OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2021 - March 2021 (1st Quarter)

NONCONFORMITY 681.102(15), F.S.

Manning v. American Honda Motor Company, 2020-0081/STP (Fla. NMVAB February 8, 2021)

The Consumer complained of a malfunction of the infotainment system components in her 2019 Honda Insight. The Consumer testified that, intermittently, the left side of the instrument cluster screen went black and the audio navigation screen also went blank. During those occurrences, she testified that she could no longer access the hands-free function of her phone and that a call would drop if someone was on the phone. Also, during these occurrences, the navigation became inoperable and the radio buttons froze and could not be controlled. She opined that it was like the two screens were not communicating with each other properly. She added that, intermittently, during times that the screens are not working, she had received two different error messages on the audio navigation screen regarding "Power flow" or "Beans API." At the hearing, she provided a video for the Board of the left side of the instrument cluster screen going black and of the two error messages she had received on the audio navigation screen. She added that at times, while driving, the audio navigation screen would go blank and then reboot itself, a process that could take up to ten minutes. During that time, she stated that she had no access to the cell phone, navigation, radio, and backup camera elements of the vehicle.

The Manufacturer asserted the alleged defects or conditions did not substantially impair the use, value or safety of the vehicle, and the alleged defects were corrected within a reasonable number of repair attempts. The Manufacturer's representative testified that he test-drove and inspected the Consumer's vehicle at the final repair attempt and inspected the Consumer's vehicle at the prehearing inspection. He testified that he did see a video of the left side of the screen going black, and because he did not know if the problem was caused by a hardware or software malfunction, at the final repair attempt he replaced the wiring harness and the gauge control module to rule out a hardware problem. He noted that the vehicle's audio unit had already been replaced; therefore, all three hardware components of the unit were new. Further, he opined that the problem could be caused by a "bug" in the software and added that Honda is always coming up with software updates to repair any "bugs" and that the Consumer's vehicle received the latest software update in October 2020, which he opined could have repaired the problem. A Manufacturer's witness acknowledged that he was able to view the left side of the instrument cluster screen going black on October 10, 2019, and took a video of the problem.

The Board found that the evidence established that the malfunction of the infotainment system components 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 Consumer was awarded a refund.

Zermeno v. American Honda Motor Company, 2020-0177/ORL (Fla. NMVAB February 16, 2021)

The Consumer complained an intermittent malfunction of the audio/display screen system while driving her 2018 Honda CRV, which manifested in both a blank or unresponsive screen, and in an intermittent display of error messages on the screen. The Consumer testified that the audio/display screen malfunctions did not occur until approximately a year after her acquisition of the vehicle. She advised that she purchased a new cellular telephone shortly after purchasing the vehicle, and that she still used that cellular telephone when she drove the vehicle. She explained that when the display screen malfunctioned it disabled use of the hands-free phone, the radio, the back-up camera, and Android Navigation, left her unable to see cruise control or air conditioning settings, and sometimes displayed error messages. She said that often the display screen went completely black or blank, and at other times the screen "freezes," continuing to display an image but being unresponsive to any touch commands. She said that if the screen went black or froze while she was on a hands-free phone call, the call would drop. She explained that she was an eye doctor and often received urgent patient-related calls while she was in the vehicle, and that she therefore relied on her ability to use her cellular phone in a hands-free capacity. She stated that the screen went blank as recently as this past Christmas.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and no defects in workmanship or materials had ever been identified. The Manufacturer's witness testified that he performed an update to the system during the December 4, 2019, repair visit. He advised that when he contacted the Honda "tech line" during the January 14, 2020, repair visit he was told that the Consumer's complaint was "a known issue" but that there was no repair available at that time. The Manufacturer's representative testified that he met with the Consumer during the February 5, 2020, repair visit. He explained that in his opinion, since the audio unit was replaced, the complaints were due to the Consumer's cellular telephone. He explained that if the Consumer had downloaded any application or file that was corrupt in any way, it could impact the audio unit's functionality.

The Board found that the evidence established that the intermittent malfunction of the audio/display screen system 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.

Gorbachev v. Tesla Motors, Inc., 2020-0117/FTL (Fla. NMVAB March 12, 2021)

The Board found the Consumers' complaints of wind noise/intrusion, door operation malfunctions, window operation noise, and autopilot malfunction in their 2018 Tesla Model X to be nonconformities. With regard to the autopilot malfunction nonconformity the Consumer testified that intermittently, the instrument cluster screen would go blank, which would render

the autopilot function inoperable at that time. While she acknowledged that the screen had not gone blank again, she testified that the autopilot was still malfunctioning and had not been repaired. Regarding to the autopilot malfunction nonconformity, the Board found that the vehicle was presented for repair to the Manufacturer's authorized service agent one time prior to mailing the written notification and presented for repair at the final repair attempt and that the nonconformity continued to exist. Under the circumstances of the case, specifically the nonconformity being safety-related, the Board found that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty for the autopilot malfunction nonconformity, as contemplated by the Lemon Law. The Consumers were awarded a refund.

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

Flitcraft v. American Honda Motor Company, 2020-0259/TLH (Fla. NMVAB March 4, 2021)

The Consumers complained of an electrical malfunction that manifested both as a noise from the speakers and as malfunctions of the infotainment system touch screen, the blue-ray player, the dash gauges, and the sonar sensors in their 2019 Honda Odyssey. The Board found the electrical malfunction to be a nonconformity that was out of service by reason of repair on November 11-13, 2019; January 14-22, 2020; February 27 – March 27, 2020; and June 11, 2020, for a total of 43 cumulative out-of-service days. With regard to the February 27 – March 27, 2020, repair visit, the Consumer testified that he was told on March 12, 2020, that the vehicle had not been repaired yet, but that he was to come pick up the vehicle and return it on March 26, 2020, when a Honda Field Technical Specialist was coming to inspect/repair the vehicle. That conversation was also confirmed by email. The Consumer added that because the dealership was 2.5 hours away from his residence, and because he did not feel safe driving a vehicle that was not yet repaired, he left the vehicle at the dealership and picked it up on March 27, 2020, after the Honda Field Technical Specialist made a repair to the vehicle.

The Manufacturer's representative testified that the dates of March 13-25, 2020, should not be considered "out of service days" as defined in Rule 2-30.001(2)(c), F.A.C. She testified that, per an email sent to the Consumers on March 12, 2020, the Consumers were instructed to pick up their vehicle and return it on March 26, 2020. While she acknowledged the vehicle had not been repaired as of March 12, she testified that, per the same email, it was the Manufacturer's position that the condition with the vehicle was not safety-related.

A majority of the Board found that the dates of March 13-25, 2020, were "out of service days" as defined in Rule 2-30.001(2)(c), F.A.C., ruling that the Consumers had met the days out of service presumption of Section 681.104(3)(b), Florida Statutes. The Manufacturer's argument to the contrary was rejected.

Goodroe v. Toyota Motor Sales, U.S.A., Inc., 2020-0206/JAX (Fla. NMVAB March 3, 2021)

A majority of the Board found that the evidence established that the Consumers' complaint of a potential fuel pump failure in their 2019 Lexus RX350 substantially impaired the safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Consumer testified that, on March 9, 2020, she brought the subject

vehicle to Lexus of Orange Park for routine maintenance. While she was there, her service advisor informed her of a recall that was issued pertaining to the fuel pump. She testified that that the service advisor told her that the part needed to repair the vehicle was unavailable and the Manufacturer did not know when the part would be available. The service advisor offered her a rental vehicle, free of charge if she agreed to park her vehicle and not drive it until the part became available, which the Consumer did, parking the vehicle in her garage. She testified that she was contacted in May of 2020 by a representative from the Manufacturer who told her that the part to repair her vehicle was available at Lexus of Orange Park. She stated that on May 26, 2020, the vehicle was towed to Lexus of Orange Park for replacement of the fuel pump per the recall. On April 30, 2020, the Consumers 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 4, 2020. On May 27, 2020, the fuel pump was replaced per the recall by the Manufacturer's authorized service agent, correcting the problem.

The Manufacturer asserted that the alleged nonconformity was eliminated within a reasonable number of repair attempts, while all substantive and procedural deadlines were suspended pursuant to Board Emergency Order 20-002. The Manufacturer's representative testified that the Manufacturer initiated a voluntary safety recall concerning the fuel pump and the owners of the potentially affected vehicles were notified. He acknowledged that at the time the Manufacturer sent the recall notice to the Consumers, the Manufacturer could not repair the vehicle because there was a delay in manufacturing the countermeasure replacement fuel pump. He asserted that the global pandemic, Covid-19, caused delays in the availability of the replacement fuel pump needed to repair the vehicle. He explained that Denso, located in Japan, manufactures the replacement fuel pump. He stated that, March through May 2020 being the height of the Covid-19 pandemic, the supply chain slowed down dramatically during that time period. He described the parts as being on the "slow boat" from Japan because the United States was limiting certain ships from entering the country. He added that a rental vehicle was offered to the Consumers until the countermeasure fuel pump became available. He testified that the fuel pump was replaced in the Consumers' vehicle on May 27, 2020, which was the remedy for the recall and which he opined repaired any problem caused by the potentially defective fuel pump. Another Manufacturer representative testified that, while there were not enough replacement fuel pumps to cover all the vehicles affected by the fuel pump recall, she was able to contact the Lexus parts department to expedite receiving the replacement fuel pump, which was installed on the Consumers' vehicle on May 27, 2020.

The Board found that the evidence established that the defective fuel pump nonconformity was corrected at the post notice repair attempt on May 27, 2020, when the countermeasure fuel pump was installed in the vehicle per the recall. The Board found the March 9 – May 26, 2020, time period while the vehicle was parked in the Consumers' garage was attributable to Covid-19 and consequently, pursuant to Board Emergency Order 20-002, not "out of service days" as defined in Rule 2-30.001(2)(c), F.A.C., and therefore, under the circumstances of this case, the Board found that the vehicle was repaired within a reasonable number of attempts and the case was dismissed.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Gabrielle v. Toyota Motor Sales, U.S.A., Inc., 2020-0219/WPB (Fla. NMVAB February 25, 2021)

The Consumer complained of a protrusion in the driver-side seat's bottom cushion in her 2018 Lexus RX450H. The Consumer testified that since the day she purchased the vehicle, she had felt a "protrusion" in the center of the driver-side seat's bottom cushion. She indicated that she felt the "protrusion" each time she sat in the driver-side seat and that it caused her discomfort when driving the vehicle. She explained that, despite presenting the vehicle to the authorized service agent for repair on four occasions, the Manufacturer had not repaired the vehicle and the "protrusion" continued to cause her discomfort when driving.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that several technicians and himself were unable to verify the Consumer's complaint of a "protrusion" in the center of the driver-side seat's bottom cushion. He explained that during three of the repair attempts the technicians attempted to verify the complaint by sitting in the vehicle's driver-side seat, by pushing down on the driver-side seat's bottom cushion, test driving the vehicle, and comparing the driver-side seat to like-model vehicles. However, during each repair attempt, the technicians could not verify any sort of "protrusion" on the driver-side seat's bottom cushion. Additionally, he stated that he inspected the vehicle during the final repair attempt. During his inspection of the vehicle, like previous technicians, he attempted to verify the "protrusion" on the driver-side seat's bottom cushion by sitting in the driver-side seat, by pushing down on the driver-side seat's bottom cushion, test driving the vehicle, and comparing the driver-side seat to like-model vehicles. However, he could not verify any "protrusion" on the driver-side seat's bottom cushion complaint. Although he acknowledged that the Consumer may feel discomfort in the driver-side seat when driving the vehicle, he asserted that her discomfort was merely subjective. Based on the repair orders and his own inspection of the vehicle, he concluded that the driver-side seat operated as designed.

The Board found that the evidence failed to establish that a protrusion in the driver-side seat's bottom cushion, as complained of by the Consumer, substantially impairs 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.

Abell v. American Honda Motor Company, 2020-0354/TPA (Fla. NMVAB March 3, 2021)

The Consumers complained of the brakes squealing and scraping when stopping in their 2020 Acura RDX. The Consumer testified that a few weeks after they leased the vehicle, she began hearing a squealing noise at times when she would press the brake pedal, which would go away as soon as the vehicle came to a stop. She explained that the noise was intermittent, occurring roughly once a week, at various times of day and in all types of weather. She noted

that when she heard the noise there were no warning lights illuminating on the dashboard. She acknowledged that she has always been able to stop the vehicle when applying the brakes.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he inspected the vehicle and test-drove it 30 miles on August 18, 2020. He explained that, within the first few minutes of the test drive upon a cold start, he was able to identify a slight squealing noise from the rear brakes when he applied the brakes, which went away after about 10 minutes of driving; however, he did not observe any other brake noises and the brakes performed normally. He said that, for customer satisfaction only and to lessen any noise heard, the front and rear brake pads and rotors were replaced during his inspection. He testified that the complained-of brake noise was a normal characteristic of the vehicle, occurring intermittently, that was present in other RDX vehicles and did not affect the performance of the brakes. He explained that the noise occurred at times because of a high-frequency vibration generated by the brake pads as the caliper clamps them against the rotating disc. He noted that certain factors affect when the noise can be heard, such as the level of humidity and the temperature of the brake pads. He explained further that the Manufacturer had issued service bulletins for customer satisfaction, in response to customers' complaints about brake noise in RDX vehicles. He testified that the Manufacturer redesigned the front brake pads for all 2019 and 2020 RDX vehicles to mitigate the noise heard from the brakes, as set forth in Service Bulletin 19-053. He stated that the redesigned front brake pads were installed on the Consumers' vehicle on June 30, 2020, noting that he did not hear any noise from the front brakes during his inspection in August 2020. He also testified that the Manufacturer redesigned the rear brake pads for all 2019 and 2020 RDX vehicles to mitigate the noise heard from the brakes, as set forth in Service Bulletin 19-053. He opined the redesigned rear brake pads had not yet been installed on the Consumers' vehicle, but, if installed, would likely lessen any noise that the Consumers were hearing from the rear brakes. He concluded that the vehicle was operating as designed.

The Board found that the evidence failed to establish that the brakes squealing and scraping when stopping, as 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 case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Jones v. FCA US LLC, 2020-0202/JAX (Fla. NMVAB March 29, 2021)

The Consumers 2019 Dodge Charger was declared a "lemon" by the Board due to a fuel starvation nonconformity. The Consumer requested reimbursement of $203.87 for a four-day rental car from Budget as an incidental charge. The Consumer testified that he rented a vehicle from Budget because he was traveling to South Carolina and did not feel his vehicle was reliable for that lengthy trip. The Manufacturer objected to the $203.87 for the Budget rental car because the Consumer's vehicle was not of out of service by reason of repair during those four days. The

Board found that the award shall include reimbursement of $203.87 for a four-day rental car as an incidental charge. The Manufacturer's objection to the Budget rental car charge was denied.

Collateral Charges §681.102(3), F.S.

Jones v. FCA US LLC, 2020-0202/JAX (Fla. NMVAB March 29, 2021)

The Consumer's 2019 Dodge Charger was declared a "lemon" by the Board. The Consumer requested reimbursement of $5,771.00 for car insurance paid on the subject vehicle as a collateral charge. The Consumer's request for reimbursement for car insurance was denied by the Board due to the fact that insurance expense was incurred as a result of state law and was not wholly incurred as a result of acquisition of the vehicle. §681.102(3), Fla. Stat.

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

Manning v. American Honda Motor Company, 2020-0081/STP (Fla. NMVAB February 8, 2021)

For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumer up to the date of the New Motor Vehicle Arbitration Board hearing was 13,445 miles (13,587 odometer miles reduced by seven miles at delivery, and 135 other miles not attributable to the Consumer). The Manufacturer objected to both cutting off the mileage as of the date of the NCDS "documents only" hearing, as the NCDS was not a state-certified program, and to using the mileage on the vehicle as listed on the Consumer's Statement of Odometer Mileage, instead requesting that the Board use the vehicle mileage as of the date of the New Motor Vehicle Arbitration Board hearing when calculating the offset. The Consumer argued that the Board should utilize either the mileage at the NCDS hearing or on the Consumer's Statement of Odometer Mileage. As noted above, the Board used the mileage as of the New Motor Vehicle Arbitration Board hearing for purposed of calculating the offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Mansour v. Jaguar Land Rover North America, LLC, 2020-0335/ORL (Fla. NMVAB March 26, 2021)

Section 681.103(1), Florida Statutes, requires that, in order to trigger the Manufacturer's duty to repair under the Lemon Law, a consumer must first report the problem to the manufacturer or its authorized service agent during the Lemon Law rights period. The Lemon Law rights period is defined in section 681.102(9), Florida Statutes, as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." However, in response to the emergence of the COVID-19 virus, Board Emergency Order 20-002 was issued following the Governor of the State of Florida's issuance of a declaration of public health emergency, as set forth in Executive Order 20-52, dated March 9, 2020. Board Emergency Order 20-002 provides, in pertinent part, that "retroactive to and including March 9, 2020, until and through the date of expiration of Executive Order 20-52, including any extension thereof, all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are

hereby STAYED, SUSPENDED and TOLLED" (hereinafter referred to as the "Stay Order"). Thereafter, on October 27, 2020, the Board issued Board Emergency Order 20-006, which provided in pertinent part that, "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." The subject vehicle was delivered to the Consumer on March 23, 2018, meaning that the Consumer's Lemon Law rights period normally would have expired on or about March 25, 2020; however, effective March 9, 2020, the running of the Lemon Law rights period was suspended by the Board's Stay Order. The evidence showed that the Consumer first reported the defective coolant system problem to the Manufacturer's authorized service agent on April 25, 2020. Upon consideration, the Board concluded that the Consumer's claim was properly before the Board as it was timely reported while the Stay Order was in effect.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2021 - June 2021 (2nd Quarter)

JURISDICTION:

Chatman v. Ford Motor Company, 2020-0129/TPA (Fla. NMVAB May 7, 2021)

The parties stipulated that, on July 9, 2019, the Consumers leased a 2019 Lincoln MKT. On April 3, 2020, the Consumers filed a Request for Arbitration with the Board. The request was approved on December 8, 2020. In response to question 23 in the Request for Arbitration, the Consumers indicated that they did participate in a procedure with the Better Business Bureau Autoline ("BBB"), the state-certified informal dispute settlement procedure sponsored by Ford. However, in question 23, the Consumers did not provide a date next to "[d]ate the procedure received your claim," nor was there a date next to "[d]ate of your hearing." The Consumers did indicate in question 23 that the BBB did not render a decision, offering the following in the explanation box: "Ford offered a reimbursement of $1,500.00, which we did not accept. We made a counteroffer of $3,500.00 and return the car and they did not accept." During the hearing, one Consumer testified that the BBB received their claim on May 18, 2020. She explained that, after filing the claim, they were communicating with Antonio Curtis at the BBB in an effort to reach a settlement with the Manufacturer. She said that Mr. Curtis never spoke to them about having a BBB hearing nor were they advised by the BBB of a hearing date. She testified that they received an email from Mr. Curtis on June 23, 2020, advising of a settlement offer from the Manufacturer. According to her, they rejected the Manufacturer's settlement offer and requested that Mr. Curtis convey a counteroffer to the Manufacturer. When questioned by the Board as to whether the Consumers withdrew their BBB claim, she said that she was not sure what constitutes a withdrawal, but she does not recall telling the BBB to stop the process. However, she acknowledged that the Consumers were frustrated with the BBB process because it was taking "so long" to receive a response to their counteroffer. As a result, they made the decision to continue to pursue their Lemon Law case with this Board. She noted that they were not aware that they needed to participate in a BBB hearing.

The Manufacturer asserted that the Consumers were not eligible to pursue their Lemon Law case unless/until they have been through the state-certified informal dispute settlement procedure sponsored by Ford. In support of that contention, the Manufacturer directed the Board's attention to the letter from Antonio Curtis at the BBB to the Consumer, dated June 3, 2020, which stated: "[t]his is to confirm you have contacted our office and indicated you no longer wish to pursue your claim at this time. If at a later date you decide to pursue your claim, you will have 60 days to re-open." The Manufacturer's counsel argued that, while the Consumers filed their BBB claim on May 18, 2020, the Consumers prematurely withdrew their BBB claim on June 3, 2020, before the BBB had an opportunity to schedule a hearing or render a decision.

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 at the time of vehicle acquisition, in writing, how and where to file a claim with the procedure. Moreover, Section 681.109, Florida Statures, provides that if the consumer submits to such a program and the program fails to render a decision within 40 days of the date the claim is filed, or if the consumer is dissatisfied with the decision rendered, the consumer may request arbitration of the dispute by this Board.

Based on the evidence presented, the Board unanimously found the evidence established that the Consumers withdrew their BBB claim on or about June 3, 2020, and did not complete the BBB process. Accordingly, it was concluded that the prior resort requirement of Section 681.108(1), Florida Statutes, had not been satisfied and the Consumers were not properly before the Board.

Motor Vehicle §681.102(14), F.S.

Maas v. BMW of North America, LLC, 2020-0377/FTL (Fla. NMVAB June 1, 2021)

Prior to hearing, the Manufacturer filed a Motion to Dismiss the Consumer's claim, asserting that the Consumer was not qualified for repurchase relief under the Lemon Law because the Consumer's 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 same assertion was raised as an affirmative defense by the Manufacturer in its Answer. Section 681.102(14), Florida Statutes, provides that for purposes of Chapter 681, Florida Statutes, a "motor vehicle" is "a new vehicle … which is sold in this state to transport persons or property …." The Manufacturer asserted that because (1) the Consumer leased the vehicle from a dealership located in Arizona; (2) the lease agreement originated and was prepared in Arizona; (3) the "down payment" was remitted to the Arizona dealership; and (4) the lease agreement did not reflect the payment of Florida's Lemon Law fee, the vehicle could not be considered to have been "sold in this state." The Consumer explained that he was looking to purchase this particular vehicle with certain specific options, and after conducting a search on a national website from his home in Florida, found only two located in the United States: one in Arizona, and one in Pennsylvania. After messaging both dealerships on the website platform, he was able to negotiate the best price with the Arizona dealership through the website's messaging platform. The cost of shipping the vehicle was paid directly to the Arizona dealership, which in turn arranged for shipping the vehicle to the Consumer's home in Florida, where it arrived unregistered and with only temporary dealer tags. In support of his position that his vehicle was "sold in this state" as required by Section 681.102(14), Florida Statutes, the Consumer asserted: (1) the lease documents were sent to the Consumer via overnight delivery and were signed and executed by the Consumer in Florida, in front of a Florida Notary; (2) delivery of the vehicle was accepted in Florida; (3) by advertising on a national website, the Arizona dealership reached out to the Consumer in Florida; (4) the Manufacturer has a well-established presence in Florida and a Lemon Law case in Florida would pose no hardship to the Manufacturer; and (5) the Consumer had never been to Arizona, and had no contacts with that State. After considering the arguments of the parties, and in light of the remedial nature of Chapter 681, Florida Statutes, the Board voted unanimously that the Consumer's vehicle was "sold in this state" and the Consumer was eligible for relief under the Lemon Law.

Motor Hauling Corp. and Orozco v. FCA US, LLC, 2020-0330/WPB (Fla. NMVAB May 20, 2021)

The Consumers purchased a 2019 Dodge Ram 5500 motor vehicle. The Consumer testified that the principal business of his company, Motor Hauling Corp., was to transport items using a "fifth wheel" trailer pulled by the vehicle that was the subject of the claim. The Consumers submitted into evidence a document reflecting the subject truck's gross weight to be 9,800 pounds. He explained that the truck was weighed with a full tank of gasoline, while he was inside of the vehicle. The vehicle was not weighed with the trailer attached. The Consumers submitted a photograph of the trailer into evidence and he referenced the photograph when he described the trailer as 54 feet long and approximated the weight to be over 10,000 pounds.

The Manufacturer argued that the case should be dismissed because the subject vehicle weighed over 10,000 pounds gross vehicle weight and was therefore not a "motor vehicle" as defined in Section 681.102 (14), Florida Statutes. In support, the Manufacturer's representative referenced a document submitted into evidence by the Consumers which listed the gross weight of the truck as 9,800 pounds. The Manufacturer asserted that the fifth wheel trailer that was regularly attached to the subject truck must be included in the calculation of the truck's gross vehicle weight, because the trailer, which attached to the truck inside the truck bed, added weight to the truck itself. In that regard, he relayed the substance of a conversation he had concerning the case with a technical advisor for FCA US LLC. According to the technical advisor, when considering the weight that will be added to a vehicle by a fifth wheel trailer, it was standard to add approximately 10 percent of the weight of the trailer and cargo to the gross weight of the truck itself. He asserted that the fifth wheel trailer used by the Consumers, which the Consumer testified weighed over 10,000 pounds, would add 1,000 pounds to the gross vehicle weight of the subject truck, bringing the "gross vehicle weight" of the subject vehicle to over 10,000 pounds.

Section 681.102 (14), Florida Statutes, defines a "motor vehicle" 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, <u>but does not include</u> vehicles run only upon tracks, off-road vehicles, <u>trucks over 10,000 pounds gross vehicle weight</u>, motorcycles, mopeds or the living facilities of recreational vehicles.

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

In order for a consumer to qualify for repurchase relief under the Lemon Law, the vehicle which was the subject of the claim must be a "motor vehicle" as defined above. The Board found that the totality of the testimony and evidence presented in the case supported the conclusion that the gross vehicle weight of the subject truck must be calculated as including 9,800 pounds for the truck, and at least 1,000 pounds for the weight that is added to the truck when the fifth wheel trailer was attached, for a gross vehicle weight of 10,800 pounds. Since the gross vehicle weight

exceeded the limit set forth in the statute, the truck was not a "motor vehicle" as defined, and the Consumers were not qualified for repurchase relief under the Lemon Law. Accordingly, the case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Ghazal v. BMW of North America, LLC, 2020-0285/MIA (Fla. NMVAB April 2, 2021)

The Consumer complained of malfunctioning of the infotainment system in his 2019 BMW X5. The Consumer described various problems he experienced with the infotainment system, which included the display screen freezing, after which he was not able to operate some of the functions until the screen was operable again; the navigation function not working; the sound not working while his phone was connected to the vehicle either by a cable plugged into the USB port, or by a wireless Bluetooth connection, or through Apple CarPlay, so that he was unable to hear calls or play music; and no bass while the radio was playing. He testified that he had no trouble with the sound in the vehicle while using his cell phone when he was given a loaner BMW X5 by South Motor BMW while his vehicle was out of service by reason of repair. In addition, he added that he has had three different Apple iPhones since he leased the subject vehicle and that he has had the problems described with all three. The Consumer further noted that he had used many different brands of USB cables, not just Apple, and that he had experienced the same problem with all of those as well. The Consumer added that, in response to the problems, the Central Information Display Screen was replaced once, while the Head Unit was replaced twice. He added that he was told the problem could be an amplifier, so that was replaced, and was also told that software updates could correct the problem, so those were performed; however, the problem had reoccurred all the way up to the day before the hearing. He stated that the Bluetooth was a feature he specifically leased the vehicle for because he often needed it for communications relating to his employment and added that he has had to pull his vehicle over on occasions in order to use the phone.

The Manufacturer asserted the alleged defect or condition did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that he was present at the final repair/post notice inspection. At that time, he was unable to duplicate any of the problems the Consumer had been experiencing with the infotainment system. In addition, he provided testimony in response to video recordings presented by the Consumer of the sound not working. He noticed that the screen on the Consumer's cell phone matched the screen on the vehicle's display screen. Therefore, he opined that the problem was not a Bluetooth connectivity problem, rather it was a sound processing issue which could be caused by overloading the system with too much data. He testified that because there have been so many parts replaced that have not corrected the Consumer's sound complaint, he believed the problem was with an outside source, specifically the Consumer's cell phone.

The Board found that the evidence established that the malfunctioning of the infotainment system 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.

Ledesma v. Ford Motor Company, 2020-0356/MIA (Fla. NMVAB May 7, 2021)

The Consumer complained of a trim and fit condition affecting the doors on the left side of his 2019 Ford Fusion. The Consumer testified that the day after he purchased the vehicle, he noticed that the doors on the driver's/left side of the vehicle were not aligned with the surrounding panels. During the hearing, the Consumer presented two photographs of the left/driver's side of the vehicle. The Consumer explained that the first photograph showed the rear door's window frame was not aligned with the vehicle's valance window frame. He pointed out that there was a large gap between the rear door window frame and the valance window frame. The Consumer explained that the second photograph showed there was also a gap between the front door and the rear door. He also pointed out that the front door "sticks out more than" the rear door. He stated that he believed the vehicle's left side doors were not aligned because the vehicle was in an accident, and subsequently repaired prior to his purchasing the 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 he was familiar with the subject vehicle and that he inspected the vehicle during the prehearing inspection. Although he acknowledged that the doors on the left or driver's side of the vehicle were not aligned with the vehicle's surrounding panels, he asserted that the misalignments were within the "tolerances as outlined in the workshop manual." He explained that during the final repair inspection, the technician measured the "gaps" or "margins" and "flushness" on the vehicle's left side. He stated that the technician found that the upper right corner of the rear window had a gap between the window frame and the window run. Additionally, the technician found that the front door had a flushness variant compared to the rear door. However, the technician found that both the gap and the flushness variant were "within the Manufacturer's specifications." He stated that when he inspected the vehicle during the prehearing inspection, like the technician who performed the final repair attempt, he found that the misalignments of the doors on the left side of the vehicle were within the Manufacturer's specifications. However, he acknowledged that during his inspection of the vehicle, he did not use any instrument or tool to measure the "gaps" or "margins" and "flushness" on the vehicle's left side.

The Board inspected the vehicle in the presence of the parties. The Board members inspected the left side of the vehicle and observed that the top and bottom of the rear door had noticeable gaps between the door and the surrounding panels. They also observed that the top of the front door had a gap between the door and the surrounding panel. Additionally, they observed that the front door was protruding and was not flush with the vehicle's rear door. The Board members also noted that the rear door required more effort to close compared to the vehicle's other three doors. One Board member noticed that the left rear door's rubber trim, on the upper side, was indented into the vehicle's frame.

A majority of the Board found that the evidence established that the trim and fit condition affecting the doors on the left side of the vehicle 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 Consumer was awarded a refund.

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

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

Cabrera v. Toyota Motor Sales, USA, Inc., 2020-0383/MIA (Fla. NMVAB June 30, 2021)

The Consumer asserted that the subject vehicle was out of service for repair from May 2, 2020, until October 10, 2020. She stated that after her husband dropped off the vehicle at the authorized service agent on May 2, 2020, no one contacted her to pick up the subject vehicle until October 6, 2020. In support, she referenced a letter from the Manufacturer dated November 5, 2020, that stated the technician performed the recall campaign on September 30, 2020, and that a vehicle inspection was performed on October 5, 2020. Upon review of the November 5, 2020, letter, the Board questioned the Consumer about an "incident" that was reported to Toyota on September 21, 2020. She explained that in September 2020, her husband had contacted the dealership to ask about the subject vehicle's repair status and reiterated the original stalling complaint from March 2020. Additionally, she acknowledged that her husband primarily spoke to the authorized service agent regarding *all* the subject vehicle's services and repairs. When the Board questioned the Consumer as to whether the authorized service agent had contacted her husband in August 2020, to pick up the vehicle, she responded that she did not know.

Although the Manufacturer's Answer offered the Consumer a refund and stipulated that the subject vehicle was a lemon, the Manufacturer's representative asserted that the vehicle was out of service by reason of repair of the defective fuel pump from May 2 through August 20, 2020, rather than the May 2 through October 6, 2020, time period asserted by the Consumer. The Manufacturer's representative testified that on August 20, 2020, he inspected the subject vehicle and replaced its fuel pump, which also corrected the stalling problem. He stated that once he replaced the fuel pump, he directed the dealership to contact the Consumer to pick up the vehicle that day. In September 2020, he stated that he received a consumer complaint that the subject vehicle had stalled. He acknowledged that he performed a second vehicle inspection on October 5, 2020, and found that the subject vehicle was operating as designed. He later learned that the report of a stalling complaint he received in September 2020 was actually the Consumer's original complaint from May 2020, which had been previously resolved on August 20, 2020. When the Board questioned him as to the September 30, 2020, repair date referenced in the November 5, 2020, letter, he stated that the September 30, 2020, date was when the subject vehicle's warranty claim was closed by the dealership and not the actual date he completed the subject vehicle's repairs. The Manufacturer's witness testified that, as a Service Advisor, he communicated with the consumers and advised them on vehicle services. He stated that on May 2, 2020, the Consumer's husband presented the vehicle to the authorized service agent for repair. He explained that the Consumer's husband was the *only* person he communicated with regarding the subject vehicle. He stated that when the subject vehicle was repaired on August 20, 2020, he called and texted the Consumer's husband to pick up the subject vehicle. He explained that he did not close the subject vehicle's warranty claim until September 30, 2020.

The Board found that the vehicle was out of service by reason of repair on May 2-August 20, 2020 (111 days); and October 5, 2020 (1 day), for a total of 112 cumulative out-of-service days. The Consumer was further awarded a refund.

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.

Grey v. American Honda Motor Company, 2020-0417/ORL (Fla. NMVAB May 18, 2021)

The Consumer complained that intermittently, the audio system did not work properly in her 2020 Honda Passport. The Consumer testified that immediately after purchasing the vehicle, she noticed that, at times, when she was listening to one of her preset radio stations, the station that she was listening to would not be highlighted in blue on the preset bar at the bottom of the audio unit display screen. She said that, when this problem occurred, the display screen would only show the station that she was listening to in small type at the top of the screen, but she did not usually look at that area of the screen. She acknowledged that she did not have a problem hearing sound from the radio, nor did she have a problem changing the radio stations. The Consumer explained that the problem posed a safety concern for her while she was driving because she could easily see on the screen which radio station was playing unless the station was highlighted in blue on the preset bar. According to the Consumer, the problem still existed and had not changed even after the authorized service agent performed several repairs, including rerouting the connectors, updating the audio unit, performing an audio reset, and replacing the audio unit.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he inspected the vehicle on October 8, 2020. He stated that some of the preset radio stations in the Consumer's vehicle were analog stations and some were high definition (HD) stations. Using photographs admitted into evidence of the audio system operating, he explained that, in order for an HD station that has been programmed as a preset to be highlighted in blue on the preset bar at the bottom of the display screen, the HD signal from the radio station must be strong enough for the tuner in the vehicle to pick up the HD signal. He explained further that if the HD signal was not strong enough, then the system would revert to playing the analog station for that radio number, which will be shown at the top of the display screen; however, the HD station that had been programmed as a preset will not be highlighted in blue on the preset bar because the HD station was not playing, rather the analog station was playing. For example, HD 105.1 is one of the Consumer's preset radio stations; when the Consumer scrolled to that preset, if the HD signal was not strong enough, then the system will revert to playing FM 105.1, which will show at the top of the display screen, but HD 105.1 will not be highlighted in blue on the preset bar because HD 105.1 was not playing. He said that there are several environmental factors that could interfere with HD signal strength, such as location, weather, cellular signals, and structures. He opined that the complained-of problem was not an issue with the vehicle, rather it was an issue relating to the strength of the HD signal at various times. He noted that, pursuant to the Consumer's testimony, the complained-of problem has remained the same even after the authorized service agent replaced the audio unit during the August 27, 2020, repair visit. He explained that the audio unit was replaced in an effort to eliminate the vehicle as a potential factor of the complained-of problem. In addition, he testified that, during his inspection of the Consumer's vehicle, he also tested the operation of the radio in his 2020 Honda Pilot for comparison purposes, as it utilized

the same audio system, and found that he experienced the same results in both vehicles. He concluded that the audio system in the Consumer's vehicle was operating as designed.

The Board unanimously found the evidence failed to establish that the audio system intermittently not working properly, as complained of by the Consumer, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

Delgado Consulting, Inc. v. FCA US, LLC, 2020-0398/MIA (Fla. NMVAB May 28, 2021)

The Consumer complained of soot build up that manifested through the illumination of the check engine light; defective Water in Fuel (WIF) sensor; and diesel fuel contamination in his 2018 Ram 1500. The primary driver of the vehicle and owner of Delgado Consulting, Inc., testified that he first observed the illumination of the check engine light in October 2018 and brought the vehicle to the authorized service agent, where he was informed that excessive soot build up was triggering the illumination of the check engine light. He stated that the check engine light reappeared later in October 2018, December 2018, and March 2019. He testified that he observed the illumination of the WIF light on the dashboard in October 2019. He testified that in August 2019, the truck stalled in the middle of downtown Miami and had to be towed to the dealership. He explained that the dealership informed him that rust particles in the fuel system had caused a fuel contamination failure, which would not be covered by the Manufacturer's warranty. He said that his insurance company paid for the repair, with the exception of the deductible. He stated that he brought the vehicle to a different authorized service agent in May 2020, because the check engine light and the WIF light had been intermittently illuminating on the dashboard for the previous three months. He explained that the dealership informed him that metal chips and diesel exhaust fluid (DEF) in the fuel system had caused a second fuel contamination failure, which would not be covered by the Manufacturer's warranty. He said that his insurance company also paid for this repair, with the exception of the deductible. He acknowledged that when the gauge on the dashboard showed that the DEF in the vehicle was low, he would pour DEF into the DEF tank, which was located directly above the diesel fuel tank. He testified that he brought the vehicle back to the authorized service agent in August 2020, because the WIF light had been intermittently illuminating on the dashboard for several days. He explained that the dealership informed him that the truck was experiencing a fuel contamination failure for the third time. He acknowledged that the truck has not yet been repaired and remains at the dealership, as of the date of the hearing.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was the result of an accident, abuse, neglect 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 when the vehicle was brought to the dealership for the first four repairs, the technicians found excessive soot build up on the sensors. He said that vehicle reports revealed that the vehicle had excessive idle time for the mileage accrued, which prevented the vehicle from reaching operating temperature and completing the regeneration process. He explained that the Consumer's vehicle was equipped with a sensor that was designed to detect soot and ash in the fuel system, and the

regeneration process burns the soot out of the exhaust system. He explained that the regeneration process can only be completed if the vehicle is driven at least 50 miles per hour (mph) for 30 minutes. He said that vehicle reports revealed that the regeneration process in the Consumer's vehicle had been interrupted on 12 different occasions. He also testified that at the August 2019 repair, the dealership determined that the fuel system was contaminated because a fuel sample from the Consumer's vehicle showed that the diesel fuel appeared cloudy rather than clear with a light-yellow tint. He explained that the fuel pump assembly should appear silver and shiny, but the Consumer's fuel pump was covered with a barnacle like debris, which could only be caused by a corrosive foreign substance like water or DEF. Lastly, he stated that at the October 2019 repair, the technician determined that the WIF sensor was faulty because there were no signs of water present in the fuel. A second Manufacturer's witness testified that he inspected the vehicle in May 2020. He stated that he took a sample of the fuel, which appeared discolored and cloudy. He showed pictures of the different components of the fuel system, which were all covered with rust chips, metal flakes and metal shavings. He said that the fuel contamination was caused by the presence of DEF in the fuel system. He explained that if DEF was poured into a cup of diesel fuel, the DEF turned the diesel fuel into a cloudy substance. He explained that DEF, which is made up of 32.5% urea and 67.5% water, is very corrosive to metal and the only foreign substance that could have caused such quick corrosion to the metal components. He said that he also inspected the vehicle when it returned to the dealership in August 2020. He showed a video in which he pumped a sample of fuel through the fuel system, and white suds and foam were present, which also indicated the presence of DEF in the fuel. He explained that based on the extent of the corrosion to the metal components and the smell of urea, he concluded that the fuel had again been contaminated by the presence of DEF in the fuel system.

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. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the diesel fuel contamination was the result of abuse and neglect, specifically the presence of DEF in the fuel system. Accordingly, the problems complained of by the Consumer did not constitute "nonconformities" as defined by the statute, and the Consumer's case was dismissed.

Sullivan v. American Honda Motor Company, 2020-0150/WPB (Fla. NMVAB April 26, 2021)

The Consumer complained her 2018 Honda Fit failed to start. The Consumer testified that on five occasions, when she went to start the vehicle, it failed to start. She testified that on those five occasions, the vehicle had to be either towed to Delray Honda or jump-started and then driven straight to Delray Honda. At each of those repair visits, it was found that the vehicle's battery had failed, so the battery was replaced. She testified that she historically has used the vehicle to drive to dentist and doctor appointments, church, and the grocery store, and that the current mileage on the vehicle was 7,642. She indicated that she has been driving the vehicle less since the start of the Covid-19 pandemic, although she did initially have her daughter drive it on occasion. She testified that the vehicle's battery last failed and was replaced in September 2020, and that following the Manufacturer's requested statutory final repair attempt in November 2020, she has had her daughter drive the vehicle at least once a week, if she had not driven it, in order to

prevent the battery from failing. She acknowledged that since her daughter began more regularly driving the vehicle in November of 2020, the vehicle was being "driven more now" than it previously was driven and the battery had not failed. She also acknowledged that she had been advised by Delray Honda to put the vehicle on a battery tender, but that she did not do so.

The Manufacturer asserted the Consumer's complaint of the no start condition was the result of accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that he performed the Manufacturer's inspection of the vehicle on November 5, 2020. During that inspection, he testified that he first hooked up a scan tool to check for any current or stored diagnostic trouble codes; none were found. Next, he made sure the vehicle had the most up to date software, which it did. He then performed a check of the integrity of the vehicle's 12-volt battery, the starting system and the charging system. The battery, the starting system and the charging system were operating as designed and he did not find any problem with any of those items. Finally, he performed a parasitic draw test in order to determine whether the battery was being drained because it was failing to go into "sleep mode." He noted that every vehicle has a parasitic draw, but that the "sleep mode" function preserves battery life by limiting the draw while the vehicle was not in use. No excessive draw was found; the test results were within the Manufacturer's specifications. Because no vehicle problems were found that would account for the premature failure of the battery, he concluded that the Consumer's insufficient use of the vehicle was preventing the vehicle's charging system from performing its secondary purpose: maintaining the battery. He explained that the industry-accepted, standard mileage for a vehicle was 12,000 – 15,000 miles per year, which equated to approximately 231 – 288 miles per week. He noted that while there was no specific "minimum" amount of mileage a vehicle has to be driven to avoid premature battery failure, the vehicle's warranty booklet stated that a vehicle needs to be driven "regularly over a distance of several miles." Looking at the vehicle's mileage in November 2020, as compared to the current mileage of the vehicle which reflected a marked increase in use, he testified that the recent increase in use was the reason the battery had not failed, which supported his conclusion that the insufficient use of the vehicle had been responsible for the battery failures. He also noted that a trickle charger or battery tender device was suggested for vehicles that were not driven a sufficient amount to prevent a no-start condition, and that such a device had been recommended to the Consumer in September and November of 2020.

A majority of the Board found that the greater weight of the evidence supported the Manufacturer's argument that the vehicle failing to start was the result of neglect of the motor vehicle by persons other than the manufacturer or its authorized service agent, more specifically the failure to drive the vehicle so as to prevent discharge of the battery. The Board majority specifically noted the low mileage during the period when the batteries failed, with the vehicle being driven only an average of 43 miles a week between April through September of 2020. In contrast, once the Consumer's daughter started to regularly drive the vehicle in November 2020, the average mileage on the vehicle through the date of the hearing increased to 97 miles per week, with no failure-to-start events occurring during that time period. The complained-of defect was the result of neglect of the vehicle by persons other than the manufacturer or its authorized service agent, and therefore did not constitute a "nonconformity" as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

Cabrera v. Toyota Motor Sales, USA, Inc., 2020-0383/MIA (Fla. NMVAB June 30, 2021)

The Consumer's 2018 Toyota Tacoma 2WD was declared a "lemon" by the Board due to a defective fuel pump. The vehicle was out of service by reason of repair from May 2-August 20, 2020 (111 days); and October 5, 2020 (1 day), for a total of 112 cumulative out-of-service days. The Manufacturer stipulated that on August 3, 2020, the Manufacturer received written notification from the Consumer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. On August 20, 2020, and October 5, 2020, the vehicle was subjected to inspection by the Manufacturer.

The Consumer requested reimbursement of $3,375.05 for a vehicle rental from August 21 to October 10, 2020, as an incidental charge. The Manufacturer objected to the rental vehicle charge based on its assertion that the vehicle should not be considered to have been out of service by reason of repair for the period covered by the rental agreement. The Board found that the award shall include reimbursement of $66.18 for vehicle rental on October 5, 2020, the date of the second vehicle inspection performed by the Manufacturer. The Board denied the Consumer's request for reimbursement of $3,308.87 for a vehicle rental costs from August 21 to October 4, 2020, and from October 6 to October 10, 2020. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Mahovich v. Ford Motor Company, 2020-0352/TLH (Fla. NMVAB April 26, 2021)

The Consumer requested reimbursement of $458.78 for window tinting, $1,300.00 for ceramic coating, $309.00 for custom color-matched Ford emblems, and $3,693.30 for electrical/audio equipment as collateral charges. The Manufacturer objected to the ceramic coating and the custom color Ford emblems because they were not itemized on the receipt provided in the record. The Manufacturer objected to reimbursement of the Consumer for any of the electrical/audio equipment that could be removed from the vehicle. The Consumer testified that the company who performed the ceramic coating of his vehicle was a mobile company that came to his house to perform the service. He stated that he paid through PayPal and that the receipt provided was what he received from the company. He testified that the Ford emblems were provided by a Colorado-based company who performed the service from Colorado and mailed back the emblems to him. That company was also paid through PayPal, and the receipt provided was the only receipt he was given. With regard to the electrical/audio equipment, he testified that it could not be easily removed as there were modifications made to the vehicle in order for some of the equipment to fit correctly.

The Board found that the award shall include reimbursement of $458.78 for window tint, $1,300.00 for ceramic coating, $309.00 for custom color matched Ford emblems, and $3,693.30 for electrical/audio equipment as collateral charges. The Manufacturer's objections were rejected.

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

Simon v. Toyota Motor Sales, USA, Inc., 2020-0385/FTL (Fla. NMVAB June 7, 2021)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $40,222.00. Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing was 6,944 miles (7,000 odometer miles reduced by 32 miles at delivery, and 24 other miles not attributable to the Consumer). The Manufacturer argued that the Board should utilize the mileage for the offset as of the final repair attempt because the Consumer went to the NCDS program prior to the final repair attempt. The Consumer argued the mileage should be used as of the date of the NCDS hearing. According to Chapter 681.101(19), Florida Statutes, "Reasonable Offset for Use" means the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first …." The Board found that the NCDS hearing was an arbitration hearing pursuant to Chapter 681.101(19), Florida Statutes, and therefore utilized the mileage as of that date.

MISCELLANEOUS PROCEDURAL ISSUES:

Rodriguez v. Volkswagen/Audi of America, Inc., 2020-0047/FTL (Fla. NMVAB June 11, 2021)

The Manufacturer received the Notice of Arbitration for the case on May 26, 2020. The Manufacturer's Answer would normally have been due 20 days after it received the Notice of Arbitration. However, in response to the emergence of the COVID-19 virus, *Board Emergency Order 20-002* was issued effective March 9, 2020, which states "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED, SUSPENDED and TOLLED." Subsequently, on October 27, 2020, the Board issued *Board Emergency Order 20-006*, which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." Applying the two Board Emergency Orders, the Board found that the 20 days to file the Manufacturer's Answer were stayed and suspended on March 9, 2020, until they resumed on November 11, 2020, making the Manufacturer's Answer filed on July 2, 2020, timely.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES
July 2021 - September 2021 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4)F.S.

White v. Ford Motor Company, 2020-0120/TLH (Fla. NMVAB September 3, 2021)

The parties stipulated that on May 5, 2018, the Consumers leased a 2018 Ford Expedition Max Limited. At the hearing, the Consumer acknowledged that he was no longer in possession of the subject vehicle. He testified that he and his wife turned in the subject vehicle to the Manufacturer on or about May 3, 2021, which was at the expiration of their three-year lease agreement. He argued that since the Manufacturer already had possession of the vehicle, the Consumers should be able to proceed with an arbitration hearing. He argued that it was outside of his control whether the lessor furnishes clear title of the vehicle to Ford Motor Company.

The Manufacturer argued that the case should be dismissed because the Consumers were no longer in possession of the vehicle, and would be unable to furnish the Manufacturer with clear title to, and possession of, the motor vehicle if they prevailed on the merits of the hearing. Pointing out that the Manufacturer, Ford Motor Company, was a separate company than Ford Motor Credit, the lessor and the company to which the vehicle was returned at lease-end, the Manufacturer asserted that the vehicle was not returned to the Manufacturer when it was returned to Ford Motor Credit in early May of 2021. The Manufacturer added that there would be no way for the Manufacturer to comply with the requirements set forth in the statutes regarding resale disclosure and title branding if they were not in possession of the vehicle and did not have clear title. The Manufacturer further pointed out that since the Consumers no longer possess the vehicle, they were no longer "Consumers" under the Lemon Law.

Section 681.104(2)(a), Florida Statutes, requires that "if the manufacturer or its authorized service agent, cannot conform the motor vehicle to the warranty by repairing or correcting any nonconformity after a reasonable number of attempts," the manufacturer shall "repurchase the motor vehicle and refund the full purchase price to the consumer, less a reasonable offset for use, or, in consideration of its receipt of payment from the consumer of a reasonable offset for use, replace the motor vehicle with a replacement motor vehicle acceptable to the consumer. . . . Upon receipt of such refund or replacement, the consumer, lienholder, or lessor shall furnish to the manufacturer clear title to and possession of the motor vehicle. [Emphasis added]. This provision requires a prevailing consumer in an arbitration hearing to deliver possession of the vehicle to the manufacturer once the manufacturer complies with the Board's decision. In order to satisfy this requirement, the consumer must be in possession of the

vehicle or otherwise capable of delivering the vehicle to the manufacturer at the time compliance occurs.

Further, 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.

A consumer who is no longer in lawful possession of the subject vehicle no longer qualifies under any of the definition's three categories, and therefore cannot qualify as a "Consumer" under the Lemon Law.

The Board found that because the subject vehicle of the case was no longer in the Consumers' possession, the Consumers could not return the vehicle to the Manufacturer in the event they were to prevail at hearing, and did not qualify as a "Consumer" for purposes of Chapter 681, Florida Statutes. Accordingly, the Consumers were not eligible for arbitration by the Board. The decision was consistent with *King v. King Motor Company of Fort Lauderdale and Kia Motors of America, Inc.,* 780 So. 2d 937 (Fla. 4th DCA 2001), which states:

> Section 681.112 thus allows for a Chapter 681 damages case in circumstances where a refund or replacement is not an option. Such circumstances might include ... the situation presented in this case, where the consumer cannot take advantage of the refund/replacement option because he cannot furnish clear title to and possession of the motor vehicle.
> …
>
> This result is consistent with the Arbitration Board cases cited by Kia. Those decisions indicate that when a vehicle is not available for return to the manufacturer, the consumer is not eligible for relief under the Lemon Law arbitration. The *only* relief provided for in a Chapter 681 arbitration is the replacement/refund option plus collateral and incidental charges. Replacement or refund requires the purchaser to return the motor vehicle. The damage remedy is available in circuit court when the arbitration cannot provide relief or is otherwise inappropriate. 780 So. 2d at 941 (emphasis in original).

Udelson, Udelson Inc. d/b/a Powertrac Machinery, and RU Leasing Inc. v. Bentley Motors Inc., 2020-0250/MIA (Fla. NMVAB September 8, 2021)

On November 2, 2019, the Consumers purchased a 2020 Bentley GT Coupe V8. The Manufacturer presented evidence showing that when buying the vehicle, the purchaser that was listed on the buyer's order, R.U. Leasing Inc., obtained a 2019 Florida Annual Resale Certificate for Sales Tax, Certificate Number 23-8012111726-2, which stated that R.U. Leasing Inc. "certifies that the taxable property or services purchased or rented will be resold or re-rented." The Manufacturer argued that by certifying its intention to resell the vehicle upon purchase, R.U. Leasing Inc. avoided payment of any and all sales tax on the purchase of the vehicle, as reflected in the Buyer's Order dated November 2, 2019. Additionally, R.U. Leasing Inc. purportedly rented the vehicle to PowerTrac Machinery on January 1, 2020, for a monthly lease payment of $2,627.92, utilizing an incomplete lease agreement that lacked specific terms. The Manufacturer argued that by certifying the intention to resell the vehicle upon purchase, the Consumers do not qualify as "consumer[s]" under Florida Statute.

The Consumers argued that under Section 681.102(4), Florida Statutes, they are eligible for relief under "three of the four" statutory clauses that define a "consumer." They acknowledged that they may not qualify under the "first clause" since the vehicle was purchased for the purpose of resale; however, the Consumers argue they qualify under the "second clause" because they were a "lessee" of the motor vehicle. R.U. Leasing Inc., which was owned by Ronald Udelson, purchased the vehicle from Holman Motorcars in November 2019. In January 2020, R.U. Leasing Inc. subsequently leased the vehicle to PowerTrac Machinery, which was also owned by Ronald Udelson, making them both a purchaser for the purpose of resale *and* a lessee of the vehicle, according to the Consumers. The Consumers argued they qualify under the "third" clause because the vehicle was transferred to the Consumers for the purpose of leasing during the Lemon Law rights period, since R.U. Leasing Inc. leased, or transferred, the vehicle to PowerTrac Machinery in January 2020. Finally, the Consumers argued they qualify under the "fourth" clause because the Consumers were authorized to enforce the obligations of the warranty, as evidenced by the fact that they have been enforcing the terms of the Manufacturer's warranty against Bentley Motors. Additionally, Consumers argue that the Board should not be concerned that R.U. Leasing Inc. failed to pay sales tax on the purchase of the vehicle; they claim that sales tax was paid as part of the monthly lease payments to R.U. Leasing, Inc. Finally, as both the purchaser and lessee of the vehicle, the Consumers asserted that under a Manufacturer buyback, they were entitled to the purchase price of the vehicle plus incidental and collateral charges, which should include the sales tax paid as part of the monthly lease payments to R.U. Leasing Inc.

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.

Upon consideration of the evidence presented, the Board found that the buyer of the vehicle, R.U. Leasing Inc., was a purchaser for the purpose of resale; as such, the Consumers did not qualify as a "consumer" under Section 681.102(4). On November 2, 2019, R.U. Leasing Inc. purchased the subject vehicle using a 2019 Florida Annual Resale Certificate for Sales Tax, which stated that R.U. Leasing Inc. "certifies that the taxable property or services purchased or rented will be resold or re-rented." By using the certificate to purchase the vehicle, R.U. Leasing Inc. affirmed that the vehicle would be resold upon purchase, enabling R.U. Leasing Inc. to avoid payment of any and all sales tax on the purchase of the vehicle. The Board found that by failing to pay any type of sales tax on the vehicle, R.U. Leasing Inc. effectively declared that it had no intention of using the vehicle as a "consumer." Additionally, on January 1, 2020, R.U. Leasing Inc. rented the vehicle to PowerTrac Machinery, who then began making lease payments to R.U. Leasing Inc. in the amount of $2,627.92 per month. The documentation revealed that R.U. Leasing Inc. subsequently registered the vehicle to R Udelson, Inc., on February 4, 2020. Shortly after purchasing the vehicle, R.U. Leasing Inc. leased the vehicle, and subsequently registered the vehicle to a company other than R.U. Leasing Inc. The Board found that the leasing and registration transactions also revealed that R.U. Leasing Inc. never intended to use the vehicle as a "consumer" under the Florida Lemon Law.

Motor Vehicle §681.102(14), F.S.

Wortner v. Ford Motor Company, 2020-0347/TPA (Fla. NMVAB July 16, 2021)

The parties stipulated that on April 22, 2020, the Consumer purchased a 2019 Ford F350. On September 22, 2020, the Consumer filed a Request for Arbitration with the Board. The request was approved on February 4, 2021. In response to question 7 in the Request for Arbitration, the Consumer indicated that the gross vehicle weight of the truck was 10,000 pounds or less. However, the Consumer also submitted into evidence a Florida Vehicle Registration for the truck that reflected "GVW: 11,500." The Manufacturer argued that the case should be dismissed because the Consumer's vehicle was not a "motor vehicle" as defined in Section 681.102(14), Florida Statutes, because the truck weighed over 10,000 pounds gross vehicle weight. In support of the contention, the Manufacturer directed the Board's attention to the Florida Vehicle Registration for the truck that was submitted into evidence by the Consumer, which provided that the gross vehicle weight of the truck was 11,500 pounds. In response, the Consumer's counsel stated that the Consumer had no evidence to contradict the weight of the truck listed in the Florida Vehicle Registration.

Rule 2-30.001(2)(d), Florida Administrative Code, defines "Gross Vehicle Weight" as "the net, curb, or actual weight of the truck, plus the weight of the load normally carried in it, including normal occupant(s), fuel and cargo." In order for a consumer to qualify for repurchase relief under the Lemon Law, the vehicle which was the subject of the claim must be a "motor vehicle" as defined above. Based on the evidence presented, the Board unanimously found that

the evidence established that the gross vehicle weight of the truck exceeded the limit set forth in the statute, the truck was not a "motor vehicle" as defined, and the Consumer was not qualified for repurchase relief under the Lemon Law.

NONCONFORMITY 681.102(15), F.S.

Walker v. American Honda Motor Company, 2020-0243/TLH (Fla. NMVAB August 24, 2021)

The Consumer complained of reoccurring premature battery failure in her 2019 Honda CR-V. The Consumer testified that on five occasions when she went to start the vehicle, it failed to start. She testified that the vehicle was towed to Proctor Honda on all five occasions, and added that the battery was replaced on three of the repair visits, including once after the final repair attempt. She testified that from the date she took delivery of the vehicle through September 3, 2020, she normally drove the vehicle approximately twice a week to travel to doctor's appointments and to the grocery store, destinations within approximately six miles of her house. She testified that at the final repair attempt on September 3, 2020, she was told by both the Manufacturer's Field Technical Specialist and Proctor Honda's Service Manager that the battery failure could have been attributable to her lack of driving. She was verbally told and given paperwork stating that her vehicle needed to be driven for 30 minutes at highway speeds to prevent battery failure. She added that she was further specifically told by the Manufacturer's Field Technical Specialist that if she drove her vehicle at highway speeds for 30 minutes, then the vehicle could last without being driven for up to 20 days without the battery failing. From that point forward, she testified that when she would go out of her way and drive the vehicle for 30 minutes at highway speeds to try and prevent the battery from failing. She recalled that she went out of town for the holidays in December of 2020. As a result, she testified that she drove the vehicle for approximately 45 minutes at highway speeds before parking the vehicle at her house. When she went to start her vehicle upon return, which had been nine days, well below the 20 days, the vehicle would not start and was towed to Proctor Honda.

The Manufacturer asserted the alleged defect or condition was the result of neglect by persons other than the Manufacturer or its authorized service agent. The Manufacturer's representative testified that he inspected the Consumer's vehicle on January 4, 2021. During that inspection, the battery failed a test, so it was replaced. In addition, he performed a parasitic draw test, with the results showing no excessive or abnormal draw found. No problem with the charging system or the battery monitoring system was found at that time. He opined that any premature battery failure was the result of the Consumer's lack of use of the vehicle. He stated that the industry-accepted standard mileage for a vehicle was 12,000 – 15,00 miles a year. He noted that the Consumer was using her vehicle well below that, having put a total of 2,881 miles on the vehicle at the approximate two-year mark of ownership. He testified that to avoid premature battery failure, according to the Consumer's Warranty booklet, a vehicle had to be driven "regularly over a distance of several miles." He added that the Consumer's vehicle was equipped with a clutch style charging system, meaning the alternator was not always charging the vehicle while it was being driven, which was an effort to provide better fuel economy. As a

result, he stated that "a simple drive around the block" was not enough to recharge the battery and the vehicle would need to be driven longer.

The Board found that the evidence established that the reoccurring premature battery failure substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Board further concluded that the reoccurring premature battery failure was *not* attributable to neglect by persons other than the Manufacturer or its authorized service agent; specifically that the Consumer's use of the vehicle was not causing the defect. 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.

Fernandez v. Tesla Motors, Inc., 2020-0464/MIA (Fla. NMVAB July 22, 2021)

The Consumer complained of water intrusion into the trunk that resulted in moisture and standing water in the trunk, and a left-rear door rattle noise in his 2020 Tesla Model 3. In anticipation of the Manufacturer's defense, the Consumer also asserted that the Motor Vehicle Defect Notification was timely sent and that he was entitled to a presumption that the Manufacturer had a reasonable number of repair attempts to repair the vehicle. He explained that on November 9, 2020, he presented the vehicle to the authorized service agent for its third repair attempt, and was notified on November 11, 2020, that the vehicle had been repaired and was ready to be picked up. The Consumer testified that when he arrived on November 11, 2020, to pick up the vehicle, he noticed that the water leaking into the vehicle's trunk was not repaired. He stated that he, therefore, left the vehicle with the authorized service agent to complete the repairs for the water leaking into the vehicle's trunk, and filed the Motor Vehicle Defect Notification on the same day. The Consumer added that he never received a response to his written notification and no final repair attempt was scheduled.

The vehicle was presented to the Manufacturer's authorized service agent for repair of the water intrusion into the trunk on the following occasions: September 21-29, 2020, when the trunk seal and carpet were replaced; November 3-6, 2020, when the trunk seal and carpet were replaced and a pinhole leak were sealed; and November 9-24, 2020, when the rear trunk carpet, rear trunk liftgate, emblems, and spoiler were replaced and the rear trunk seal was adjusted. The vehicle was presented to the Manufacturer's authorized service agent for repair of the left-rear door rattle noise on the following occasions: September 21-29, 2020, when the light interior component, trim, and seal were adjusted; November 3-6, 2020, when no repairs were performed; and November 9-24, 2020, when the left-rear door harness was secured. On November 13, 2020, the Manufacturer received the Consumer's written notification to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer failed to respond to the written notification.

The Manufacturer asserted there had not been at least three repair attempts for the same nonconformity before the Consumer submitted his Motor Vehicle Defect Notification to the Manufacturer. The Manufacturer asserted that the Consumer's Motor Vehicle Defect Notification was premature, and that the Consumer was not entitled to a presumption that the Manufacturer had a reasonable number of repair attempts to repair the vehicle. The Manufacturer argued that the subject vehicle was presented to the authorized service agent for a third repair attempt on November 9, 2020, and that prior to the completion of the third repair attempt on November 24, 2020, the Consumer sent the Motor Vehicle Defect Notification to the Manufacturer on November 11, 2020.

The Board found that the evidence established that the water intrusion into the trunk that resulted in moisture and standing water in the trunk, and the left-rear door rattle noise, 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 issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformities. 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 both the water intrusion into the trunk that resulted in moisture and standing water in the trunk and the left-rear door rattle noise nonconformities were subjected to repair by the Manufacturer's authorized service agent a total of *three times*, and the nonconformities continued to exist after the third attempt. The defect notice was sent to the Manufacturer after the third repair attempt had been initiated, but before it had been completed. The evidence established that the Manufacturer received the statutory written notification from the Consumer on November 13, 2020. "When a manufacturer responds to the written notification of a final repair opportunity set forth in Section 681.104(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. The Manufacturer failed to respond to the notification. In its defense, the Manufacturer asserted that because the Consumer sent the defect notice before completion of the third repair attempt, the notice should be treated as a nullity. In so arguing, however, the Manufacturer treated the elements of the presumption set forth in Section 681.104(3)(a), Florida Statutes, as mandatory. The Board rejected this argument. The Manufacturer failed to respond to the Consumer's written notice. Therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Under the circumstances of the case, the Board found that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty, as contemplated by the Lemon law. The Manufacturer having failed to correct the nonconformity after a reasonable number of attempts, the Consumer was entitled to the requested relief under the Lemon Law.

Bradley v. American Honda Motor Company, 2021-0013/ORL (Fla. NMVAB August 16, 2021)

The Consumer complained of a "Collision Mitigation System Problem" warning message illuminating intermittently in his 2019 Honda CR-V. The Consumer testified that, three or four months after taking delivery of the vehicle, he began experiencing a problem with the Collision Mitigation Braking System (CMBS). He explained that, at random times while driving on the highway or city streets, he would first hear a "loud bonging" noise that would last five to eight seconds and then, immediately thereafter, a warning message would illuminate near the speedometer that would state "Collision Mitigation System Problem." He stated that when the problem occurred, the cruise control function that he routinely utilized would stop working; as a result, he would attempt to resolve the issue by pulling over, turning the vehicle off and then restarting it, but the same problem repeatedly occurred. He described one instance, during a road trip to Georgia in August of 2020, when he experienced the problem 25 to 30 times throughout the trip. He said that he brought the vehicle to the authorized service agent numerous times for this problem and, on many instances, no repairs were performed. According to him, he has not experienced this problem since the final repair attempt in February of 2021.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he inspected the vehicle on February 19, 2021, during the final repair attempt. Regarding the complained-of "Collision Mitigation System Problem" warning message illuminating intermittently, he acknowledged that the authorized service agent inspected the vehicle for that issue on six occasions prior to the final repair attempt, but did not perform any repairs to the CMBS at those prior visits. However, he noted that, at one of those prior visits on September 21-23, 2020, the authorized service agent replaced the vehicle's four tires due to tire wear. He testified that "the vehicle wearing tires could actually indicate an alignment issue that could have affected the performance of the CMBS." He then explained that during his inspection on February 19, 2021, he first checked for diagnostic trouble codes and found none. Thereafter, he went on a fifteen to twenty-mile test drive and observed that the steering wheel alignment was off to the left. As a result, the following repairs were performed: a steering wheel alignment; a four-wheel alignment; and a complete radar and multiuse camera aim. He stated that the CMBS utilized the radar and multiuse camera systems, including taking input from the steering-angle position, the throttle position and the brake position, to calculate the distance between the vehicle and the object it sensed to determine when to activate. He noted that when the steering-angle position was off, as it was in the Consumer's vehicle, the performance of the CMBS can be affected. He also said that many circumstances can trigger the illumination of a CMBS warning message, including environmental conditions such as heavy rain or dust. He added that if the CMBS warning message does not illuminate during the next drive cycle, then the message was likely triggered by an "intermittent failure" due to an environmental condition; however, if the CMBS warning message remains on during the next drive cycle, then the vehicle needs to be taken to an authorized service agent. He concluded that the complained-of problem was repaired during the February 19-23, 2021, repair visit.

The Board found that the evidence established that the "Collision Mitigation System Problem" warning message illuminating intermittently 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 issue remaining was whether a reasonable number of attempts were undertaken to correct the "Collision Mitigation System Problem" warning message nonconformity. The Board unanimously found the evidence established that the nonconformity was corrected at the seventh repair attempt for the problem on February 19-23, 2021, which was the Manufacturer's final repair attempt following written notification from the Consumer, when a steering wheel alignment, a four-wheel alignment, and a complete radar and multiuse camera aim were performed.

The question remaining is whether the nonconformity was corrected within a reasonable number of attempts. 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 Board unanimously concluded that based on the repair history, the Manufacturer, through its authorized service agent, failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law, and concluded that the case should therefore be decided in favor of the Consumer.

Knight v. General Motors, LLC, 2020-0478/FTL (Fla. NMVAB August 26, 2021)

The Consumer complained of a noise upon making sharp turns in his 2018 GMC Sierra 1500. The Consumer testified that since February 2020, he intermittently heard a "crackling" noise coming from the front end of the vehicle when he made both left and right turns. The vehicle was presented to the Manufacturer's authorized service agent for repair of the noise on the following occasions: February 17-20, 2020, when the front control arm bolts were torqued and one bolt was replaced; and April 14-15, 2020, when the rotors and mounting points were cleaned and retorqued. On October 6, 2020, 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 October 21, 2020. On January 25, 2021, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the rims and the hubs were cleaned and retorqued. The noise upon making sharp turns continued to exist after the final repair attempt.

The Manufacturer asserted the alleged nonconformity did not substantially impar the use, value, or safety of the motor vehicle. The Manufacturer's representative acknowledged that the technician verified the complaint during the final repair attempt held on January 25, 2021. She asserted that the problem was corrected when the technician cleaned the rims and hubs and retorqued the suspension.

The Board found that the evidence established that the noise upon making sharp turns 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.

The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformity. The Board found that the evidence established that the nonconformity was subject to repair by the Manufacturer's service agent on two occasions, February 17, 2020, and April 14, 2020, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on January 25, 2021. 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. At the February 17, 2020, service visit, the front control arm bolts were torqued, and one bolt was replaced. At the April 14, 2020, service visit, the rotors and mounting points were cleaned and retorqued. At the January 25, 2021, final repair attempt, the rims and hubs were cleaned, and the front suspension was retorqued. The noise when making sharp turns nonconformity continued to exist after the final repair attempt. The Board found that because the same type of unsuccessful repairs were performed at the February 2020, and April 2020, repair visits, as well as the January 2021, final repair attempt, it was not necessary for the Consumer to bring the vehicle back for a third repair visit, prior to sending the motor vehicle defect notice to the Manufacturer. Under the circumstances of the case, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty and as to this nonconformity, the Consumer was qualified for the requested relief under the Lemon Law.

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.

Silver v. Toyota Motor Sales, USA, Inc., 2020-0334/WPB (Fla. NMVAB July 12, 2021)

The Consumers complained of the air conditioning taking too long to cool and an air conditioning noise in their 2019 Toyota C-HR. The Consumer testified that that the air conditioning took too long to cool the cabin of the vehicle. He testified that when he first noticed the issue, the air conditioning would take 1-1.5 minutes to cool, but has gotten progressively worse and now took 2-2.5 minutes to cool. He added that the cooling issue was most pronounced in the summer when the ambient temperature outside was at its highest. He described the noise from the air conditioning as a grinding or rumbling noise and stated that it only occurred when the vehicle was at idle.

The Manufacturer asserted the alleged nonconformities did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that temperature, relative humidity and pressure differential are all important factors that determine

how fast an air conditioning can cool a vehicle. Specifically, he noted to the Board that removing humidity from the air was a primary function of the air conditioning system. According to him, the lower the humidity was outside, the faster the system can cool the vehicle down and consequently, with high humidity outside, it would take the system longer. He opined that, based on the temperature and relative humidity in Florida, approximately two minutes for an air conditioning to cool a vehicle was not unreasonable and was a normal amount of time. Further, he testified that a different Manufacturer's Field Technical Specialist inspected the Consumers' vehicle at the final repair attempt on August 3, 2020. The Specialist, whose report was provided to the Board, compared the air conditioning system in the Consumers' vehicle to that in a like model C-HR vehicle that he had been driving. He placed a thermometer in the center upper vent of both vehicles. According to the report, the Consumers' vehicle thermometer reading went from 85 degrees to 50 degrees in approximately one minute and thirty seconds; a similar result was attained in the like model. Further, both vehicles reached approximately 43 degrees after five minutes of idling. He testified that those results indicated that the air conditioning system was operating as designed and did not have a defect or condition that substantially impaired the use, value or safety of the vehicle. With regard to the noise, he testified that the air conditioning would make a clicking sound from the compressor clutch when it kicked on and can make a rumble type sound as a result of the natural components in the compressor moving. He opined that both those noises were normal characteristics of the system and did not substantially impair the use, value or safety of the vehicle.

The Board found that evidence failed to establish that the air conditioning taking too long to cool and the air conditioning noise, as 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.

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

Henderson v. Ford Motor Company, 2020-0492/TPA (Fla. NMVAB August 23, 2021)

The Consumer complained of a loss of engine power when driving his 2019 Ford Edge. The Consumer testified that sometime in 2020 he purchased a GTS RaceChip (the "RaceChip") online for approximately $400.00 or $500.00 at the recommendation of his Service Advisor at Ford of Port Richey. According to the Consumer, he had been experiencing a loss of power when driving that could not be duplicated by the authorized service agent. He said that the Service Advisor recommended that he purchase the RaceChip so that the authorized service agent could obtain readings from the vehicle to confirm the loss of power complaint that he was experiencing. He testified that the RaceChip was both installed by and then subsequently removed a few weeks later by the authorized service agent; however, he acknowledged that this was not reflected in any documentation admitted into evidence. He was not able to recall when the RaceChip was installed or removed from the vehicle.

The Manufacturer asserted the alleged nonconformity was the result of 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 during his inspection on September 21, 2020, he observed and the photographs admitted into evidence depict that an aftermarket RaceChip was installed on the vehicle's engine. He stated that he retrieved stored diagnostic trouble code "P0299," indicating a problem with the turbocharger. He said that the Consumer was advised during the September 21, 2020, repair visit that the RaceChip was tied into sensors on the vehicle, and that even after being disconnected from the vehicle, it could cause codes and drivability issues. He testified that the RaceChip provided "false readings to trick the vehicle's computer to give the vehicle more power." He added that he verified in the vehicle's computer that the RaceChip was increasing the vehicle's boost by at least "five PSI." He explained that when the turbocharger was at 20 PSI, or full boost, the RaceChip would tell the vehicle's computer that it was only at 15 PSI, so that the boost will increase by five PSI. He opined that the complained-of loss of engine power when driving was attributable to the RaceChip. He noted that the authorized service agent had nothing to do with the recommendation, installation, or removal of the RaceChip. Additionally, the Service Advisor mentioned in the Consumer's testimony, testified that he was the Service Advisor at most of the visits when the Consumer brought the vehicle to the authorized service agent, Ford of Port Richey. He testified that he never recommended the RaceChip to the Consumer, nor was the RaceChip installed or removed by the authorized service agent.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the loss of engine power when driving was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the loss of engine power when driving complaint 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.

Labarbiera v. Jaguar Land Rover North America, LLC, 2020-0309/WPB (Fla. NMVAB September 8, 2021)

The Consumers' 2018 Jaguar F-Pace was declared a "lemon" by the Board due to an intermittent infotainment system malfunction that manifested in Bluetooth connectivity issues and in the screen going black. The Consumers requested reimbursement of $109.00 for a traffic ticket received when she was holding her cellular phone while driving, which she testified was necessary because of the malfunction, as an incidental charge. The request was denied by the Board.

Collateral Charges §681.102(3), F.S.

Smith and Binstead v. Tesla Motors, Inc., 2020-0471/WPB (Fla. NMVAB August 17, 2021)

The Consumers' 2020 Tesla Model 3 was declared a "lemon" by the Board. The Consumers requested reimbursement of $2,016.60 for a vehicle wrap as a collateral charge. The Manufacturer objected to the Consumers' request for reimbursement of the vehicle wrap, asserting that it was an aftermarket item that did not add value to the vehicle. The Board awarded the Consumer the requested amount for the vehicle wrap and denied the Manufacturer's objection.

Rodriguez v. BMW of North America, LLC, 2020-0452/MIA (Fla. NMVAB July 16, 2021)

The Consumer's 2021 BMW 330e 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 on the basis that the Consumer did not produce a receipt for same. The Board awarded the Consumer the requested amount for the window tinting and denied the Manufacturer's objection.

Net Trade-in Allowance §681.102(18), F.S.

LeRoy v. Toyota Motor Sales, USA, Inc., 2020-0447/WPB (Fla. NMVAB July 30, 2021)

The Consumers' 2018 Toyota Highlander, leased on August 15, 2018, was declared a "Lemon" by the Board. The Consumer testified that on July 13, 2018, he leased a 2018 Toyota Highlander (the "first Highlander") that the dealership had ordered for him and traded in a 2016 Dodge Ram 1500. That lease agreement was part of the record. He testified that when he got home that day, he realized that the first Highlander did not have the features that it was supposed to have, resulting in the dealership having to order him another vehicle, which was the subject Highlander. While the lease agreement for the subject vehicle indicated that the first Highlander was the trade-in vehicle, the Consumers argue that the 2016 Dodge Ram 1500 should be considered the trade-in vehicle for purpose of calculating the refund. The Manufacturer objected to using the Dodge Ram as the trade-in, arguing that the paperwork for the subject vehicle listed the first Highlander as the trade-in vehicle. Upon consideration, the Board concluded that the 2016 Dodge Ram would be used as the trade-in vehicle pursuant to Section 681.102(18), Florida Statutes. The Consumers' 2016 Dodge Ram 1500 was encumbered by debt in the amount of $38,100.00, for which a gross allowance of $38,800.00 was assigned, resulting in a net trade-in allowance of $700.00, according to the first Highlander's lease agreement. The net trade-in allowance reflected in that lease agreement was not acceptable to the Consumers. The Consumers produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. According to the NADA Guide, the trade-in vehicle had a base retail price of $39,475.00. Adjustment for mileage and accessories as testified to by the Consumers

and/or reflected in the file documents, resulted in a total retail price of $45,050.00. Deduction of the debt resulted in a net trade-in allowance of $6,950.00.

MISCELLANEOUS PROCEDURAL ISSUES:

Smith and Binstead v. Tesla Motors, Inc., 2020-0471/WPB (Fla. NMVAB August 17, 2021)

The Manufacturer's Answer was due to be filed on March 21, 2021, but was not filed until July 22, 2021. Pursuant to paragraph (8), *Hearings Before the Florida New Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration." At hearing, the Manufacturer acknowledged that its Answer was filed untimely, explaining that the Manufacturer had been going through "internal [staffing] changes," and once it was realized that the Consumers had filed their Request for Arbitration, the Manufacturer immediately filed its Answer. The Consumers objected to the Board accepting the Answer because it had not been timely filed. Upon consideration, the Board declined to accept the Manufacturer's untimely filed Answer; therefore, the Manufacturer's presentation was limited to cross-examination of the Consumer's witness and a closing statement.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2021 - December 2021 (4th Quarter)

JURISDICTION

Consumer §681.102(4), F.S.

H & I Gallery Inc. and Arutyon Stambolyan v. Mercedes-Benz USA, LLC, 2021-0019/WPB (Fla. NMVAB October 8, 2021)

The Manufacturer asserted that the corporation and Consumers do not meet the definition of "consumer" contained in Section 681.102(4), Fla. Stat. The Manufacturer stated that neither of the Consumers could be considered a "consumer" under Section 681.102(4), Florida Statutes, arguing that pursuant the definition, the vehicle must be "primarily used for personal, family, or household purposes." The Manufacturer alleged that the vehicle was leased by a corporation and used for business 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 asserted that the Consumers were not qualified for relief under the Lemon Law because the vehicle was registered to a corporation and used for business purposes. However, the Manufacturer's argument failed to consider the third category of individuals entitled to relief under the Lemon Law – "any other person entitled by the terms of the warranty to enforce the obligations of the warranty." The Consumers fell under the third category of individuals eligible for relief as the Consumers were "entitled by the terms of the warranty to enforce the obligations of the warranty"; thus, the Manufacturer's argument was rejected by the Board.

With respect to the circumstances surrounding his acquisition of the subject vehicle, the Consumer testified that he wanted a particular model and after not being satisfied with the few he located for sale in Georgia, he expanded his search and located the subject vehicle at Jaguar Fort Lauderdale, located in Fort Lauderdale, Florida. The Consumer, a Georgia resident, testified that he contacted the dealership where the vehicle was located via telephone from his home in Georgia, and a price was agreed upon. Thereafter, he flew to Florida and went to Jaguar Fort Lauderdale. At the dealer, he was shown the car in question and then went on a test drive. He then completed the purchase paperwork, handed the dealership the down payment check, and took delivery of the vehicle. He added that he signed for and was given the Consumer Guide to the Florida Lemon Law Booklet and received a temporary Florida registration at the time. The vehicle was then driven by him back to his home in Georgia where he subsequently registered the vehicle and was given a Georgia license plate.

The Manufacturer asserted the vehicle failed to meet the definition of "motor vehicle" per Section 681.102(14), Florida Statutes, as it was not sold in this state. No testimonial evidence was presented by the Manufacturer. The Manufacturer asserted that because the Consumer was not a resident of Florida, and because the purchase agreement did not indicate the Consumer paid the $2.00 Florida Lemon Law fee, the purchase should be considered a Georgia sale. The Manufacturer theorized that the Consumer had Lemon Law rights in Georgia and should use that forum for any potential remedy.

. Section 681.102(14), Florida Statutes, defines a "motor vehicle" as:

> a new vehicle, propelled by power other than muscular power, which is <u>sold in this state</u> 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, electrical bicycles, or the living facilities of recreational vehicles ....

Based on the totality of the circumstances, the Board found that the Consumer's vehicle was sold in this state and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The Board found particularly compelling that the selling dealer was located in Florida, the Consumer took delivery of the vehicle in Florida, the vehicle was originally registered in Florida with a temporary plate, and that the Consumer signed for and was given a Florida Lemon Law Booklet. Having determined that the subject vehicle did meet the statutory definition of a "motor vehicle" under the Lemon Law, the Manufacturer's assertion to the contrary was rejected.

NONCONFORMITY 681.102(15), F.S.

D'Angelo v. American Honda Motor Company, 2021-0073/PEN (Fla. NMVAB October 25, 2021)

The Consumer complained of a musty odor in her 2018 Honda Odyssey. The Consumer testified that the musty odor was most pronounced after the vehicle had been driven for 25 – 30 minutes. She added that the musty odor had caused her to have sneezing fits, watery eyes, and postnasal drip. With regard to her purchase of the vehicle and the disclosures made to her at that time, she testified that it was not until after she had already signed the paperwork and given the dealership her trade-in vehicle that she was made aware of the water damage to the vehicle. She explained that prior to completing the sale documents, she was told by the salesman that one of the vehicle's windows had been replaced because it had been scratched during Hurricane Michael. She testified that, in response, she told the salesman that she was allergic to mold, and sought assurance from him that the vehicle had not incurred water damage. She said that the salesman assured her that no water had gotten into the vehicle. However, following completion of the purchase transaction, she was approached by a different dealership employee, who informed her that water had gotten into the vehicle as a result of Hurricane Michael, and that the vehicle's carpet needed replacing. She pointed out to the Board that the section on page 1 of her Buyer's Order, where the seller can identify a vehicle as "a flood vehicle," was left blank, supporting her position that the water damage was not disclosed prior to purchase.

The Manufacturer asserted the alleged defect or condition did not substantially impair the use, value or safety of the vehicle; any alleged defect or condition was repaired within a reasonable number of attempts; and the Consumer's complaint of the musty odor was the result of accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's witness testified that following Hurricane Michael, he completed an "Internal Repair Order" for the vehicle that noted "minor hurricane damage," and claimed he provided that information to the Consumer prior to her completion of the purchase documents. However, there was no "Internal Repair Order" submitted as part of the record, and his verbal description of his notation made no mention of "water damage" to the vehicle. Another Manufacturer's witness testified that on October 22, 2018, approximately two weeks after Hurricane Michael hit the Panama City area, he inspected the subject vehicle on the lot at Honda of Bay County. At that time, he noticed that the rear driver's side window had shattered resulting in at least three inches of water getting into the vehicle. On November 5, 2018, he testified that Honda of Bay County replaced the broken window, used a shop vac to vacuum the carpet, and sealed the vehicle to prevent moisture from getting in or out of the vehicle. He acknowledged that vacuuming the carpet did not get all the water out of the carpet and agreed that some amount of water remained in the vehicle from the time of Hurricane Michael in October of 2018, through February 28, 2019, when the carpet and dash pad were replaced. Shortly after the window was replaced, the vehicle was sent to an out-of-state body shop for repairs to other damage caused by Hurricane Michael. He testified that the vehicle was then returned to Honda of Bay County in February of 2019, and that the vehicle was then sold to the Consumer prior to replacing the carpet and dash pad. The Manufacturer's representative testified that he performed the final repair attempt on June 11, 2020. Prior to

inspecting the vehicle, he testified that he was aware the vehicle had suffered damage due to Hurricane Michael. During the inspection, he performed a water test to make sure the vehicle did not have any leaks, which it did not. He further testified that he did not detect a musty odor during the inspection and that he visibly did not detect any mold. Two different Manufacturer representatives both testified that any damage to the vehicle that was caused by Hurricane Michael was not covered by the Manufacturer's warranty because they considered it to be an outside influence or an "Act of God."

The Board found that the evidence clearly established that the musty odor substantially impaired the use, value and safety of the vehicle. The Manufacturer asserted, however, that the musty odor was caused by Hurricane Michael, and was therefore the result of "an accident … by someone other than the Manufacturer or its authorized service agent," exempting the complaint from the Lemon Law definition of "nonconformity." The Board, while not disputing the impact of Hurricane Michael in October of 2018, found the musty odor complained of by the Consumer was the result of neglect by the manufacturer's authorized service agent, specifically the fact that water was allowed to remain in the vehicle for approximately four months. The Board further noted that the vehicle was sold to the Consumer prior to completion of repairs for the water damage, and that there was no credible evidence provided to show the Consumer was made aware of any water damage to the vehicle prior to sale. Accordingly, the musty odor constituted a nonconformity 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.

Kosches v. Tesla Motors, Inc., 2021-0065/MIA (Fla. NMVAB November 8, 2021)

The Board found that the Consumer's complaints of a defective automatic steering wheel adjustment and defective driver assistance features to be nonconformities. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective automatic steering wheel adjustment on July 5, 2019, when the steering wheel column was removed and replaced; and March 9, 2020, when no repair work was performed. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective driver assistance features condition on July 5, 2019, when no repair work was performed; and October 7, 2020, when a firmware update of the driver assistance system electronic control unit was performed.

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 but did not contact the Consumer to schedule a final repair attempt. The defective automatic steering wheel adjustment and defective driver assistance features condition continued to exist after the written notification.

The Manufacturer asserted the Manufacturer was not provided a reasonable number of repair attempts. No testimonial evidence was presented by the Manufacturer. In support of its argument that it was not provided a reasonable number of repair attempts, the Manufacturer pointed out that the Consumer's complaint of the loose driver's seat was the only complaint reported to the Manufacturer's authorized service agent at least three times prior to the Consumer completing the motor vehicle defect notification form. The Manufacturer further argued that each of the Consumer's driver assistance feature complaints should be considered separately by the Board, and did not constitute a condition as defined in Rule 2-30.001(2)(a), F.A.C.

A majority of the Board found that the evidence established that the defective automatic steering wheel adjustment and defective driver assistance features condition substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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 nonconformities were subjected to repair by the Manufacturer's service agent a total of two times each, prior to the Manufacturer's receipt of written notice. With regard to the steering wheel nonconformity, a majority of the Board found, based on both the failure to perform any repair work at the second repair visit and the Manufacturer's failure to perform a final repair attempt, that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. With regard to the driver assistant feature nonconformity, due to the problem involving numerous different features that were still not repaired, in addition to the Manufacturer's failure to perform a final repair attempt, a majority of the Board found that under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. The Manufacturer's arguments to the contrary were denied. Accordingly, the Consumer was awarded a refund.

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

Kristjansson v. Jaguar Land Rover North America, LLC., 2021-0196/TLH (Fla. NMVAB December 17, 2021)

The Board found that the Consumer's complaint of a driver's side rattle, a cracked windshield, and an electrical short to be nonconformities. The vehicle was out of service by reason of repair of those defects August 24 – October 7, 2020 (45 days); March 26 – April 6, 2021 (12 days); and November 11-18, 2021 (8 days), for a total of 65 cumulative out-of-service days.

The Manufacturer asserted that because the driver's side rattle repair, which took place from August 24 – October 7, 2020, occurred during the stay period created by Board Emergency Order 20-002, those days should not be considered days out of service.

The Board found that 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. The Manufacturer's argument that the driver's side rattle repair visit, lasting from August 24 – October 7, 2020, should not count as "out of service days" was rejected by the Board. The vehicle was accepted by the authorized service agent for repair. Numerous repairs were performed by the authorized service agent over the course of the visit. The Manufacturer provided no evidence that the repairs performed during that time period were in anyway delayed due to COVID-19. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. Accordingly, the Consumer was awarded a refund.

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.

Beller v. BMW of North America, LLC., 2021-0104/FTL (Fla. NMVAB October 29, 2021)

The Consumer complained of a one-time illumination of a malfunction warning light for the vehicle's SOS system, and an Apple Car Play connectivity issue in her 2019 BMW 330. Regarding the Apple Car Play connectivity issue, the Consumer indicated that when she ended a phone call using the Apple Car Play system, the phone did not disconnect.

The Manufacturer asserted the alleged nonconformities did not substantially impair the use, value or safety of the motor vehicle. With regard to the SOS malfunction light illumination, the Manufacturer's witness testified that the complaint was presented to the authorized service agent on only one occasion, at which time there was no fault found with the system, and that the Consumer never complained of it again. He also advised that the SOS system was not related to Apple Car Play; it was an independent call system for emergency situations. The Manufacturer's representative confirmed that the SOS system was completely independent of both Apple Car Play and the Consumer's phone, and testified that if there were a fault in the SOS system, the vehicle would display a message and store a code. With regard to the Apple Car Play complaint, he said that the Consumer was not required to use Apple Car Play to make or receive calls. He explained that the vehicle had a system called "iDrive" which allowed a cellular phone to be used with the vehicle's handsfree Bluetooth system, independent of Apple Car Play. He testified that Apple Car Play was an Apple product, not a BMW product. He explained that BMW simply provided the ability to use the vehicle's display screen as a mirror of the Consumer's phone; any problems the Consumer was experiencing with Apple Car Play were a result of problems with the Consumer's phone, not BMW's product. He testified that following the final repair attempt, he was advised that the Consumer was again complaining of the problem, so he authorized replacement of the vehicle's radio head unit. He explained that the fact that the Consumer was

still having the same issue after replacement of the radio head unit confirmed that the problem was with the Consumer's phone.

A majority of the Board found that the evidence failed to establish that the one-time illumination of a malfunction warning light for the vehicle's SOS system, and the Apple Car Play connectivity issues, as complained of by the Consumer, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

Angulo v. BMW of North America, LLC., 2021-0146/MIA (Fla. NMVAB November 19, 2021)

The Consumer complained of a vibration/brake noise condition in her 2019 BMW X3. The Consumer testified that on June 16, 2019, while she was driving home from work at a speed of approximately 35 miles per hour, a dog ran into the street, causing her to swerve to the left to avoid hitting the dog. As a result of the quick swerve to the left, she testified that the vehicle struck the median.

The Manufacturer asserted that the Consumer's complaint was the result of accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's witness testified that on June 17, 2019, the Consumer called the dealership to let them know that her vehicle had been in an accident and was being towed there for repair. According to the witness, the authorized service agent replaced the steering rack, the left lower control arm, the left outer tie rod, the left ball joint, the left front wheel and tire, and the fender liner. He testified, however, that after the Consumer repeatedly reported vibration issues, the authorized service agent examined and replaced the wheel bearings on February 22, 2020. He opined that the bearings had been damaged in the accident, with the damage becoming progressively worse over time, leading to the vibration problem the Consumer described with the vehicle. The Manufacturer's representative testified, with regard to the June 16, 2019, accident, that based on the repairs performed to the vehicle, the impact of the vehicle hitting the median had caused severe damage to the suspension components. He further testified that after the wheel bearings were replaced on February 22, 2020, the vibration while braking could not be reproduced, leading him to the conclusion that the wheel bearings were the cause of the vibration, and that the wheel bearings had been originally damaged in the accident. He added that damage to wheel bearings can cause other damage to brake components, which would explain why numerous brake repairs were performed on the Consumer's vehicle. He testified that he test drove the Consumer's vehicle on December 4, 2020, and again at the final repair attempt on February 4, 2021, and did not experience any vibration or any abnormal brake noise during either test drive.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>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</u>." §681.102(15), Fla. Stat. (emphasis added). A

"condition" is defined as "a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." Rule 2-30.001(2)(a), F.A.C.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the vibration/brake noise condition was the result of an accident, specifically the accident that occurred on June 16, 2019, when the Consumer's vehicle struck a median. 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.

JBB Service Corp and Maria Olid v. BMW of North America, LLC., 2020-0254/FMIA (Fla. NMVAB November 22, 2021)

The Consumers' 2020 BMW M5 was declared a "lemon" by the Board due to a water leak from the sunroof; and an electrical malfunction that manifested in the check engine light illuminating, the air conditioner blowing warm air, the dash instrument cluster going dark, the traction control warning light illuminating, the drive train malfunction light illuminating, the vehicle shutting down while driving on one occasion and not restarting, and a loss of power when driving. The Consumers requested reimbursement of $22,800.00 for the purchase of a new engine, $7,361.58 for the installation of the new engine, and $18,000.00 for rental car charges, as incidental charges. The Manufacturer objected to the incidental charges. The Board awarded the Consumers' $22,800.00 for the purchase of a new engine and $7,361.58 for the installation of the new engine, as reasonable incidental charges. The Consumers' request for $18,000.00 for rental car charges was denied by the Board.

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

Kosches v. Tesla Motors, Inc., 2021-0065/MIA (Fla. NMVAB November 8, 2021)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $71,200.00. Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing was 34,496 miles (34,762 odometer miles reduced by 50 miles at delivery, and 216 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $20,467.63. With regard to the mileage to be used in calculating the offset, the Consumer testified that his owner's manual instructed him that he could file a case with NCDS, as that was an arbitration program that Tesla utilized to try to resolve disputes. Therefore, he argued that the mileage used to calculate the offset for use should be frozen on the date of the NCDS documents-only hearing. The Manufacturer argued that the mileage attributable to the Consumer for purposes of calculating the offset for use should be the mileage as of the day of the hearing because, as stated in the owner's manual, filing a case with NCDS was optional for consumers. The Board rejected

the Manufacturer's argument and utilized the mileage as of the NCDS hearing for purposes of calculating the offset for use.

Sirang v. Porsche Cars North America, Inc., 2021-0032/FTL (Fla. NMVAB November 3, 2021)

The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $72,840.23. Mileage attributable to the Consumer up to the date of the CAP-Motors Program hearing was 5,049 miles (5,530 odometer miles reduced by 77 miles at delivery, and 404 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $3,064.75. The Manufacturer objected to using the mileage as of the CAP-Motors Program hearing and requested that the mileage as of the Florida New Motor Vehicle Arbitration Board hearing be used. The Manufacturer's objection to using the mileage as of the CAP-Motors Program hearing for the calculation of the reasonable offset for use was denied by the Board. The Manufacturer was entitled to a reasonable offset for use of $3,064.75. §681.102(20), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES

Eilbigli v. Mercedes-Benz USA, LLC, 2021-0254/FTL (Fla. NMVAB October 29, 2021)

The Manufacturer's Answer raised several affirmative defenses, including that the Consumer's case should be dismissed because it was not timely filed with the Florida New Motor Vehicle Arbitration Board. Section 681.109(4), Florida Statutes, states that "[a] consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months after the date of original delivery of a motor vehicle to a consumer." However, as a result of the COVID-19 pandemic, *Board Emergency Order 20-002* was entered on March 20, 2020, retroactive to March 9, 2020, providing that "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED and SUSPENDED." That Order was subsequently superseded by *Board Emergency Order 20-006*, entered on October 27, 2020, which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." In order to determine whether the Consumer's claim was timely filed, the Board first calculated the expiration of the Lemon Law rights period, and then the 60-day deadline for filing the claim. In this case, the date of delivery of the subject vehicle was December 31, 2018. Applying the two Board Emergency Orders, as well as Rule 2.514 (a)(1)(A) and (a)(1)(C), Florida Rules of Judicial Administration, regarding the computation of time, the Board found that the Lemon Law rights period expired on September 9, 2021, and therefore, the 60-day filing deadline was November 8, 2021, making the Consumer's Request for Arbitration, filed on June 8, 2021, timely filed. The Manufacturer's assertion to the contrary was rejected by the Board.