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.