "sold in this state" and was therefore a "motor vehicle as defined in Section 681.102(14), Florida Statutes. The Manufacturer's arguments to the contrary were rejected and the Board heard testimony regarding the alleged nonconformities.

NONCONFORMITY 681.102(15), F.S.

Ye and Checa v. BMW of North America LLC, 2016-0145/MIA (Fla. NMVAB May 24, 2016)

The Consumers complained of a foul odor coming from the air conditioner (A/C) vents in their 2015 Mini Cooper when the vehicle was turned on. Ms. Checa testified that she was the primary driver of the vehicle and that when she started the vehicle in the mornings, especially when the vehicle has been in a garage overnight, there was intermittently a foul smell coming from the A/C vents. She stated that the odor emitted from the vents was similar to the smell of "urine or ammonia" and lasted from three to five minutes or so, and then goes away. She reported that every time she has brought the vehicle in for repair, the odor was gone for a couple of days but then returned.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative explained that the Mini Cooper models have an evaporator case with two microfilters: one on the top and the other on the bottom. The Manufacturer found that there were complaints of some slight odor, and Technical Service Bulletin SIM 64 02 14 addressed this issue by directing the dealer to place glue beads between the micro-filters to act as spacers in order to avoid the bottom microfilter from remaining wet. According to the Manufacturer's representative, air conditioner odor complaints are fairly common in Florida because of the weather, and usually when a filter was replaced, there was no discernible smell afterwards. In addition to adding the glue beads, the Manufacturer has attempted to address the issue with the Mini Cooper models by replacing the microfilters at every mandated service visit, and by cleaning the microfilters with a sanitizer.

During the hearing, the Board inspected the vehicle. Although the inspection did not take place under the circumstances the Consumer testified that the odor occurs – in the morning, especially when the vehicle had been in a garage overnight – the Board was able to detect a slight smell coming out of the A/C vent for about 30 seconds. A majority of the Board detected the odor when they were about five inches away from the A/C vent.

The Board found that the evidence established that the foul odor coming from the A/C vents substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumers were awarded a refund.

Calle v. General Motors LLC, 2015-0235/WPB (Fla. NMVAB May 11, 2016)

The Consumer complained of an undiagnosed condition that manifested itself by the intermittent illumination of the check engine light in her 2014 Chevrolet Malibu. The Consumer's husband testified that 12 days after the purchase of the vehicle, the check engine light illuminated, and remained on. After taking the vehicle to the authorized service agent for the problem, the light ceased illuminating continuously, but did continue to illuminate intermittently. He indicated that because the purpose of the light was to notify you that something may be wrong with the vehicle, he indicated that the continued intermittent illumination of the light was a problem. According to the Consumer's husband, on one occasion he took the vehicle to the dealer and showed the service person the illuminated check engine

light, yet the dealer claimed that the technician could not duplicate the problem in the shop. He stated that not knowing what causes the check engine light to illuminate was a safety concern for him and his family.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer asserted the vehicle was performing properly. The Manufacturer's witness testified that he was familiar with the repair history of the vehicle and that he was involved in the repair of the vehicle on at least two occasions. He explained that during the first repair attempt the technician could not duplicate the concern. He stated that since the complaint was that the check engine light was illuminated, the technician should have found a code somewhere in the history of the vehicle; however, there was no report on the repair order of a code being found. The vehicle came back into the shop two days later and a code was found for a low voltage battery, so the battery was replaced. He added that during the Final Repair Attempt the Consumer continued to complain that the check engine light was illuminated; however he was not able to duplicate the concern, and could not find any codes when a scan was performed. He acknowledged that whenever the check engine light comes on, codes should be found in the module.

The evidence established that the undiagnosed condition that manifested itself by the intermittent illumination of the check engine light 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. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was 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.

Kuzniewski v. Toyota Motor Sales USA Inc., 2016-0131/TPA (Fla. NMVAB May 23, 2016)

The Consumers complained of a pre-collision system malfunction in their 2015 Toyota Avalon Hybrid. The Consumers testified that they had experienced the pre-collision safety system inappropriately activating, even though there were no vehicles nearby, as well as the system failing to "alert" them when a vehicle pulled out in front of them. The Consumer explained that the reason they purchased the vehicle was for her husband, who was a disabled veteran with a herniated disk and a bad knee that caused him to have a delayed reaction time when braking. According to both Consumers, they purchased this particular option for an additional $1,900.00 because it was supposed to engage the brakes automatically for the driver, in case of an unanticipated vehicle in their path. She further testified that sometimes the system would sound and illuminate when she was entering her garage and there was nothing visible to cause it to alert. When the Consumers brought the vehicle to the Manufacturer's authorized service agent for service on January 16, 2016, they asked about the recall and the timeline for parts, but were told that they knew nothing about a "safety recall" for the pre-collision system and were not aware of a timeline. When the vehicle was brought in for the Manufacturer's repair

after receipt of notice, an "interim recall" was performed. According to the Consumer, the whole system was disabled and a "sticker" was placed on his dash. He continued to call the Manufacturer directly, but received no further assistance. He received a letter from Toyota Customer service on February 1, 2016, stating that there was no timeline for parts for repair of his 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 that the pre-collision system was not the same as an avoidance system and was not intended to avoid accidents altogether. He did acknowledge, however, that there was "something wrong with the system" to the extent that, in limited situations, the pre-collision system would not work.

The Board found that the evidence established that the pre-collision system malfunction substantially impaired the value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining is whether a reasonable number of attempts have been undertaken. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent a total of two times. In this case, the evidence established that each time the Consumers reported the nonconformity to the Manufacturer's authorized service agent or to the Manufacturer directly, they were told that there was no repair and/or no parts available to finally correct the problem. Additional repair visits by the Consumers would not have garnered a different result. The Manufacturer had a reasonable number of attempts to correct the nonconformity in this case and failed to do so; therefore, the Consumers were qualified for the requested relief under the Lemon Law and were awarded a refund by the Board.

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.

Stocksdale v. Mercedes-Benz USA LLC, 2015-0553/FTL (Fla. NMVAB April 6, 2016)

The Consumer complained that, intermittently, the Bluetooth in his 2015 Mercedes-Benz S65 did not work or dropped the connection. The Consumer testified that intermittently, while he was using the speaker phone, the call reverted back to the cellular device at various times during the call. The Consumer stated that he spent a lot of time in his car driving and he usually conducted business on his iPhone 6, as it was synchronized with all his other electronics. The Consumer explained that when the dealer provided him with another Model S65 to test drive for a week, the speaker phone in that vehicle intermittently failed with his iPhone 6 as well. The Consumer added that his vehicle has never failed and he was very happy with it, the only problem was the speaker phone.

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 Mercedes Benz provided a list of cellular phones that were compatible with each Mercedes Benz model, and the iPhone 6 was not compatible with the S65 at the time, although it was compatible with the iPhone 5. He noted that the Manufacturer was working on a software update to address the issue. He explained that each vehicle model was designed at least five years prior to its launch date, and it was not possible to always have available compatible software for each cellular phone. He added that the car has been scanned for codes and there was nothing wrong with the vehicle; it was working as designed.

The Board found that the evidence failed to establish that the Bluetooth intermittently not working or dropping connection condition, 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.

Perez Cruz v. Mercedes-Benz USA LLC, 2016-0026/FTM (Fla. NMVAB April 14, 2016)

The Consumer complained of an alignment condition which manifested itself by excessive tire wear, a "drone" noise, vibration at idle, and constant tire re-balancing in his 2014 Mercedes-Benz C300 4Matic. The Consumer testified that while his wife is the main driver of the vehicle, he had performed all the maintenance and dealt with the dealership since he is a mechanic by trade. According to the Consumer, the Manufacturer has the "incorrect" tire specifications for his vehicle. He additionally opined that on several occasions, the wheels were incorrectly balanced. The Consumer acknowledged that the rim and tire insurance company paid for two new tires to be mounted on the vehicle at one of the repairs because a "tire failed" and "that was not the responsibility" of the Manufacturer.

The Manufacturer asserted the alleged nonconformity was the result of abuse, accident or unauthorized modifications or alterations of the motor vehicle by persons other then the manufacturer or its authorized service agent. The Manufacturer's witness testified that on the two occasions that tire replacements were paid for by the authorized service agent, it was done as a good will gesture. The witness testified that on at least one occasion, the vehicle came in with scuffed tires and bent rims. Another Manufacturer's witness testified that there have been multiple attempts to re-align and re-balance the vehicle. When the vehicle came in on November 29, 2014, he tried to road-force balance both right side wheel assemblies; however, both tires exceeded 30 pounds of road force, which was well above Manufacturer specifications. He opined that the only factor affecting road force was road conditions. He later observed the front tires worn below minimum specifications and additionally explained that the center of each tire was worn due to centrifugal force created by speed cornering or heavy braking. At a later date, there was scuff noted on the outer edge of the left front wheel, and the inside lip of both front wheels were scratched. The Manufacturer's representative testified that at the Manufacturer's final repair attempt, he swapped the tires and wheels from a similar vehicle to rule out any other causes of potential tire wear. On the road test, he experienced no vibration and no drone noise.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results 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. A majority of the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the alignment condition was the result of accident or abuse by persons other than the manufacturer or its authorized service agent. Specifically, a majority of the Board was persuaded that the road force readings being off by significant margins, the scuffing on the front tires outer edge and the bent rim damage supported a finding that the complained-of issues were the result of accident or abuse by persons other than the manufacturer or its authorized service agent. Accordingly, the problem complained of by the Consumer did not constitute a "nonconformity" and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Keener v. Ford Motor Company, 2016-0198/JAX (Fla. NMVAB June 29, 2016)

The Consumers' 2014 Ford Focus was declared a "lemon" by the Board. The Consumers requested reimbursement of $7.99 in postage for mailing the Request for Arbitration by certified mail to the Office of the Attorney General as an incidental charge. The Manufacturer objected to the reimbursement of the $7.99 postage fee because the law does not require a Consumer to send the Request for Arbitration by certified mail. The Manufacturer's objection was denied by the Board and the $7.99 in postage for mailing the Request for Arbitration by certified mail to the Office of the Attorney General was awarded to the Consumers.

MISCELLANEOUS PROCEDURAL ISSUES:

Andeer v. Volkswagen/Audi of America Inc., 2016-0018/TPA (Fla. NMVAB April 29, 2016)

The Consumer complained of an unreliable oil monitoring system in his 2015 Audi SQ5. On December 8, 2015, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement procedure sponsored by Audi. On December 23, 2015, the Consumer received a letter from the BBB stating that "you no longer wish to pursue your claim," which the Consumer refuted by e-mail on the same day, stating that he was ready to proceed with the hearing. No further action was taken on the claim by the BBB, and the Consumer subsequently requested arbitration by the Board on January 18, 2016, seeking a refund.

The Manufacturer asserted the Consumer failed to submit his claim to the manufacturer's state-certified informal dispute settlement procedure. The Manufacturer argued the Consumer failed to permit the BBB to arbitrate his claim prior to filing the Request for Arbitration because he voluntarily withdrew his claim before a hearing could be scheduled and conducted. The only

documentation provided in support of that contention was the aforementioned letter from the BBB to the Consumer, dated December 23, 2015.

Section 681.108(1), Florida Statutes, requires that a consumer must first resort to a manufacturer-sponsored informal dispute settlement procedure if the procedure was certified by the State of Florida on or before the date of acquisition of the subject motor vehicle and if the consumer was informed how and where to file a claim with the procedure in writing at the time of vehicle acquisition. A consumer may request arbitration by this Board if the certified procedure lacks jurisdiction to resolve the dispute. If a consumer submits to a certified procedure and the procedure fails to render a decision within 40 days of the date the claim is filed, or if the consumer is not satisfied with the decision rendered, the consumer may request arbitration of the dispute by this Board. §681.109, Fla. Stat. The evidence established that the claim with the BBB was filed on December 8, 2015, and the procedure had failed to render a decision prior to the Consumer filing his Request for Arbitration by this Board on January 18, 2016. Even in the light most favorable to the Manufacturer, the procedure failed to render a decision within 40 days. Consequently, the prior resort requirement of Section 681.108(1), Florida Statutes, had been satisfied and the Consumer was properly before this Board. The Manufacturer's assertion to the contrary was rejected.

Crowell and Fisher v. Ford Motor Company, 2016-0121/FTM (Fla. NMVAB June 8, 2016)

At the commencement of the hearing, the Manufacturer, through counsel, requested a continuance in the case, because he had tried to contact his witness and was not able to reach her. The Board had previously waited 30 minutes for counsel to contact the witness. Counsel provided no explanation of why the witness was unavailable. The Consumers objected to the Manufacturer's request on the basis that they were prepared to proceed and had taken time off to appear at the hearing. Pursuant to paragraph (31), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, a request to reschedule a hearing will be denied if the party making the request does not establish good cause for the request. In this case, the Board found that the Manufacturer did not have good cause for rescheduling the hearing, and upon consideration, the request was denied and the hearing proceeded.