

**OFFICE OF THE ATTORNEY GENERAL  
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

**QUARTERLY CASE SUMMARIES**

January 2016 - March 2016 (1st Quarter)

**JURISDICTION:**

**Motor Vehicle §681.102(14), F.S.**

*Mann v. Ferrari North America Inc.*, 2015-0506/MIA (Fla. NMVAB January 26, 2016)

The Consumer purchased a new 2013 Ferrari FF after an internet search conducted from her home in Miami Shores, Florida. She purchased the vehicle from Ken Garff Ferrari of Salt Lake, which is located in Salt Lake City, Utah. Negotiations for the vehicle were conducted by the Consumer from her Miami Shores residence. As part of the purchase, the Consumer paid Florida sales tax, as well as Florida title and registration fees; no taxes were paid to the State of Utah. The vehicle was registered and titled only in Florida, and was never issued a temporary plate from Utah. The Consumer testified that she viewed the sale as a Florida sale, because she would receive delivery of the vehicle in Florida, and she paid the Florida sales tax rather than the Utah tax. The boilerplate purchase documents from Utah were signed by the Consumer while in her home in Florida, and returned to the dealer in Utah using a prepaid Fed Ex envelope that was provided to her. The vehicle was delivered to the Consumer's residence in Florida by the Utah dealer, who had also arranged for pick up and transport of the Consumer's trade-in vehicle back to Utah. The Consumer did not go to Utah at any time during the negotiation or finalization of the purchase.

The Manufacturer asserted that the Consumer's claim should be dismissed "as a matter of law" because the subject vehicle was not sold in the State of Florida, and therefore did not meet the statutory definition of a "motor vehicle" pursuant to Section 681.102(15). The Manufacturer further argued that the Uniform Commercial Code, Sections 672.106(1) and 672.41(2), which provide that "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods..." supports the contention that the sale occurred in Utah.

A majority of the Board found that the evidence established the Consumer was a Florida resident and she negotiated the purchase from her residence in Florida. The Consumer intended this to be a Florida sale, she intended that the vehicle be delivered to her residence in the State of Florida, and she paid the Florida sales tax. The vehicle never had a temporary plate from Utah and it was registered and titled in Florida. The statute does not otherwise define the phrase "sold in this state" and further, does not require purchase from or through a Florida dealer. Looking at the totality of the circumstances presented in this case, a majority of the Board concluded that the Consumer's vehicle was "sold in this state" and was therefore a "motor vehicle" as contemplated under section 681.102 (14), Florida Statutes.

*Vara v. Ford Motor Company*, 2016-0005/JAX (Fla. NMVAB March 11, 2016)

The Consumer testified that she was initially in contact with Lilliston Ford, which is located in Kingsland, Georgia, as a result of an internet search, from Florida, during which a used vehicle being offered by Lilliston Ford came to her attention. She drove to Georgia to test drive the used vehicle, decided against purchasing it, and returned home to Florida that day. Shortly after that, a representative from Lilliston Ford emailed her to see if she might be interested in the subject vehicle. She entered into negotiations for the purchase of the subject vehicle with a salesman with Lilliston Ford, via email from her office in Florida. They agreed on a price via email, and she called Lilliston Ford from her office in Florida to give them her credit card number for the down payment. The next day, the subject vehicle was transported from Bozard Ford in St. Augustine, Florida (where the vehicle had been located pursuant to the Window Sticker) to Lilliston Ford. Later that day, she drove to the dealership in Georgia, gave them her 2011 Cadillac, and was given the subject vehicle. The Buyer's Purchase Order and Retail Installment Contract were then mailed to the Consumers' home in Florida for signature. The Consumers signed the documents at their home in Florida, and a representative from Lilliston Ford subsequently drove to her office in Jacksonville, Florida, to pick up the signed documents. The Buyer's Purchase Order indicated that the Consumers' paid Florida taxes and paid a \$3.00 Georgia Lemon Law fee. The vehicle was registered and titled in Florida and never had a temporary plate from Georgia.

In its Amended Answer, the Manufacturer asserted the Consumers were not qualified for repurchase relief because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. The Manufacturer argued that because the vehicle was purchased through a Georgia dealership, and since the Consumers paid the \$3.00 Georgia Lemon Law fee, the vehicle should be considered to have been sold in Georgia. In addition, the Manufacturer argued that the sale took place in Georgia because Georgia was where the Consumers took delivery of the vehicle, and where they traded in their 2011 Cadillac to the dealership.

Based on the totality of the circumstances, a majority of the Board found the Consumers' vehicle was "sold in this state" and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The majority found particularly compelling that the sale was negotiated electronically while the Consumers were in Florida, the down payment was made from the Consumers' office in Florida, the Consumers paid Florida taxes, and the fact that the signed documents were picked up by the dealership at the Consumers' office in Florida.

*Infantas v. Hyundai Motor America*, 2015-0595/MIA (Fla. NMVAB March 15, 2016)

The Manufacturer asserted the Consumer was not qualified for repurchase relief under the Lemon Law because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. The Manufacturer, through its representative, argued that the sale took place in South Carolina as evidenced by the sales contract and the fact that the Consumer paid South Carolina State taxes. Additionally, the Manufacturer asserted that the sales contract specifically provided, in bold letters, that the arbitration laws of the South Carolina Uniform Arbitration Act apply to the sale. Based upon those facts, the Manufacturer asserted that the vehicle was sold in South Carolina.

The Consumer asserted that the vehicle was sold in Florida and testified that she understood that she purchased the vehicle in Florida, as she had never been to South Carolina. She stated that the sales contract was signed in her house in Florida, and that the vehicle was driven to Florida from the dealer. The Consumer's husband testified that his daughter danced with a girl whose father owns a car dealership in South Carolina, and that he directly contacted the father, looking for this particular vehicle. He stated that the gentleman who delivered the vehicle, along with the paperwork, took the trade-in vehicle back to South Carolina; however, he acknowledged that he paid the full delivery fee for the vehicle, a fee that was not included in the vehicle's purchase price or otherwise reflected on the purchase documents. He also acknowledged that the vehicle came with a temporary tag from South Carolina, and he paid the State of Florida registration fee for the Florida tag.

Upon consideration of the totality of the evidence presented, the Board concluded that because (1) the Consumer paid the full measure of the South Carolina sales tax; (2) there were no Florida Lemon Law fees paid in the transaction; (3) the delivery fee was not part of the sales transaction; (4) the shipper was a delivery agent for the Consumer; (5) the delivery of the vehicle occurred in South Carolina; and (6) the trade-in vehicle was given to the shipper to take back to South Carolina; the Consumer's vehicle was not a "motor vehicle" under for purposes of Chapter 681, Florida Statutes, because it was not "sold in this state," and the Consumer was not qualified for the relief requested.

#### **Warranty §681.102(22)F.S.**

*Santare v. Volkswagen/Audi of America Inc.*, 2015-0355/FTL (Fla. NMVAB January 12, 2016)

The Consumer complained of poor fuel economy in his 2014 Volkswagen Jetta. The Manufacturer, through its Attorney, argued that the case should be dismissed because: the gas mileage estimates provided by the Environmental Protection Agency and given on the window sticker were not warranted by the Manufacturer, and the Consumer's claim that his vehicle did not attain those estimates was outside the scope of the Board's authority. The Consumer objected to the Manufacturer's request. Upon consideration, the Board denied the Manufacturer's request as it had the authority to hear whether or not the vehicle had a defect or condition that affected the fuel consumption of the vehicle.

*Dittman v. Volkswagen/Audi of America Inc.*, 2015-0459/JAX (Fla. NMVAB January 4, 2016)

The Consumers complained that their 2014 Volkswagen Passat did not comply with applicable emissions standards. The Manufacturer asserted that the Florida New Motor Vehicle Arbitration Board did not have the jurisdiction to adjudicate regulatory matters currently being investigated and decided by the Federal EPA, or should at least defer arbitration in this matter until the EPA concluded its work; and that the Florida New Motor Vehicle Arbitration Board did not have the jurisdiction to hear the Consumers' claim because the definition of "warranty" contained in Section 681.102(22), Florida Statutes, was limited to issues of vehicle material or workmanship, and did not include design concerns related to emissions. A majority of the Board found that the Manufacturer's assertion that the Board did not have jurisdiction to hear the Consumers' claim should be rejected.

## **NONCONFORMITY 681.102(15), F.S.**

*Gensemer v. Mercedes-Benz USA, LLC*, 2015-0493/WPB (Fla. NMVAB February 5, 2016)

The Consumer complained of a defect with the body/trim that caused a whistling noise when the vehicle was driven at highway speeds. The Consumer testified that she traveled on the turnpike daily, and that there was a constant whistling noise coming from the windshield that starts when she hit about 68 mph. She further testified that she was a surgeon and frequently got calls regarding patient care while she was driving, and that the noise was very distracting. None of the loaner vehicles that she had been given made the noise.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he was involved at the Final Repair Attempt and took a test drive in the motor vehicle. He did not hear the whistling noise complained of by the Consumer; however, he explained that not everyone hears at the same frequency. He also contacted the Manufacturer's engineering section, and learned that the temporary solution that had been performed on the Consumer's vehicle at the third repair attempt had been developed as a result of two complaints in the United States for that particular problem, but that there was not yet a solution. Since he did not hear the whistling noise at issue, it would serve no purpose to reapply the temporary fix. He testified that, shortly before the arbitration hearing, the Manufacturer had identified a corrective measure for the problem, but that information had not been available at the time of the final repair attempt.

The Board found that the evidence established that the whistling noise that occurred when the vehicle was driven at highway speeds 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 to the contrary was rejected. Accordingly, the Consumer was awarded a refund.

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

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

*Lenis v. Ford Motor Company*, 2015-0434/FTL (Fla. NMVAB February 25, 2016)

The Board found that the Consumer's complaint regarding a defective transmission in his 2013 Ford F150 substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity. The Consumer explained that he sent notification to the Manufacturer regarding the problem with his vehicle, and then he coordinated a date for the final repair attempt with the dealer representative. The Consumer added that he left his vehicle at the dealer on March 20, 2015, and he picked it up when it was ready on March 30, 2015. According to the Service Manager at Sawgrass Ford, the vehicle was brought in for repair by the Consumer on March 20, 2015, the technician found a problem with the transmission which required it to be overhauled, and the vehicle was ready for pick up by the Consumer on March 30, 2015, 11 days later.

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. The manufacturer shall have 10 days, ... commencing upon the delivery of the motor vehicle to the designated repair facility by the consumer, to conform the motor vehicle to the warranty. 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.

The Consumer took the vehicle to the Manufacturer's authorized service agent for repair of the same nonconformity on at least three occasions prior to sending the written notification; thereafter, a final repair was attempted. The evidence established that, pursuant to instruction by the Manufacturer, the Consumer delivered the motor vehicle to the Manufacturer's designated repair facility for the final repair attempt on March 20, 2015. The Manufacturer failed to complete the repairs within the 10 days required by statute; therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Manufacturer failed to correct the nonconformity after a reasonable number of attempts; accordingly, the Consumer was entitled to the requested relief under the Lemon Law and was awarded a refund.

**REFUND §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(7), F.S.**

*Uribe v. Ford Motor Company*, 2015-0536/MIA (Fla. NMVAB March 1, 2016)

The Consumer's 2014 Ford Focus was declared a "lemon" by the Board. The Consumer requested reimbursement of the following incidental charges: \$16.00 for postage; \$885.43 for the cost of transportation via Lyft and Uber; \$254.95 for public transit costs; and \$700.00 for two months prospective Uber and Lyft expenses to be incurred by the Consumer while awaiting the final outcome in the present case. The Manufacturer objected to the \$700.00 two month prospective Uber and Lyft expenses. The Board rejected the Manufacturer's argument. The Board awarded the Consumer everything she requested which included \$16.00 for postage, \$885.43 for the cost of transportation using Lyft and Uber; \$254.95 for public transit costs; and \$700.00 for two months prospective Uber and Lyft expenses to be incurred by the Consumer.

*Brester v. Volkswagen/Audi of America Inc.*, 2015-0550/MIA (Fla. NMVAB February 22, 2016)

The Consumer's 2015 Audi A5 was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as an incidental charge: \$101.99 for car rental from October 29, 2015 through November 2, 2015. The Manufacturer objected to this amount as

unreasonable on the basis that the subject vehicle was not inoperable or at the service agent for repair of a nonconformity during the period in which the rental charge was incurred. The Consumer's request for reimbursement of \$101.99 for car rental from October 29, 2015 through November 2, 2015 was denied by the Board as unreasonable.

**Collateral Charges §681.102(3), F.S.**

*Molina v. FCA US LLC*, 2015-0237/MIA (Fla. NMVAB January 26, 2016)

The Consumer's 2013 Chrysler 300 was declared a "lemon" by the Board. The Consumer requested reimbursement of the following as a collateral charge: \$100.00 for window tint. The Manufacturer objected to the request as the Consumer did not provide any receipt for the charge. The Board awarded the Consumer the \$100.00 for window tint as a collateral charge.

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

*Crocker v. Volkswagen/Audi of America Inc.*, 2016-0056/MIA (Fla. NMVAB March 29, 2016)

The Consumer's 2015 Audi Q7 was declared a "lemon" by the Board. For purposes of calculating the reasonable offset for use, mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing was 2,020 miles (2,301 odometer miles reduced by 35 miles at delivery, and 246 other miles not attributable to the Consumer). The Manufacturer objected to use of the mileage figure included on the Better Business Autoline documents, arguing that the mileage used to calculate the offset should be the miles attributable to the Consumer "as of" the date of the hearing before the Florida New Motor Vehicle Arbitration Board, as the Better Business Bureau Autoline hearing was a "documents only hearing." The Manufacturer's argument concerning the appropriate mileage figure to be used in calculation of the offset was rejected by the Board. The Board used the mileage as of the Better Business Bureau Autoline hearing.

**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 than 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:**

*Adeer 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.

**OFFICE OF THE ATTORNEY GENERAL  
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

**QUARTERLY CASE SUMMARIES**

July 2016 - September 2016 (3rd Quarter)

**JURISDICTION:**

*Layton v. Volkswagen/Audi of America Inc.*, 2016-0233/TLH (Fla. NMVAB July 18, 2016)

The Manufacturer, in its Answer, raised the affirmative defense that the Consumer's case should be dismissed because it was not timely filed. Section 681.109(2), Florida Statutes, states that if a Manufacturer has a certified procedure, a claim arising during the Lemon Law rights period must be filed with the certified procedure no later than 60 days after the expiration of the Lemon Law rights period. Section 681.109(4), Florida Statutes, requires that a consumer must file a claim with this Board within 60 days after the expiration of the Lemon Law rights period, or 30 days after the final action of a certified program, whichever date occurs later. In this case, the date of delivery of the subject vehicle was December 19, 2013. The Consumer filed her case with the Manufacturer's certified procedure on February 18, 2016, and subsequently with this Board on May 11, 2016. Concurrent with the filing of her Request for Arbitration, the Consumer submitted documentation showing that she has been on active duty military since purchasing the subject vehicle, and that pursuant to The Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C.A. 3936(a), her Request for Arbitration must be considered timely filed.

The Manufacturer asserted that the case was not timely filed. Focusing first on the issue of timeliness under State law, the Manufacturer argued the case should be dismissed because the case was submitted to the certified procure later than 60 days after expiration of the Lemon Law rights period, and that the case was filed with this Board later than 30 days after the final action of a certified program. The second argument was that the SCRA might not apply in this case, but that if it does, it could be used only once; once the Consumer had relied upon the SCRA to file a case past the deadline with the certified procedure, she could no longer use the SCRA to file a complaint with this Board past the deadline.

The Board rejected all of the Manufacturer's assertions. Initially, the Board found that the SCRA, which provides that the period of a service member's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State, clearly applies in this case because the Consumer was a service member and has been on active duty since the date of purchase. As such, it was not necessary for the Board to determine the timeliness, under State law, of the Consumer's filing with either this Board or the certified program. The Board found that the intent of the SCRA was to apply to all deadlines established under the Lemon Law, includes both that for filing with a manufacturer's certified procedure, if applicable, as well as that for filing a case with this Board. As a result, the Board found the Consumer was properly before this Board and completed the hearing.

*Gilwit v. Mercedes-Benz USA, LLC*, 2016-0294/WPB (Fla. NMVAB August 31, 2016)

At the start of the hearing, the Manufacturer made a Motion to Dismiss the case, asserting that the Board lacked jurisdiction to hear the claim. The Manufacturer argued that because the Consumer was alleging that the defect in the vehicle caused an accident and/or collision, he should file a personal injury/products liability action in circuit court. According to the Manufacturer, matters relating to accident, causation and personal injury were necessarily at issue in the case, and the Board was without jurisdiction to make findings on those issues. Upon consideration, the Board determined that the case presented by the Consumer requested the Board to make findings regarding the alleged nonconformity, and whether a reasonable number of repair attempts were undertaken, which were matters well within its jurisdiction. *See* §681.1095(8), Fla. Stat. Therefore, the Manufacturer's Motion to Dismiss was denied.

### **Consumer §681.102(4), F.S.**

*Kostenski v. Mercedes-Benz USA, LLC*, 2016-0217/JAX (Fla. NMVAB August 23, 2016)

The Consumer purchased a 2014 Mercedes-Benz S63 AMG. The Consumer primarily used his vehicle for business purposes, as he was the owner and founder of Nationwide Equipment Company, Inc. The Manufacturer asserted the Consumer was not a “Consumer” as defined by the Lemon Law, because the vehicle was not used primarily for personal, family, or household purposes.

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:

the 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 Manufacturer has asserted that the Consumer was not qualified for relief under the Lemon Law in this case because the vehicle was used primarily for commercial or business purposes. That argument was rejected by the Board on the basis of *Results Real Estate v. Lazy Days R.V. Center*, 505 So. 2d 587 (Fla. 2nd DCA 1987); the Manufacturer presented no evidence showing the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty. §681.102(4), Fla. Stat.

### **NONCONFORMITY 681.102(15), F.S.:**

*Socias v. Ford Motor Company*, 2016-0280/MIA (Fla. NMVAB September 30, 2016)

The Consumer complained of a transmission shudder upon acceleration and deceleration in his 2014 Ford Focus. The Consumer testified that he experienced a shudder when he accelerated and decelerated his vehicle. He stated that even though the clutch was replaced at the first repair attempt, the problem reoccurred 6-8 months later. The Consumer further stated

that the clutch was replaced a second time on June 22-25, 2015, and a third time at the final repair attempt on March 17-18, 2016. In both cases, the problem again reappeared 6-8 months later. The Consumer opined that it was unfair for him to continue paying for a vehicle that doesn't work properly. He added that he was currently experiencing a shudder on an intermittent basis.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle and the alleged nonconformity was repaired within a reasonable time. The Manufacturer's representative testified that the Ford Focus had a manual transmission with a dual clutch system, defined as two separate clutches that shift automatically, unlike an automatic transmission with a torque converter. He explained that this transmission had improved fuel economy by 7%-10% but could cause a shudder, which was a normal characteristic of a manual transmission. He acknowledged that the clutch was replaced on three different occasions because the amount of shudder recorded during a test drive exceeded the Manufacturer's threshold; however, he asserted that the clutch had been working as expected since the final repair attempt. Furthermore, he argued that the amount of shudder recorded at the prehearing inspection on September 2, 2016, was below the Manufacturer's threshold, which indicated that the vehicle was operating as designed.

A majority of the Board found that the evidence established that the transmission shudder substantially impaired both the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The remaining Board member also found that the transmission shudder was a nonconformity, but that it impaired only the use of the vehicle. Accordingly, by unanimous vote the Consumer was awarded a refund.

*Tower v. Ford Motor Company*, 2016-0098/TPA (Fla. NMVAB July 22, 2016)

The Consumer complained of a malfunctioning air conditioner in his 2014 Ford F-150. The Consumer testified that shortly after delivery, he noted that it took a "long time" for the vehicle to cool down, even with the air conditioner set to high output. The Consumer drives 25 minutes to work and back and it took the air conditioner that amount of time to start to cool down. He additionally explained that both the high-side and low-side leaking Schrader valves and the evaporator assembly were replaced and the air conditioner was still not properly cooling the vehicle, and expressed fear that the vehicle was losing refrigerant.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, or any alleged nonconformity was repaired within a reasonable time. The Manufacturer's witness testified that, based on the repair orders, the air conditioner was not cycling excessively and was "operating as designed." He did, however, acknowledge that he has never personally seen the Consumer's vehicle. The Manufacturer's representative testified that, at the post-notice repair that took place August 3-6, 2015, the vehicle was driven for a total of 126 miles, and during that period the air conditioner performed as designed. At that time, he used a digital thermometer and recorded an output temperature of 40 degrees. According to him, when he checked the temperature recently at the pre-arbitration inspection, it measured between 42 and 52 degrees on the test drive. At the inspection, he additionally checked the Freon levels and reported them to be "close enough." He did acknowledge that he would have replaced Freon if it had not been the pre-hearing inspection.

The Board found that the evidence established that the malfunctioning air conditioner 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.

*MW Consultants, LLC v. Jaguar Cars*, 2016-0225/WPB (Fla. NMVAB September 20, 2016)

The Consumer complained that the Bluetooth did not function properly in her 2015 Jaguar X. The Consumer testified that she must repeatedly pair her phone to her Bluetooth while driving. She stated that she automatically paired her phone each time she started her vehicle in anticipation that her Bluetooth would not function properly. She added that she was concerned for her safety when her Bluetooth malfunctioned since she relied on her hands-free device to make phone calls.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that a technician addressed a Bluetooth complaint by attempting to pair the Consumer's phone to the Bluetooth in the vehicle to determine whether the Consumer's complaint could be duplicated. He explained that the technician may instead try to pair his own phone if he does not have access to the Consumer's phone. He added that even if the technician was successful in pairing his own phone, he would not be able to determine whether the problem was the Consumer's phone or the vehicle if he was not able to test the Consumer's phone. In this case, he stated that the technician was not able to duplicate the Consumer's complaint on his personal phone and determined that the Bluetooth system was operating as designed.

The Board found the evidence established that the Bluetooth malfunction 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.

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

### **What Constitutes a Reasonable Number of Attempts §681.104, F.S.; §681.1095(8), F.S.**

*MW Consultants, LLC v. Jaguar Cars*, 2016-0225/WPB (Fla. NMVAB September 20, 2016)  
(See also "Nonconformity" above)

The Consumer complained of that the Bluetooth did not function properly in her 2015 Jaguar X, which the Board found to be a nonconformity. The vehicle was presented to the Manufacturer's authorized service agent for repair of the Bluetooth malfunction on August 14, 2015, when no problem was found, and December 29, 2015, when no problem was found. On January 12, 2016, 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 January 25, 2016. The Manufacturer failed to schedule a final repair attempt with the Consumer.

While 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law; the statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. With respect to the Bluetooth failing to function properly nonconformity, the evidence established that the Consumer took the vehicle to the Manufacturer's authorized service agent for repair on two occasions; however, the Bluetooth continued to malfunction. The Manufacturer received the Consumer's statutory written notification for a final repair attempt on January 25, 2016. As set forth in Section 681.104(1)(a), F.S., "[t]he 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 . . . 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." The evidence established that the Manufacturer failed to respond to the notification; therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Board found that under the circumstances of this case, the Manufacturer failed to correct the Bluetooth malfunction nonconformity within a reasonable number of attempts; the Consumer was therefore awarded a refund.

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

*Conception v. FCA US LLC*, 2016-0235/FTL (Fla. NMVAB September 20, 2016)

The Consumer complained of a defective transmission in his 2015 Chrysler 200. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective transmission on November 18, 2015, December 16, 2015, December 30, 2015 and January 4, 2016. On February 1, 2016, 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 4, 2016. The Manufacturer sent the Consumer's attorney an email, dated February 9, 2016, instructing the Consumer to bring the vehicle to Massey Yardley DCJ on March 3, 2016, at 8:30 a.m. for a final repair attempt/inspection. The Consumer failed to bring the vehicle to the designated location at the designated time. The Manufacturer then sent a letter directly to the Consumer on March 7, 2016, informing the Consumer that the Manufacturer was again seeking a final repair attempt/inspection. The Consumer also failed to respond to the Manufacturer's second request.

The Manufacturer asserted they were never provided with the opportunity for a final repair attempt and/or inspection. The Manufacturer's representative asserted that by failing to provide the Manufacturer with an opportunity for a final repair attempt and/or inspection, as required by Florida law, the Board cannot award the requested refund to the Consumer.

The Board found that the evidence established that the defective transmission 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 evidence further established that the Consumer failed to respond to both requests for a final repair attempt, and never made his vehicle available for a final repair attempt/inspection. The statute clearly contemplates that the Manufacturer, upon compliance with the conditions set forth in the statute,

has the opportunity to conduct a final repair attempt. The Board found that the conditions set forth in the statute have been met, and the Manufacturer has not yet had its opportunity for a final repair attempt. By neglecting to make the vehicle available to the Manufacturer for a final repair attempt/inspection, as statutorily mandated in Section 681.104(3), Florida Statutes, the Manufacturer was not provided with a reasonable number of attempts, and the Consumer was not eligible for the relief requested under the Lemon Law at that time. Accordingly, the case was dismissed.

**Days Out of Service & Post-Notice Opportunity to Inspect or Repair §681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.**

*Ewseychik v. BMW of North America*, 2016-0251/ORL (Fla. NMVAB August 11, 2016)

The Consumer complained of a defective transmission in his 2015 BMW Mini Cooper S which the Board found to be a nonconformity. The vehicle was out of service by reason of repair of the defective transmission on December 21-30, 2015 (10 days); January 25 through February 18, 2016 (25 days); and May 19, 2016 (1 day), for a total of 36 cumulative out-of-service days. On April 28, 2016, the Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification on May 3, 2016. On May 19, 2016, the vehicle was the vehicle was subjected to inspection by the Manufacturer's authorized service agent.

The Manufacturer's representative testified that he did not know why the vehicle was with the authorized service agent for ten days the first time it was presented for repair of the transmission, because the repair order showed they could not duplicate the issue and no work was performed. Although he opined that it would take "less than a day" to do this, he acknowledged that the in and out dates reflected on the repair order were accurate. The next time the vehicle was in for repair of the transmission, the dealer became aware of an engine recall, so both the transmission and the engine were replaced. He opined that it would take only one day to replace the transmission; however, he acknowledged that the dealership's internal records reflected that the transmission replacement was not completed until February 18, 2016.

The evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the required written notification was sent to the Manufacturer. Following receipt of the notification, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. Accordingly, the Board found it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty and a refund was awarded to the Consumer.

**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.**

*Vinci Enterprises and Vinci v. Mercedes-Benz USA, LLC*, 2016-0109/ORL (Fla. NMVAB August 17, 2016)

The Consumers complained of a condition which manifested itself by loss of tire pressure, accompanied by illumination of the tire pressure monitor (TPM) warning light in their 2014 Mercedes-Benz S550. The Consumer testified that the TPM warning light came on about every three months or after about 3,000 miles of driving, indicating that her tires needed air. She stated that neither she nor her husband have ever put air into the tires; rather, as soon as the warning light came on, they took the vehicle to the authorized service agent.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, or was corrected within a reasonable number of repair attempts prior to written notification. The Manufacturer's witness testified that tires were porous, and when you mount a tire to a rim, you will lose two to three pounds of pressure per month. He explained that resetting tire pressures by filling the tires with air was a routine maintenance item, and noted that the TPM warning light will illuminate when a tire was down approximately three pounds of pressure to alert the driver that the pressure needs to be corrected in the tire. In the Consumers' vehicle, in addition to the warning light, the tire pressure would also be displayed. He noted that the Consumers' vehicle was checked for fault codes, and there was never any fault code found for the TPM system. He also noted that, if the TPM system had failed, there would be no reading for any sensor, which would be indicated by a line where the pressure-reading value would normally be displayed. Although no faults were found, he opined that all four sensors were changed out as "a customer goodwill gesture," in an effort "to ease the Customer's concerns." On February 9, 2016, he made sure that the TPM sensor readings in the Consumers' vehicle were accurate by manually checking the tire pressures with a digital tire pressure gauge. He agreed that, if the TPM system showed the tire pressure was low, and it was not actually low, it would be a defect; however, he asserted that this was not what happened in the Consumer's case because each time she came in with her TPM light on, the tire pressure was found to be low.

The Board found that evidence failed to establish that the condition which manifested itself by loss of tire pressure, accompanied by illumination of the tire pressure monitor warning light 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.

**REFUND §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(7), F.S.**

*MW Consultants, LLC v. Jaguar Cars*, 2016-0225/WPB (Fla. NMVAB September 20, 2016)  
(See also “Nonconformity” above)

The Board found the Consumer’s vehicle to be “lemon” due to a Bluetooth malfunction. The Consumer requested reimbursement of \$1,500 for expert witness fees for Robert Richardson of Automotive Litigation Consultants LLC, as an incidental charge. The Board denied the Consumer’s request for reimbursement for expert witness fees because the Consumer did not provide a report from the expert witness and the expert witness did not provide any testimony related to the Bluetooth malfunction. §681.102(7), Fla. Stat.

**MISCELLANEOUS PROCEDURAL ISSUES:**

*Sievers v. FCA US LLC*, 2016-0284/TPA (Fla. NMVAB August 22, 2016)

Pursuant to a Board Order, Darren Elpers was authorized to appear via telephone as a witness for the Manufacturer. The Board’s Order specifically stated that the Manufacturer’s witness must have a notary present at the site from which the witness was testifying, for the purpose of identifying the witness and administering the oath. At the outset of the hearing, Mr. Elpers called in to the number provided and stated that the notary public would be calling in to the hearing from another location shortly. The Consumer objected to the Manufacturer’s witness not having a notary present at his location. Upon consideration by the Board, it was determined that the Manufacturer, being fully apprised of the necessity that the notary be present with the witness at the time the oath was administered, would not be allowed to present the testimony of Mr. Elpers via telephone at the hearing.

*Fowler v. Ford Motor Company*, 2016-0333/JAX (Fla. NMVAB September 30, 2016)

During the hearing, the Manufacturer sought to introduce the testimony of Don Christoff, a Field Service Engineer with Ford Motor Company. Mr. Christoff was not listed as a witness on the Manufacturer’s Amended Prehearing Information Sheet (or on the Manufacturer’s Original Prehearing Information Sheet). Paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that a witness may not be allowed to testify, and the Board may decline to consider attachments, if the Manufacturer fails to provide the prehearing information sheet with any attachments and listing any witnesses no later than five days before the scheduled hearing. No reason was given by the Manufacturer’s Attorney as to why Mr. Christoff was not listed as a witness. The Consumer objected to the Manufacturer’s request to have Mr. Christoff testify. Upon consideration, the Board found there was not good cause shown for the failure to list Don Christoff on the Manufacturer’s Amended Prehearing Information Sheet, therefore, Mr. Christoff was not permitted to testify.

**OFFICE OF THE ATTORNEY GENERAL  
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

**QUARTERLY CASE SUMMARIES**

October 2016 - December 2016 (4th Quarter)

**JURISDICTION:**

*Warford v. Ford Motor Company*, 2016-0360/WPB (Fla. NMVAB December 21, 2016)

The Request for Arbitration filed by the Consumer alleged that the Consumer took delivery of his 2014 Ford Fiesta on April 25, 2014. At the hearing, the Consumer testified that he took physical possession of the vehicle on January 31, 2014, but did not sign the lease agreement until April 25, 2014. The Consumer explained that he previously worked at the dealership from which the subject vehicle was leased, and at the time he took physical possession of the vehicle, he was still under a lease for a different vehicle, was unable to terminate that lease early, and was therefore unable to execute a new lease. He testified that he was allowed to use the subject vehicle as a “loaner” during the period between January 31-April 25, 2014, until his prior lease ended and he could enter into a new lease. On May 26, 2016, the Consumer filed a claim with the Better Business Bureau Autoline (BBB), the state-certified informal dispute settlement program sponsored by Ford Motor Company. The program rendered a decision denying the claim. The Consumer was not satisfied with that decision and on August 4, 2016, requested arbitration by the Board.

The Manufacturer asserted that the Consumer’s claim with the Manufacturer’s certified procedure was not timely filed because it was not filed within the time frame provided by the statute, which was no later than 60 days after the expiration of the Lemon Law rights period. The Manufacturer asserted that the original date of delivery of the vehicle to the Consumer was January 31, 2014, and that the expiration of the Consumer’s Lemon Law rights period would therefore be 24 months after that date. However, because the Consumer did not file his claim with the BBB until May 26, 2016, more than 60 days after the Lemon Law rights period had expired, the claim cannot be considered timely filed with the Board and must be dismissed. In support of its argument that the date of the original delivery of the motor vehicle to the Consumer was January 31, 2014, the Manufacturer pointed out that the Consumer’s actions clearly evidenced an intent to take possession of the vehicle as of January 31, 2014. The Consumer registered the vehicle with the State of Florida on February 2, 2014; obtained an insurance policy on the vehicle, effective February 3, 2014; and transferred the license plates from his previous vehicle to the vehicle soon after he left the dealership on January 31, 2014. The Manufacturer argued that those actions were inconsistent with an intent to simply use the vehicle as a loaner between January 31-April 25, 2014.

The Board found that the evidence established that the original date of delivery of the motor vehicle was February 2, 2014, when the Consumer registered the vehicle with the State of Florida. The Lemon Law rights period expired twenty-four months later. The Consumer was

required to file a claim with the BBB no later 60 days after the lemon law rights period expired. The Consumer did not file a claim with the BBB until May 26, 2016, well past the sixty-day deadline. Accordingly, the claim with the BBB was not filed within the time period required by the statute, and the Consumer's case was dismissed.

**Consumer §681.102(4)F.S.**

*Mauri v. Mitsubishi Motors North America, Inc.*, 2016-0305/MIA (Fla. NMVAB October 31, 2016)

The Consumer purchased a 2016 Mitsubishi Outlander SE. She testified that she was a student and made a living as an Uber/Lyft driver. The Manufacturer asserted that the Consumer was not properly before the Board as her vehicle was a commercial vehicle.

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

the 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.

There was no dispute that, at the time of purchase of the vehicle and during the course of repairs, the Consumer was entitled by the terms of the Manufacturer's warranty to enforce the obligations of that warranty. The plain language of the third clause in the above-quoted definition does not repeat the use restriction set out in the first two clauses, and thereby makes available the protections of Chapter 681, Florida Statutes, to anyone "entitled ... to enforce the obligations of the [manufacturer's] warranty." See, *Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc.*, 505 So. 2d 587, 589 (Fla. 2d DCA 1987). The Board found that the Consumer was qualified for relief under the law and rejected the Manufacturer's assertion.

**Motor Vehicle §681.102(14), F.S.**

*Missi and Begley v. FCA US LLC*, 2016-0357/ORL (Fla. NMVAB December 23, 2016) (*See also "What Constitutes a Reasonable Number of Attempts" below*)

On July 22, 2015, the Consumers, Ms. Missi and Mr. Begley, purchased a 2015 Dodge Hellcat. Ms. Missi testified that the vehicle was purchased as a birthday present for her. Mr. Begley testified that he called a local Dodge dealer and asked if they had a black Hellcat with the options Ms. Missi wanted, and was told that they did not have one at that dealership. He was also advised that those vehicles were highly sought after, with dealerships charging \$25,000.00 to \$30,000.00 over the sticker price, so no other dealership was just going to send one to the local dealership. According to Mr. Begley, Dodge built only 13 of those vehicles with the exact options he was looking for. The local Dodge dealership checked inventory and found there was only one Hellcat available in the whole country with those options, which was at Gulfgate Dodge ("Gulfgate") in Houston, Texas. Mr. Begley subsequently called Gulfgate and began

negotiations for the subject vehicle, which he conducted from Florida via telephone, email, and texts. According to Mr. Begley, the deal was set up for Ms. Missi to buy the vehicle, and Gulfgate sent the purchase and financing documents to Florida. Ms. Missi never left the State of Florida. She signed the purchasing and finance documents in Florida, had them notarized in Florida, and then sent them back to Gulfgate. Ms. Missi paid \$4,000.00 for a deposit to hold the vehicle either via wire transfer or credit card from Florida; however, Gulfgate subsequently required an additional \$3,000.00 to hold the vehicle for them. Mr. Begley testified that he signed all the paperwork for the trade-in vehicle in Florida, and was going to send it back to Gulfgate; however, Gulfgate told him that he had to bring his trade-in vehicle to Houston, so he drove the trade-in vehicle to Houston in July 2015, and delivered it to the dealership along with his signed paperwork. The only document Mr. Begley signed in Texas was an odometer disclosure statement for the trade-in vehicle. While in Texas, Mr. Begley also delivered \$3,000.00 in cash for the additional deposit requested by the dealership. After he delivered the trade-in vehicle to Texas, Mr. Begley said it took so long for them to get the Hellcat that he called Gulfgate to see what was going on, and he was told that it had taken Gulfgate a while to find out what taxes, fees, etc., needed to be paid to the State of Florida. Mr. Begley relied on the document from the Florida tag and title office as proof that they paid Florida taxes, title and registration fees, as well as the Florida Lemon Law fee. Mr. Begley stated that the Hellcat was delivered to them in Florida in August 2015, and that he and Ms. Missi paid the delivery fee in cash to the delivery company at the time the vehicle was delivered. The Consumers did not appear to recall whether the vehicle was delivered with a temporary tag from Texas, or Florida, or with a dealer tag; however, they subsequently received a new Florida tag in the mail, along with a Florida Lemon Law Booklet.

The Manufacturer asserted the subject vehicle was not a "motor vehicle" as defined in the Lemon Law because it was "purchased out of state." In support of that assertion, the Manufacturer's representative argued that the vehicle was sold in Texas because: (1) the selling dealership, Gulfgate Dodge, was located in Texas, and "the deal was not complete" until the Consumers returned the signed buyer's order to Texas; (2) "the deal was not complete" until Mr. Begley delivered the trade-in vehicle to the dealer in Texas; (3) while in Texas, Mr. Begley paid the balance of the down payment in cash; (4) the Consumers paid the delivery fee to have the vehicle delivered to them in Florida; and (5) the vehicle was delivered with a temporary tag from Texas. He discounted the fact that the Consumers paid Florida taxes, title and registration fees, asserting that "anyone who brings a vehicle with them when they move here must pay those things to get their car legally on the road." He also stated there was no Lemon Law fee in the State of Texas; rather, a consumer simply pays \$34.00 to file there.

Based on the totality of the circumstances, a majority of the Board found the Consumers' vehicle was "sold in this state" and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The majority found particularly compelling that the subject vehicle was found via the internet from Florida; the initial deposit was sent from Florida; the purchase documents were all signed and notarized in Florida; the Consumers paid Florida sales tax and the Florida Lemon Law fee; Ms. Missi, as the owner of the vehicle, never left the State of Florida; and the Texas dealer took the responsibility to register and title the vehicle in Florida, resulting in the Consumers receiving a Florida license plate.

## **NONCONFORMITY 681.102(15), F.S.**

*White v. Ford Motor Company, 2016-0433/JAX (Fla. NMVAB December 16, 2016)*

The Consumer complained of an exhaust odor in the interior cabin of her 2015 Ford Explorer. The Consumer testified that the exhaust odor occurred during a heavy acceleration or while driving on an incline. In addition, the smell was noticed while the air conditioning was on and in recirculation mode. She added that the odor smelled like sulfur and would stay in the vehicle until the windows were opened. As a result of the odor, she had reduced the amount of driving she did in the vehicle. The Consumer produced three witnesses at the hearing who all testified that they have driven in the vehicle and smelled the exhaust odor. Two of the witnesses opined that the odor smelled like it was from a burnt petroleum-based product and one witness added that he was able to smell the odor during moderate acceleration.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that he test drove the Consumer's vehicle during the three times it was presented for repair and that he did not smell any "abnormal" smells during any of those drives. He acknowledged that a technician did detect an odor during one of the test drives. He added that a technical service bulletin (TSB) relating to exhaust odors in the vehicle was performed on the Consumer's vehicle. The TSB involved reprogramming the HVAC module, replacing the air extractors, and sealing the body of the vehicle. The Manufacturer's witness testified that he inspected and test drove the Consumer's vehicle at the final repair attempt and noted that there were no diagnostic trouble codes found at that time. He testified that during his approximate 20 mile test drive, he only smelled a mild odor during the last mile of the drive. He added that, while the vehicle was at wide open throttle, the AC recirculation mode would automatically change temporarily to fresh air mode, which could lead to outside smells coming into the cabin of the vehicle.

During the hearing, the Board test drove a total of 16 miles on the Interstate at highway speeds, performing numerous hard accelerations and driving up an incline with the air conditioning on. A majority of the Board smelled a mild odor that was described as "fummy." A majority of the Board found that the evidence established that the exhaust odor in the interior cabin substantially impaired the use 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.

*Castillo v. Ford Motor Company, 2016-0423/FTL (Fla. NMVAB December 14, 2016)*

The Consumer complained of an exhaust smell entering the cabin of his 2016 Ford Explorer. The Consumer testified that exhaust fumes entered the cabin the minute the vehicle was accelerated over 3000 revolutions per minute (RPMs). The Consumer stated the smell lasted approximately two to three minutes before it dissipated when he opened the windows. The Consumer added that the smell was nauseating. The Consumer's witness testified that he was a technician at Firestone and that he inspected the vehicle at the request of the Consumer. He testified that he test drove the vehicle for two and a half miles and that once the vehicle reached 2800 to 3000 RPMs there was a smell of rotten eggs in the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, and the vehicle was repaired within a reasonable time. The Manufacturer's representative testified that he reviewed the repair orders for the vehicle and test drove the vehicle on two occasions. He explained that during the April 28, 2016 repair, a TSB was performed that addressed smells entering the cabin. He stated that during his first test drive, he was not able to duplicate the Consumer's concern; it was not until he test drove the vehicle with the Shop Foreman that the concern was duplicated. He stated that it is possible that during heavy acceleration with a wide-open throttle, a sulfur-like smell could enter the cabin of a vehicle as a result of the catalytic converter.

The Board found that the evidence established that the exhaust smell entering the cabin 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 and that the nonconformity continued to exist after the final repair attempt. The Manufacturer's assertions to the contrary were 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.**

*Missi and Begley v. FCA US LLC, 2016-0357/ORL (Fla. NMVAB December 23, 2016) (See also "Motor Vehicle" above)*

The Board found the evidence established that the harmonic balancer malfunctioning by falling off the front of the engine substantially impaired the use, value and safety of the Consumers' 2015 Dodge Hellcat, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. At the outset of the problem, the vehicle was towed to the Manufacturer's authorized service agent. Subsequently, the Consumers were told that the engine would have to be replaced. Ms. Missi stated that the sticker price of the vehicle was around \$65,000.00, and the cost of a new crate engine was \$30,000.00. She asserted that replacing the engine would dramatically reduce the value of the "muscle" car because it will not have "matching numbers," meaning the identifying numbers on the engine would not be original to the vehicle. Because replacement of the engine would substantially impair the value of the vehicle, they declined to have the engine replaced, and paid to have the vehicle towed back to their home. Mr. Begley testified that he had 13 years of experience in the towing business, during which time he had learned a lot about vehicles and valuation of vehicles. He stated that, while it was true that the price of this vehicle, which was "only made in certain numbers," may go up in value in the future, in his view, replacement of the engine devalues the vehicle right now. He testified that the foreman at the Fields dealership agreed with him that if they put a new engine in the vehicle, he wouldn't have "a matching numbers car," which would devalue the vehicle, but he also told him that repair was the only thing the engineers at Chrysler would authorize. He asked the authorized service agent if they could do a less drastic repair, such as fixing the harmonic balancer; however, he was told the engine must be replaced. According to the Consumer, there were two different aftermarket fixes available that could go on the harmonic balancer, which

would not require replacement of the engine, but he was told that using either of those would have voided his warranty. He acknowledged that, even if the Manufacturer had timely responded to the Consumers' written notification, he would not have allowed the engine to be replaced.

The Manufacturer asserted the Consumer did not meet the presumption of the Lemon Law regarding repair attempts or the days out of service. The Manufacturer's representative said that the engineers in the SRT division were the ones who made the call to put a new engine in the Consumers' vehicle. He noted that the authorized service agent had stopped all repairs when the Consumers refused to allow the engine to be replaced, so it was the Manufacturer's position that "there have been no repair attempts on this vehicle." In his view, the Consumers chose not to go to the final repair attempt because they did not want to have the engine replaced. He countered the Consumers' assertion that the Manufacturer's response to the defect notification form was not timely by asserting that the statute only requires the Manufacturer to respond within ten days, "whether it is [by] a phone call or [by] mailing out an appointment letter." He did acknowledge that, even if the Manufacturer had been afforded the opportunity for a final repair, the only repair option it would have offered to the Consumers would be to replace the engine.

The evidence established that the nonconformity was presented for repair by the Manufacturer's service agent on one occasion, at which time the Manufacturer directed the authorized service agent to replace the engine, which the Consumers declined to have done because of the affect that repair would have on the value of the vehicle. Under the unique circumstances of the case, a majority of the Board found that the value of the vehicle would have remained substantially impaired if the engine had been replaced because this highly sought after, performance vehicle would no longer have its original equipment, with matching identifying numbers. It was undisputed that replacement of the engine was the only fix being offered by the Manufacturer, and a majority of the Board concluded that the Lemon Law did not require the Consumers to return multiple times to the authorized service agent to be told the same thing. And while not necessary based on the Board's specific findings, the Board also rejected the Manufacturer's argument and concluded that the greater weight of the evidence established that the Manufacturer failed to timely respond to the Consumers' statutory written notification. "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 receive 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. Since the Manufacturer failed to respond to the notification within the required ten days, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Under the narrow circumstances presented in the case, a majority of the Board concluded that the Manufacturer had a reasonable number of attempts to conform the vehicle to the warranty as contemplated by the statute. Accordingly, the Consumers were awarded a refund.

*Niffenegger v. Ford Motor Company*, 2016-0379/JAX (Fla. NMVAB December 19, 2016) (*See also "What Constitutes Written Notification Under §681.104(1)(a), F.S." below*)

The Board found that the Consumer's vehicle had a clutch shudder which 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. With regard to the repair

attempts on the vehicle, the Consumer testified that he was told on February 27, 2015, that the vehicle would need a new clutch, and that he would receive a call from Santa Fe Ford when a loaner vehicle would be available for him to use while the repair was being performed. After not receiving a call, he brought his vehicle back for repair to Santa Fe Ford on March 30, 2015, and May 13, 2015, without an appointment. Santa Fe Ford declined to perform any repair work or otherwise inspect the vehicle at either visit. At the May 13, 2015 repair visit, the Consumer was told by Santa Fe Ford that they did not have a trained transmission technician on staff, and that he would need to take his vehicle to a different Ford authorized service agent, recommending he go to either Gainesville or Lake City. However, on August 7, 2015, the Consumer received a letter from Ford stating that Santa Fe Ford “now [has] a service technician that is trained in transmissions and [they] would be happy to look” at his vehicle. In response, he took the vehicle to Santa Fe Ford for the clutch shudder on August 17, 2015, at which time the transmission control module was reprogrammed. The Consumer added that, to date, he has never received a call from Santa Fe Ford to bring his vehicle back for repairs to replace the clutch.

The Manufacturer asserted they were not given a reasonable number of attempts to correct the nonconformity. The Manufacturer argued that the March 30, 2015, and May 13, 2015, repair dates should not be considered repair attempts since the vehicle was not inspected on either occasion.

The Board found that the evidence established that the vehicle was brought in to the Manufacturer’s authorized service agent for repair of the clutch shudder on February 27, 2015, and August 17, 2015. A majority of the Board also concluded that the Consumer’s attempts to get his vehicle repaired on March 30, 2015, and May 13, 2015, after being told the vehicle needed a new clutch and not receiving a call back from Santa Fe Ford, also constituted repair attempts. Therefore, per a majority of the Board, there were four repair attempts for the clutch shudder prior to sending written notification to the Manufacturer.

*Crawford v. Ford Motor Company*, 2016-0368/MIA (Fla. NMVAB December 6, 2016)

The Consumer complained of a paint defect in his 2015 Ford F-150. The Consumer testified that shortly after the vehicle was delivered to him, he discovered that dirt was embedded in the paint on the roof of the vehicle. The Consumer also stated that the rocker panels on both sides of the truck were missing paint. Additionally, he testified that he had noticed some aluminum corrosion underneath the paint of the vehicle. Although the Manufacturer offered to repaint the vehicle, the Consumer argued that the Manufacturer would never be able to repair the vehicle, even if the vehicle was repainted three different times, because a repaired paint system did not meet the quality of a factory applied paint system. He also asserted that the value of his truck would significantly decline if the truck was repainted within one year of purchase.

The Manufacturer asserted they were not afforded any repair attempts to conform the subject vehicle to the warranty. The Manufacturer’s representative testified that he inspected the vehicle and acknowledged that the vehicle had some minor imperfections in the paint on the roof of the vehicle as well as some orange peel in the rocker panels, which he argued was a common occurrence in that area of the vehicle. He explained that the Manufacturer was never provided the opportunity to repair the vehicle because the Consumer would not allow the Manufacturer to repaint the vehicle.

The Board found the evidence established that the paint defect substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken. The vehicle in this case was presented for repair on two occasions. On both occasions an offer was made to repaint the vehicle. On both occasions that offer was refused. Under the circumstances of this case, the Board found that the Manufacturer has not been provided a reasonable number of attempts to repair the vehicle. Since the Manufacturer was not provided a reasonable number of attempts to repair the nonconformity, the Consumer was not yet qualified for refund/replacement relief under the Lemon Law and the case was dismissed.

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

*Niffenegger v. Ford Motor Company*, 2016-0379/JAX (Fla. NMVAB December 19, 2016) (*See also "What Constitutes A Reasonable Number of Attempts §681.104, F.S." above*)

The Board found that the clutch shudder in the Consumer's vehicle was a nonconformity, and a majority of the Board found there had been four repair attempts for the clutch shudder prior to sending written notification to the Manufacturer. On October 8, 2015, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. Included with the written notification was a separate letter from the Consumer's attorney which, among other things, included a demand for the Manufacturer to repurchase the vehicle. The Manufacturer received the notification on October 13, 2015. On October 27, 2015, the Manufacturer sent a letter to the Consumer's attorney requesting a final repair attempt. No final repair attempt was scheduled.

The Manufacturer asserted that that the Consumer's written notification was improper because it was accompanied by a separate letter which, among other things, demanded that the Manufacturer repurchase the vehicle.

The Board found that the Manufacturer received the statutory written notification from the Consumer, but failed to respond within the statutory 10-day time frame. Therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Manufacturer's assertion that the notice was improper because it was accompanied by a separate letter demanding that the vehicle be repurchased was rejected.

## **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.**

*Miot-Cesar v. Nissan Motor Corporation, USA*, 2016-0304/WPB (Fla. NMVAB October 14, 2016)

The Consumer complained of a paint defect in her 2014 Nissan Sentra. The Customer testified that orange spots appeared on the exterior of the vehicle, approximately 2-3 weeks after she purchased her vehicle. She testified that the spots could be seen on the roof of the vehicle, the hood of the vehicle, the trunk of the vehicle and the interior of the trunk. She stated that clay bar treatment applied to the exterior of the vehicle on two occasions would initially remove the orange spots; however, the spots reappeared after each treatment.

The Manufacturer asserted the alleged nonconformity was caused by environmental fallout which was not covered by the Manufacturer's warranty. The Manufacturer's representative personally inspected the vehicle and testified that he determined that the spots could be classified as debris from an external source that settled onto the surface of the vehicle. He stated that both the dealer's certified body shop and the district service manager also concluded that the spots were the result of an external source. He further explained that the dealer performed clay bar treatment to the vehicle at two of the repairs, as a courtesy to the Consumer. He asserted that the spots could not be the result of a paint defect since the clay bar treatment had successfully removed the spots.

During the hearing, the Board inspected the vehicle and found that the vehicle was well maintained. All three Board members observed some orange spots on the exterior of the vehicle, but noted that the spots would disappear when rubbed. No defects with the paint were observed. The Board found that the evidence failed to establish that the paint defect 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.**

*DeVinney v. Hyundai Motor America*, 2016-0356/WPB (Fla. NMVAB December 21, 2016)

The Consumer complained of a thermal event in the center dash console of her 2016 Hyundai Sonata. The Consumer testified that she drove her vehicle to a medical appointment on May 31, 2016, and when she returned to her vehicle, she observed that the center dash console had been severely damaged from a recent fire and the interior of the vehicle was filled with black smoke. The Consumer stated that she always unplugged her cell phone from the charging jack when she exited her vehicle and never left any objects in her vehicle. The Consumer explained that she did not know the origin of the fire and believed that the vehicle had a Manufacturer's defect.

The Manufacturer asserted the alleged nonconformity was the result of an accident or abuse of the motor vehicle by persons other than the manufacturer or its authorized service agent.

The Manufacturer testified that Hyundai hired an independent third party to determine the origin of the fire. After examining the vehicle, the investigator concluded that a flammable foreign object in the center console storage space in front of the cup holder had self-ignited; however, the unknown foreign object had been removed prior to the investigation. The Manufacturer also presented a photograph that showed the presence of a telephone charging jack in the USB port during the fire. The Manufacturer added that the Consumer's insurance company also conducted an investigation and concluded that the fire originated in the center dash console. Since the fire was caused by a foreign object, the Manufacturer asserted that the fire was not caused by a Manufacturer's defect.

The Board found that the greater weight of the evidence supported the Manufacturer's affirmative defense that the thermal event in the center dash console was the result of an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the problem complained of by the Consumer did not constitute a "nonconformity" as defined by the statute, and the Consumer's case was dismissed.

**REFUND §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(7), F.S.**

*Ackerman v. BMW of North America, LLC*, 2016-0342/STP (Fla. NMVAB October 10, 2016)

The Consumer's 2015 BMW X5 was declared a "lemon" by the Board. The Consumer requested reimbursement of \$33.87 for certified mail expenses to send written notification to the Manufacturer, as well as to mail various other documents related to the arbitration, as an incidental charge. The Manufacturer objected on the grounds that the statute requires only that the motor vehicle defect notice be sent by certified mail. The Board awarded the Consumer the \$33.87 for certified mail expenses to send written notification to the Manufacturer, as well as to mail various other documents related to the arbitration, as an incidental charge. The Manufacturer's objection to reimbursement of the cost of certified mailing for documents other than the motor vehicle defect notification was denied.

*Lisa's Construction, Inc. and Lisa Puffer v. FCA US LLC*, 2016-0375/FTL (Fla. NMVAB December 6, 2016)

The Consumer's 2014 Dodge Ram 1500 was declared a "lemon" by the Board. The Consumers requested reimbursement of \$150.00 for the deductible that the Consumers paid at the May 18, 2016 repair; \$79.92 for the cost to drive a replacement truck to the dealership on two separate occasions when the vehicle was being repaired; and \$2,098.63 for a rental vehicle from August 29, 2016 through September 13, 2016, as incidental charges, which were all awarded by the Board.

### **Collateral Charges §681.102(3), F.S.**

*Daigle v. Volkswagen/Audi of America Inc.*, 2016-0362/WPB (Fla. NMVAB October 3, 2016)

The Consumer's 2014 Volkswagen Beetle was declared a "lemon" by the Board. The Consumer requested reimbursement of \$100.00 for window tinting as a collateral charge. The Manufacturer objected to the request because the Consumer could not produce a receipt for the charge. The Board awarded the Consumer the \$100.00 for window tinting as a collateral charge. The Manufacturer's objection was denied.

### **MISCELLANEOUS PROCEDURAL ISSUES:**

*Olson v. Ford Motor Company*, 2016-0353/JAX (Fla. NMVAB October 3, 2016)

At the outset of the hearing, the Manufacturer sought to have the Board prohibit the Consumer from testifying about carbon monoxide, arguing that any complaint regarding carbon monoxide was outside the scope of the Board's authority and was pre-empted by federal law. The Consumer objected to the Manufacturer's request. Upon consideration, the Board denied the Manufacturer's request as it had the authority to hear whether or not the vehicle had a defect or condition that substantially impaired the use, value or safety of the vehicle, including hearing applicable testimony about carbon monoxide.

*Jureidini v. BMW of North America, LLC*, 2016-0414/MIA (Fla. NMVAB November 10, 2016)

During the Board's deliberations on the merits of the Consumer's claim, and prior to the refund calculation phase of the hearing, the Manufacturer moved to disqualify the Board Members pursuant to Paragraphs (44) and (45), *Hearings Before the New Motor Vehicle Arbitration Board*. Counsel for the Manufacturer asserted that the Board members showed bias, prejudice or interest because they allegedly failed to follow the statute during deliberations. Upon consideration, the Manufacturer's Motion was found to be legally insufficient; accordingly, the hearing proceeded to its conclusion.