OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2022 - March 2022 (1st Quarter)

JURISDICTION

Consumer §681.102(4), F.S.

Moore v. General Motors, LLC, 2021-0337/FTL (Fla. NMVAB March 25, 2022)

The parties stipulated that the Consumer purchased a 2018 Chevrolet Malibu. At the hearing, Karen Moore acknowledged that the Consumer was no longer in possession of the subject vehicle. She testified that the Consumer sold the vehicle to Carvana in January 2022. The Consumer argued that she was "forced" to sell the subject vehicle because the Manufacturer delayed offering the Consumer a settlement in good faith and the Consumer could no longer store the vehicle.

The Manufacturer argued that the case should be dismissed because the Consumer no longer possessed the vehicle and she was therefore no longer a "Consumer" 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, in order to be eligible for the refund or replacement remedies set forth in 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.

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.

Because the subject vehicle of the case was no longer in the Consumer's possession, the Consumer could not return the vehicle to the Manufacturer in the event they were to prevail at hearing; nor does she qualify as a "consumer" under the statute. Accordingly, the Consumer was 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

NONCONFORMITY 681.102(15), F.S.

Hawkins v. Jaguar Land Rover North America, LLC, 2021-0284/FTL (Fla. NMVAB March 7, 2022)

The Consumer complained that the infotainment system in her 2020 Jaguar F-Pace was intermittently inoperable. The Consumer testified that upon start-up, the infotainment screen would intermittently go blank, or become inoperable when the Jaguar emblem appeared and continuously stayed on the screen. She explained that the infotainment system controlled the back-up camera, the navigation system, the radio and other features of the vehicle, and she could not use those features when the screen became inoperable. She further explained that when the

problem occurred, the screen remained inoperable for the duration of her drive and would only become functional if she turned off the ignition and let the vehicle sit for some time before restarting the ignition. She stated that the failure of the infotainment system was a safety concern, especially when she could not use the back-up camera. The Consumer documented her complaint with photos and videos showing the infotainment screen failure on multiple occasions. She testified that the infotainment screen had gone blank on at least two occasions since the last repair attempt was completed in May 2021.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that at the first repair attempt in December 2020, the technician opened a case with the Manufacturer for assistance in diagnosing the problem. He explained that the technician performed several diagnostic tests, test drove the vehicle at the Manufacturer's direction, and determined that a software update should be performed on the vehicle. He next explained that at the second repair attempt, from December 28, 2020, through January 6, 2021, the technician replaced the Audio Amplifier Module, which controlled the sound in the vehicle. He asserted that the vehicle was repaired at the third repair attempt, in March 2021, when the authorized service agent installed a "replacement part," which the repair order reflected was the electronic control unit. He acknowledged that the failure of the back-up camera would be a safety concern for the Consumer.

The Board found that the evidence established that the intermittently inoperable infotainment 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. 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.

Black v. BMW of North America, LLC, 2021-0303/MIA (Fla. NMVAB March 30, 2022)

The Board found that the Consumer's complaint of a drivability condition evidenced by the illumination of various warning lights, stalling, and shaking in her 2020 BMW X3 constituted a nonconformity under the statute. The vehicle was out of service by reason of repair of the drivability condition on February 28, 2020 (1 day); August 17-September 4, 2020 (19 days); and October 15-December 7, 2020 (54 days), for a total of 74 cumulative out-of-service days.

The Manufacturer asserted that the subject vehicle was repaired within a reasonable number of repair attempts and within a reasonable amount of time, arguing that the repair attempts held in August 2020 and October 2020 were both affected by the Covid-19 global pandemic. The Manufacturer's representative explained that the shipping delays caused by the global pandemic resulted in repair delays at BMW dealerships. He further explained that

replacement parts for BMW were typically ordered from Germany and/or Spain. However, when asked when the replacement wire harness was ordered by the dealership, he stated that he did not have that information. Additionally, he stated he did not have any specific information regarding how the Covid-19 pandemic affected either the August 2020 or October 2020 repair attempts.

The evidence established that the drivability condition substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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 argued that because both the August 2020 and October 2020 repair attempts were affected by the Covid-19 global pandemic, the days attributable to those repairs should not count against the Manufacturer and the nonconformity should be found to have been corrected within a reasonable number of repair attempts. However, the Manufacturer's argument failed to demonstrate, with specificity, *how* the Covid-19 pandemic affected the August 2020 and October 2020 repair attempts, and specifically how the pandemic delayed the repairs performed on the vehicle. The Manufacturer's argument was unanimously rejected by the Board. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty and 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.

C*ostello v. FCA US, LLC,* 2021-0186/ORL (Fla. NMVAB February 2, 2022)

The Consumer complained of an intermittent transmission shift issue in her 2019 Alfa Romeo Stelvio. The Consumer, who was the sole driver of the vehicle, testified that at times while stopped or traveling at a low speed, when she pushed on the gas pedal to accelerate, the vehicle did not go but the RPMs revved up. She explained that when that occurred, she was able to get the vehicle to accelerate by either pushing more slowly on the gas pedal or putting the vehicle in park and then back into drive. She explained that she brought the vehicle to the authorized service agent on three occasions for the transmission shift issue, but the problem was never duplicated, and no repairs were ever performed.

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 reviewed the repair orders, spoke with representatives from the authorized service agent, and attended a pre-hearing inspection of the vehicle. He confirmed that the Consumer brought the vehicle to the authorized service agent for this complaint on three occasions and because the problem could not be duplicated and no diagnostic trouble codes were retrieved, no repairs were performed. He

detailed that on the third visit the authorized service agent took apart the shifter to ensure every potentially contributing factor was examined but nothing abnormal was identified. During the pre-hearing inspection, no relevant codes were recovered, and he test drove the vehicle. He added that following the three repair visits, the Consumer took the vehicle to another authorized service agent for routine maintenance on two occasions but did not complain about this problem. He explained the vehicle had a joystick shifter, which was stationary, but when the driver pulled it to the left, the vehicle went into sequential driving mode and when the driver pulled it to the right, the vehicle went into automatic driving mode. Similarly, the steering wheel had long paddle shifters on each side and the paddle on the right upshifted while the paddle on the left downshifted. He advised that it was possible that the Consumer was unknowingly bumping either the joystick shifter or the steering wheel paddle shifters, which could downshift and result in the engine revving but not going any faster. He concluded that the vehicle was operating as designed and if the transmission were to fail, then a fault code would be stored in the vehicle.

A majority of the Board found that, based on the evidence presented, the intermittent transmission shift issue, as complained of by the Consumer, did not substantially impair the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. The Board member who found a nonconformity also found that the Manufacturer had not been provided a reasonable number of repair attempts. Accordingly, the Board unanimously found that the Consumer was not entitled to repurchase relief under the Lemon Law and dismissed the case.

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

G3 Construction, Inc. and Gross v. Jaguar Land Rover North America, LLC, 2021-0233/WPB (Fla. NMVAB January 31, 2022)

The Consumers' 2019 Land Rover Range Rover was declared a "lemon" by the Board due to a malfunction of the upper and lower display screens. The Consumers requested reimbursement of an unspecified amount for new tires as an incidental charge. The Manufacturer objected to reimbursement for new tires, claiming that it was a maintenance item. The Consumer opined that the new tires were required due to an issue he had with the vehicle's hydraulic system. The Consumers' request for an unspecified amount for new tires was rejected by the Board. §681.102(7), Fla. Stat.

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

G3 Construction, Inc. and Gross v. Jaguar Land Rover North America, LLC, 2021-0233/WPB (Fla. NMVAB January 31, 2022)

The Consumers' 2019 Land Rover Range Rover was declared a "lemon" by the Board. The Consumers traded in a used 2011 Lincoln MKX for which a net trade-in allowance of $5,500.00 was received, according to the purchase contract. The net trade-in allowance reflected

in the purchase contract was not acceptable to the Consumers. Pursuant to Section 681.102(18), Florida Statutes, a J.D. Power/NADA Official Used Car Guide (NADA Guide) in effect at the time of the trade-in was presented. The Manufacturer objected to the use of information from J.D. Power, arguing that §681.102 (18) specifically states that "the trade-in allowance shall be an amount equal to 100 percent of the retail price of the trade-in vehicle as reflected in the NADA Official Used Car Guide (Southeastern Edition) . . . in effect at the time of the trade-in." In response, the Consumers' Attorney explained that he originally contacted NADA and was advised that they had been bought by J.D. Power, and that he should contact J.D. Power for the retail price of the trade-in vehicle in effect at the time of the trade-in. According to the J.D. Power/NADA Guide, the trade-in vehicle had a base retail price of $10,875.00. Adjustment for mileage and accessories as testified to by the Consumers and/or reflected in the file documents, results in a net trade-in allowance of $9,575.00. The Manufacturer's objection to utilizing the J.D. Power Used Car Vehicle Information in determining the net trade-in allowance was rejected by the Board as that guide was now synonymous with the NADA Official Used Car Guide.

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

Whitaker v. Volkswagen/Audi of America, Inc., 2021-0256/TPA (Fla. NMVAB February 14, 2022)

The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $33,114.92. Mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing was 29,844 miles (30,096 odometer miles as of the June 17, 2021, repair attempt, reduced by six miles at delivery, and 246 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $8,235.68.

The parties presented conflicting positions regarding the mileage to be used in calculating the statutory reasonable offset for use. The Manufacturer asserted that because the BBB/Autoline hearing was a documents-only hearing not attended by the parties, the mileage reflected in the BBB decision did not accurately reflect the actual mileage on the vehicle as of May 10, 2021, the date of that hearing. The Manufacturer also pointed out the Consumer's testimony that the vehicle had been driven a significant number of miles since the BBB/Autoline hearing. When taking those two factors into consideration, the Manufacturer contended that the Board should use the mileage as of this arbitration hearing to calculate the reasonable offset for use. In contrast, the Consumer urged use of the mileage as of the date of the BBB/Autoline hearing, as required by the statutory language defining "reasonable offset for use" as "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first" §681.102(19), Fla. Stat.

The Manufacturer's argument that the offset should be calculated using the vehicle mileage as of the day of this hearing was rejected by the Board as contrary to §681.102(19), Fla. Stat. The Board instead found it appropriate to use the mileage documented on the vehicle on the date closest to the May 10, 2021, BBB/Autoline hearing, which was the 30,096 odometer miles reflected on the June 17, 2021, repair order.

MISCELLANEOUS PROCEDURAL ISSUES

Garcia v. American Honda Motor Company, 2021-0130/FTL (Fla. NMVAB March 1, 2022)

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 January 6, 2019. 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 13, 2021, and therefore, the 60-day filing deadline was November 12, 2021, making the Consumer's Request for Arbitration, filed on March 19, 2021, timely filed. The Manufacturer's assertion to the contrary was rejected by the Board.