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.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2022 - June 2022 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.

Averhoff-Laurenceau v. Nissan Motor Corporation, USA, 2021-0459/FTL (Fla. NMVAB May 13, 2022)

The Consumer complained of a malfunction of the backup camera in her 2019 Nissan Pathfinder. The Consumer testified that when she put the vehicle into reverse, the backup camera would intermittently fail to operate, with the display being either completely black, or black with only the "guide lines" appearing. At the hearing, she played numerous videos for the Board demonstrating the malfunction of the backup camera. She added that she had three children utilizing car seats in the vehicle, and the car seats could obstruct her view of the back of the vehicle; consequently, she relied on the backup camera to be functional so she could safely drive in reverse.

The Manufacturer asserted the alleged defect did not substantially impair the use, value or safety of the vehicle, the Manufacturer was not provided a reasonable number of attempts for repair, and the alleged defect was the result of an accident by persons other than the Manufacturer or its authorized service agent. The Manufacturer's representative testified that he inspected the Consumer's vehicle on October 13, 2021, and added that his inspection did not find any connection or corrosion problems with the backup camera. He further testified that, upon inspection, he noticed some damage to the back of the vehicle, "liked the vehicle had backed into something" or vice versa. While he acknowledged that he did not find any evidence of any physical external damage to the backup camera, he opined there could be internal damage to the camera as a result of the damage. He acknowledged, however, that he could not prove that the damage was causing any backup camera problems, and further recognized that the Manufacturer did not raise that the alleged defect was caused by an accident by persons other than the Manufacturer or its authorized service agent as part of their defense on the Manufacturer's Answer.

The Board found that the evidence established that the malfunction of the backup camera 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 replacement vehicle.

Erlick v. Toyota Motor Sales, USA, Inc., 2021-0417/WPB (Fla. NMVAB May 17, 2022)

The Consumer complained of a no-start condition in her 2020 Lexus ES350. The Consumer's witness testified that when she attempted to start the vehicle on August 4, 2020, the vehicle failed to start. She explained that the vehicle was towed to the dealership, where she was provided with a loaner vehicle. She said that on that occasion, the dealership replaced the battery. She testified that when she attempted to start the vehicle on February 16, 2021, the vehicle again failed to start. She explained that after jump starting the vehicle, she was able to drive the vehicle to the dealership. The Consumer alleged that after she took the vehicle to the dealership for repair on February 16, 2021, no one from the dealership ever called her to inform her that the vehicle was repaired and ready for pick up. She explained that she called the Manufacturer several times to request that a technical specialist inspect the vehicle to determine if the vehicle had been repaired, but never received any confirmation that an inspection had been performed. She stated that she told the Manufacturer that she would not pick up the vehicle from the dealership until a technical specialist inspected the vehicle and confirmed that the vehicle had been repaired. The Consumer's documentation revealed that the Manufacturer first notified the Consumer that the vehicle had been repaired in a letter sent to the Consumer on March 31, 2021. She stated that she purchased the vehicle for her 92-year-old mother and said that her mother stopped driving the vehicle when the no start condition occurred for the first time in August 2020.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was repaired within a reasonable number of repair attempts. The Manufacturer's witness testified that at the second repair attempt in February 2021, the dealership determined that a Technical Service Information Bulletin (TSIB) should be performed on the Telematics Control Module (TCM) to correct poor programing on the vehicle installed by the factory. He alleged that the flash update was performed on the TCM on February 17, 2021, which repaired the no start condition. He asserted that he instructed the service advisor to call the Consumer on February 17, 2021, to advise her to pick up the vehicle, but could not provide any documentation to support his contention that the Consumer was contacted. He also stated that he spoke with the Consumer one week later, advising her to pick up the vehicle. He claimed that she refused to pick up her vehicle, although he could not provide any documentation to support his claim. He also alleged that he was not aware of any inspection by a technical specialist ever taking place at his dealership. The Manufacturer's representative testified that due to COVID restrictions, he performed a virtual inspection on the vehicle at the dealership on March 23, 2021. He stated that as part of his inspection, he instructed a dealership employee to start the vehicle and confirm that the vehicle was functioning correctly. In contrast to the prior witness's testimony that a technical specialist had never inspected the vehicle at the dealership, he alleged that the witness had taken part in his virtual inspection on March 23, 2021, by turning on the vehicle. He stated that after performing his virtual inspection, he concluded that the vehicle was functioning correctly. He admitted that he did not know whether the Consumer was informed that an inspection had taken place or whether the Consumer had received a copy of the report from the inspection. He testified that he performed a physical inspection on the vehicle on September 13, 2021. He explained that during his physical inspection, he verified that the flash update had been performed on the vehicle and test drove the vehicle, concluding that the vehicle was operating as designed.

The Board found that the evidence established that the no-start 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. 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), F.S.

Gallipoli v. BMW of North America, LLC, 2021-0318/WPB (Fla. NMVAB April 19, 2022)

The Consumer complained of a restraint system malfunction in her 2020 BMW XM3 Competition. The Consumer testified that since March 2020, the message "passenger restraint malfunction" intermittently appeared on the vehicle's display screen. Additionally, she testified that since October 2020, the message "driver restraint malfunction" intermittently appeared on the vehicle's display screen. She stated that when either message appeared on the vehicle's display screen, the messages were accompanied with a "bring vehicle to dealership" message.

The vehicle was out of service by reason of repair on March 18-19, 2020 (2 days); October 19-21, 2020 (3 days); November 12-17, 2020 (6 days); April 14-22, 2021 (9 days); May 12-June 30, 2021 (50 days); and November 4-8, 2021 (5 days), for a total of 75 cumulative out-of-service days.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and to the extent that the servicing at the dealership was delayed, it was beyond the control of the dealership and/or BMWNA because it was a result of Covid-19. With regard to the restraint system malfunction, the Manufacturer's representative testified that during his inspection of the vehicle in May 2021, he discovered loose wire connector pins in the driver's seat harness that connect to the seat belt buckle module. He stated that the loose wire connector pins disrupted the communication between the driver's seat module, the seat belt buckle module, and the air bag control unit, which triggered the restraint system malfunction messages. He explained that, in the event of a low impact collision, when the driver was buckled, the safety system was programmed to "drop the seat belt 40 millimeters" and tighten the restraint. He explained that the lack of communication between the modules consequently caused the safety system to fail and operate as if the driver's seat belt was not buckled. Additionally, he acknowledged that the technician verified the Consumer's complaint and performed repairs in March 2020, October 2020, November 2020 and April 2021. However, he stated that it was not until the May 2021, repair attempt that he discovered the loose wire connector pins in the driver's seat harness. He explained that after the driver's seat harness was replaced, the vehicle was operating as designed. The Manufacturer also asserted that to the extent that there were repair delays at the dealership, it was beyond the control of the dealership and/or the Manufacturer due to the Covid-19 global pandemic. The Manufacturer's witness explained that at the May 2021, repair attempt, upon ordering the driver's seat harness, it took 16 days to be delivered to the dealership. Additionally, at the May 2021, repair attempt, the

dealership determined that one of the control units controlling the instrument display had to be replaced and upon ordering the control unit, it took "approximately" 13 days to be delivered to the dealership. He asserted that the shipping delays for both the driver's seat harness and the control unit were a result of the Covid-19 global pandemic. However, the witness was unable to provide information about pre-pandemic shipping times, and indicated that he assumed delays in shipping were the result of Covid.

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 argued that the May 2021, repair attempt was affected by the Covid-19 global pandemic, that the days attributable to that repair attempt should not count against the Manufacturer, and that 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 May 2021, repair attempt, and specifically *how* the pandemic delayed the repairs performed on the vehicle during that repair attempt. 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 replacement vehicle.

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.

Kidd v. Kia Motors America, Inc., 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer complained of a hesitation upon acceleration in three of four transmission modes of his 2019 Kia Sorento. The Consumer testified that a few weeks after delivery, he noticed that when he accelerated, he would experience a "hesitation" or "jerking." He explained that the hesitation did not occur when in sport mode, but he preferred not to drive in sport mode because the gas mileage was not as efficient as when driving in the other three transmission modes. He detailed that despite the annoyance that the hesitation has been, it had not been a safety concern for him. He further detailed that he had driven several other Kia motor vehicles and had the same experience in all but one vehicle. He acknowledged that the vehicle had been reliable, and only one software update was performed by the authorized service agent.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. Regarding the complained-of vehicle hesitation upon acceleration in three of four transmission modes, the Manufacturer's representative testified that no repairs were performed for the complained-of hesitation because no diagnostic trouble codes were retrieved, and no malfunction indicator lamps had illuminated. He also checked to see if there were any technical service bulletins related to the Consumer's complaint and there were

none. He explained that the jerking or hesitating that the Consumer feels was a normal characteristic resulting from the vehicle's 8-speed transmission. He noted that the 8-speed transmission was designed to maximize fuel economy. He stated that with more gears, the driver may feel the shifting, depending upon driving style and concluded that the Consumer's vehicle was operating as designed.

The Board found that the evidence failed to establish that the vehicle hesitating upon acceleration in three of four transmission modes, 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.

Sessions v. Hyundai Motor America, 2021-0389/MIA (Fla. NMVAB April 5, 2022)

The Consumer complained of a knocking noise condition emitting from the engine area that resulted in a seized engine in her 2020 Hyundai Tucson. The Consumer testified that on June 26, 2021, one year after purchase, she heard a "knocking sound from under the hood"; as a result, she stopped driving the vehicle and had the vehicle towed that day to the authorized service agent, Kendall Hyundai, for repair. She stated that she was told by Kendall Hyundai that the "oil needed changing"; that the vehicle needed a new engine; and that the Manufacturer would not replace the engine under warranty. She explained that she did not authorize the performance of any repairs, asserting that the engine should be replaced under warranty since it was a "new vehicle." She said that the vehicle remained at Kendall Hyundai until July 22, 2021, when she had the vehicle towed from Kendall Hyundai to another authorized service agent, Doral Hyundai, for a second opinion. Doral Hyundai similarly advised her that the engine needed replacement and would not be replaced under warranty. The vehicle remained at Doral Hyundai, without undergoing any repairs, until she had the vehicle towed to her house on September 8, 2021. She explained that the vehicle remained undriveable and was presently parked in front of her house. When questioned by the Board as to whether regular oil changes had been performed on the vehicle, she said, "I took it in for service," but she did not specify when any oil changes had been performed. She added that the vehicle was only taken to Kendall Hyundai for service, and that she submitted into evidence all of the repair orders in her possession. For the one-year time period prior to experiencing the complained-of noise in June of 2021, she only submitted into evidence two repair orders, dated December 23, 2020, and February 15, 2021. She acknowledged that neither of these repair orders reference the performance of an oil change, only that the authorized service agent performed repairs concerning an unrelated recall. When questioned further by the Board as to why oil changes were not performed at either of these visits, she recollected that she was told by the authorized service agent that it was "not yet time for an oil change."

The Manufacturer asserted "a repurchase or replacement is not warranted, due to the vehicle's lack of maintenance." The Manufacturer's representative stated that that he reviewed all of the repair orders concerning the Consumer's vehicle in preparation for the hearing. He testified that the oil was only changed in the Consumer's vehicle on one occasion, on September 30, 2020, when the vehicle had 7,145 miles, pursuant to a Kendall Hyundai repair order that was not submitted into evidence by either party. He then explained that the vehicle had 25,827 miles

when the Consumer had the vehicle towed to Kendall Hyundai for the complained-of noise, as set forth in the June of 2021 repair order. He asserted that the Consumer had driven over 18,000 miles from the first and only oil change until she experienced the complained-of noise. He testified that the oil should be changed in the Consumer's vehicle every 7,500 miles, in accordance with the Manufacturer's recommended service intervals; as a result, the Consumer missed two recommended oil changes. He explained that, when the authorized service agent inspected the vehicle for the complained-of noise, the "engine seized" and they found evidence of "sludge in the engine," although no photographs were submitted into evidence. He said that due to evidence of "lack of maintenance," the Manufacturer determined that it would not replace the engine under warranty. He concluded that the complained-of noise was the result of neglect on the part of the Consumer in failing to have regular oil changes performed.

The Board unanimously found, based on the evidence presented, that the complained-of knocking noise condition emitting from the engine area that resulted in a seized engine, was the result of neglect, specifically a failure to perform regular oil changes on the vehicle. The complained-of condition did not constitute a "nonconformity" as defined by the statute; therefore, the Consumer was not qualified for repurchase relief under the Lemon Law and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Gomes v. Mercedes-Benz USA, LLC, 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer's 2019 Mercedes-Benz C300 was declared a "lemon" by the Board. The Manufacturer stipulated that a deformed seal popping out constituted a nonconformity and that the vehicle was out of service by reason of repair or 30 or more days. The Consumer requested reimbursement of $2,769.93 for Uber costs as an incidental charge. The Manufacturer objected to the request for Uber costs, arguing that the reimbursement of Uber costs should be limited to the number of days the vehicle was out of service for the stipulated nonconformity. The Board found that the award shall include reimbursement of $169.43 for Uber costs, as a reasonable incidental charge. The Consumer's request for reimbursement of $2,769.93 for Uber costs was denied as to those days when the vehicle was not out of service for the stipulated nonconformity. §681.102(7), Fla. Stat.

Tennant v. Jaguar Land Rover North America, LLC, 2021-0293/FTM (Fla. NMVAB April 20, 2022)

The Consumer's 2020 Land Rover Range Rover was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,050.00 for towing charges incurred by the Consumer in order to have her mobile women's clothing boutique trailer towed to and from previously-scheduled events while the vehicle was at the authorized service agent for repair, as an incidental charge. The Consumer explained that the vehicle had a factory-installed hitch, which she would utilize to tow the trailer as needed; however, none of the rental vehicles provided to

her, when the vehicle was subject to repair, had a hitch. She testified, and the documents admitted into evidence supported, that each of the towing dates were corroborated by a repair order for the same period. She stated that she paid cash for these towing charges and did not have any cash receipts. The Manufacturer objected to the reimbursement of the towing charges, arguing that the charges were incurred by the Consumer's business and not by the Consumer, and that it could have been the Consumer's business that actually paid the charges. When questioned further by the Board, the Consumer testified that she personally paid these towing charges, and that they were not expenses incurred by her business. The Board found that the replacement award shall include reimbursement of $1,050.00 for towing charges incurred by the Consumer to have her mobile women's clothing boutique trailer towed to and from previously-scheduled events while the vehicle, which has a factory-installed hitch and would ordinarily be utilized to tow the trailer as needed, was at the authorized service agent for repair, as an incidental charge. §681.102(7), Fla. Stat. The Manufacturer's objection to reimbursement for the incidental charge was denied.

Collateral Charges §681.102(3), F.S.

Gomes v. Mercedes-Benz USA, LLC, 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer's 2019 Mercedes-Benz C300 was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,500.00 for broker fees to lease the vehicle at the agreed upon value; $1,600.00 for ceramic coating; and $200.00 for a sealant on the convertible roof, as collateral charges. The Manufacturer objected to the documentation reflecting the costs for the ceramic coating and the sealant on the convertible roof that was provided by the Consumer. The Board found that the award shall include reimbursement of $1,600.00 for a ceramic coating and $200.00 for a sealant on the convertible roof, as reasonable collateral charges. §681.102(3), Fla. Stat. The Consumer's request for reimbursement of $1,500.00 for broker fees to lease the vehicle at the agreed upon value was denied by the Board.

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

Baldini v. Tesla Motors, INC, 2021-0265/WPB (Fla. NMVAB May 17, 2022)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $91,790.00. Mileage attributable to the Consumer up to the date of the New Motor Vehicle Arbitration Board hearing was 10,406 miles (11,247 odometer miles reduced by 150 miles at delivery, and 691 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $7,959.72. Although Tesla did not have a Manufacturer sponsored state-certified informal dispute resolution procedure, the Consumer took part in the National Center for Dispute Settlement (NCDS) program, which the Manufacturer's warranty book stated was a requirement. The Manufacturer objected to the Board's use of the mileage, as of the NCDS hearing on June 1, 2021, to calculate the reasonable offset for use, and argued that if the Board utilized the mileage from the NCDS hearing to calculate the reasonable offset for use, any repair attempts performed on the subject vehicle after June 1, 2021, should not be considered by the Board as a day out of service. The Board rejected the Manufacturer's argument.

MISCELLANEOUS PROCEDURAL ISSUES:

Kidd v. Kia Motors America, Inc., 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Manufacturer argued 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 the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Thursday, January 31, 2019. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Thursday, January 31, 2019, the next day that is "not a Saturday, Sunday, or legal holiday" on which to begin the count is Friday, February 1, 2019. To then determine the expiration of the Lemon Law rights period, the Board looked to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to 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." The Board then looked to *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." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on January 31, 2021; rather, it was extended 248 days from January 31, 2021, until October 6, 2021. Accordingly, the Consumer's Request for Arbitration, filed on June 15, 2021, during the Lemon Law rights period, was timely filed. The Manufacturer's assertion to the contrary was rejected.

Atkins v. Ford Motor Company, 2021-0408/ORL (Fla. NMVAB May 3, 2022)

The Manufacturer raised several affirmative defenses in its Answer, 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 the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Thursday, December

13, 2018. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Thursday, December 13, 2018, the next day that is "not a Saturday, Sunday, or legal holiday" on which to begin the count is Friday, December 14, 2018. To then determine the expiration of the Lemon Law rights period, the Board must also look to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to 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." The Board then looked to *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." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on December 13, 2020; rather, it was extended 248 days from December 13, 2020, until August 19, 2021. With this information, to determine the timeliness of the Consumers' filing, section 681.109(1), Florida Statutes, states "If a manufacturer has a certified procedure, a consumer claim arising during the Lemon Law rights period must be filed with the certified procedure no later than 60 days after the expiration of the Lemon Law rights period." Accordingly, the Consumer's deadline to file with the certified program was October 18, 2021. Therefore, the Consumer's claim with the certified program, made on September 14, 2021, and subsequent Request for Arbitration, filed on September 28, 2021, were both timely filed. The Manufacturer's assertion to the contrary was rejected.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2022 - September 2022 (3rd Quarter)

NONCONFORMITY 681.102(15), F.S.

McSherry v. Mercedes-Benz USA, LLC, 2021-0488/WPB (Fla. NMVAB July 18, 2022)

The Consumer complained of an emissions condition that manifested through the illumination of the check engine light in his 2020 Mercedes Benz GLE350. The Consumer testified that in early March 2020, the check engine light illuminated and he took the vehicle to the authorized service agent. He said that when he picked up the vehicle, the check engine light was off; however, the check engine light reappeared in April 2020, May 2020, June 2020, October 2020, and November 2020. He stated that each time the check engine light came on, he took the vehicle to the dealership, at which time the dealership claimed to have repaired the vehicle, but the light always reappeared. He was so concerned about the safety of the vehicle that after driving to New York in June 2020, he shipped the vehicle back to Florida instead of taking the risk of driving the vehicle back to Florida. He alleged that at the November 2020 visit, the Manufacturer informed him that the ongoing check engine light was caused by rodent damage and advised him that rodent damage was not covered under the Manufacturer's warranty. The Consumer said he was advised to file a claim with his insurance company; the Consumer paid a $1,000 deductible for the repairs to the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; the alleged defect was caused by rodent damage; and the rodent damage was neither a warrantable nor a manufacturing defect. The Manufacturer's representative testified that he reviewed the repair history of the vehicle. He explained that the authorized service agent replaced multiple parts on the vehicle, including the charcoal canister and diagnostic module, between March 2020 and October 2020, but acknowledged that those repairs did not fix the problem that was causing the repeated illumination of the check engine light. He said that the cause of the repeated illumination of the check engine light was not detected until the seventh repair visit in November 2020. He said that at the November 2020 repair, the technicians identified a small leak in the evaporative emission system and determined that the leak was caused by rodent damage. He alleged that although the evaporative emissions system was mandated by the federal government to prevent fuel vapors from leaking into the atmosphere, a defect in the evaporative emissions system does not affect the drivability of the vehicle. The witness showed pictures that identified a bite mark on the top of the fuel tank and another bite mark on the hose that runs from the charcoal canister to the fuel tank in the rear of the vehicle. He also showed a picture of a yellow substance that he claimed were rodent droppings under the hood in the engine compartment and in the air filter housing. He acknowledged that rodent damage was typically accompanied by some type of nest around the

damage and acknowledged that the pictures did not show evidence of a nest. He stated that the Manufacturer informed the Consumer that the Manufacturer's warranty did not cover rodent damage and advised the Consumer to contact his insurance company. He further confirmed that the vehicle remained at the authorized service agent from November 3 - December 23, 2020, totaling 51 days. He could not answer with certainty the question of when and where the rodent damage had occurred. He also failed to put forth evidence showing the rodent damage occurred while the vehicle was in the Consumer's possession. When questioned why the technicians had not detected the alleged existence of rodent damage between March 2020 and October 2020, he acknowledged that the diagnostic testing "should have picked up" the damage and additionally, he would have expected the technicians to see the rodent damage during their physical inspections of the vehicle. He acknowledged that during the final repair attempt in March 2021, he did not see any additional evidence of rodent damage, only finding some leaf-like debris in front of the vehicle.

The Board found that the evidence established that the emissions condition that manifested through the illumination of the check engine light substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Board rejected the Manufacturer's assertion that the emissions condition was the result of rodent damage to the vehicle caused by the Consumer. 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.

Powell v. Mercedes-Benz USA, LLC, 2022-0093/WPB (Fla. NMVAB July 22, 2022)

The Consumer complained of, and the Manufacturer stipulated, that a headlight control unit malfunction in the Consumer's 2022 Mercedes Benz GLE350 was a nonconformity. The vehicle was out of service by reason of repair on January 14 - March 17, 2022, for a total of 63 cumulative out-of-service days.

The Manufacturer asserted that any days out of service were due to COVID-related parts delays. The Manufacturer's representative testified that the Consumer's vehicle arrived at the authorized service agent on January 14, 2022. She stated that the headlight malfunction was caused by a defective right front headlamp control unit, and after ordering the part, the authorized service agent received it on January 27, 2022. She stated that the replacement part failed to repair the vehicle and it was determined that the headlamp control unit on the left side would need to be replaced. She explained that the left side headlamp control unit was ordered sometime prior to February 10, 2022, but failed to arrive to the authorized service agent until March 15, 2022. She explained that once the part arrived at the authorized service agent, the technicians installed the part, which repaired the vehicle, and the vehicle was ready for pickup on March 16, 2022. Counsel for the Manufacturer argued that the second replacement part took

over 30 days to arrive to the authorized service agent due to a natural disaster, specially COVID. When the witness was questioned as to the exact date that the left side headlamp control unit was ordered, she did not know the exact date. When the witness was questioned as to how many days it would typically take for the left side headlamp control unit to arrive to the authorized service agent in the absence of COVID, she was not able to provide a specific number of days. Additionally, the Manufacturer could not provide details as to the specifics of how COVID affected the supply chain for the part in question. Due to the witness's failure to provide time frames regarding the arrival of the left side headlamp control unit, as well her failure to provide details regarding the effects of COVID on the Manufacturer's supply chain, the Manufacturer could not state, with any certainty, how many days out of service were attributable to supply chain delays caused by COVID.

The Board found that the evidence established that the headlight control unit malfunction substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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. The Board rejected the Manufacturer's assertion that the 30-day period should be extended due to supply chain delays caused by COVID, based on a lack of evidence. After 15 or more days out of service, the required written notification was sent to the Manufacturer. Following receipt of the notification, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. The Consumer was entitled to the requested relief under the Lemon Law and a refund was awarded.

Stillman v. FCA US LLC, 2022-0076/TLH (Fla. NMVAB July 27, 2022)

The Consumer complained of a cracked differential in which the Board found to be a nonconformity. The vehicle was out of service by reason of repair from January 6 – February 10, 2022, for a total of 36 cumulative out-of-service days. The Manufacturer asserted the cracked differential was repaired within a reasonable number of attempts. More specifically, the Manufacturer argued that the majority of the out of service days should not be attributable to repair because of parts delays caused by COVID-19, which should be considered a natural disaster pursuant to §681.104(3)(b), Fla. Stat. The Manufacturer's representative testified that once the dealership diagnosed the problem of the cracked differential on January 6, 2022, a new front differential housing was needed to repair the vehicle and was ordered the next day. He testified that, while the part was on back order, the Manufacturer upgraded the order status with the part supplier to "VOR" or "vehicle off road," meaning the supplier should overnight the part once it became available. He argued the part delay was due to supply chain problems caused the COVID-19 global pandemic and that, prior to COVID, the part would normally be available in around three days, and argued that the repair attempt should only count as seven out of service days: two days for the diagnosis and ordering of the part, three days for the normal delivery time for the part to be delivered to the repair facility, and two days for the repair work to be completed. In response to a question posed to him, he did not know if the part was available at the factory where new Jeep Gladiators were being assembled.

The Board unanimously found that the evidence established that the cracked differential 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 the length of the January 6 - February 10, 2022, repair attempt was caused by the COVID-19 global pandemic, that only seven days should be found attributable to this repair attempt, and that the nonconformity should be found to have been corrected within a reasonable number of attempts. However, a majority of the Board, while acknowledging that the part needed for repair was not available in the regular supply chain, found that the Manufacturer failed to demonstrate that the part was not available by some other means outside the regular supply channel, such as the factory where new Jeep Gladiators were being produced. Therefore, the Manufacturer's argument was rejected by a majority of the Board. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. The Consumer was entitled to the requested relief under the Lemon Law and 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.

Shah and Asad v. American Honda Motor Company, 2022-0098/MIA (Fla. NMVAB July 29, 2022)

The Consumers complained of an Apple Car Play malfunction in their 2022 Honda CR-V. The Consumer testified that, shortly after taking delivery of the vehicle, he and his wife began to experience intermittent Apple Car Play issues. He explained that when the problem occurred, the infotainment display screen would freeze, leaving him unable to access the features that are part of the infotainment system, including the backup camera, the navigation system, and making or receiving phone calls. Further, regarding Apple Car Play, he testified that when using Google Maps, the display screen was intermittently blurry or pixelated. He played several videos to the Board showing the screen freezing and the display screen blurriness while using Google Maps.

The Manufacturer asserted the alleged defect or condition did not substantially impair the use, value or safety of the vehicle, and any defect were repaired within a reasonable number of attempts. The Manufacturer's representative testified that he test drove the Consumers' vehicle for 60 miles on March 9, 2022, and for 155 miles at the final repair attempt on May 16, 2022. Regarding the March 9, 2022, test drive, he testified that he was unable to duplicate any problem with Apple Car Play or the display screen during his test drive. At the final repair attempt test

drive, he testified that, while the Consumer was using Google Maps, he did witness that the display screen at times was a little blurry or further described it as like a minor pixelization of the images. He added that this occurred only while Apple Car Play was being used and only while the Consumer's cell phone and connecting cable were being utilized. He testified that he then plugged his cell phone and his connecting cable into the vehicle to use Google Maps with Apple Car Play. He added that he was unable to duplicate any problem with blurriness or pixelization while using his cell phone/connecting cable. He added that he believed there was no defect with the Apple Car Play function of the vehicle and opined that any problems with the use of Apple Car Play were as a result of the Consumers' cell phones and not with the vehicle itself.

The Board found that the evidence failed to establish that the Apple Car Play malfunction 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 were not entitled to repurchase relief under the Lemon Law and the case was dismissed.

Ward v. Toyota Motor Sales, USA, Inc., 2022-0102/STP (Fla. NMVAB September 16, 2022)

The Consumer complained that the third-row seat did not lay flat when folded down in the stored position of her 2022 Toyota Sienna. The Consumer testified that on the day she purchased the vehicle, she immediately noticed a problem with the 60/40 split bench seat in the third row of the vehicle. She explained that when the third-row seat was folded down in the stored position, the larger "60 section" of the seat laid "flat"; however, the smaller "40 section" of the seat did not lay flush next to the larger section, rather it "protrudes up" about three inches. She submitted photographs of the seat into evidence to depict the problem. She first complained about the problem to the salesperson on the date of purchase and was told that the seat could be fixed or replaced; as a result, she proceeded with the vehicle purchase. Just a few days later on April 1, 2022, she brought the vehicle to the authorized service agent for repair of the problem. She was told by the service department that the seat was operating normally; that no repair was necessary; and that the complained-of problem was a "design characteristic." She asserted that the problem made it very difficult to slide luggage and files in and out of the vehicle's cargo space. She explained that she had been utilizing a bungee cord to tie down the "40 section" of the seat so that it would lay flush next to the larger "60 section," since the problem has not been remedied. When questioned by the Board as to whether the third-row seat locked in place when it is put in the upright position, she said that the seat appears to lock; however, she testified that she has never had a passenger sit in the third-row seat because she was worried that the seat may be potentially unsafe.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was a normal characteristic of the vehicle. With respect to the Consumer's complaint that the third-row seat did not lay flat when folded down in the stored position, the Manufacturer's representative testified that he inspected and took photographs of the third-row seat in a like model vehicle, which were submitted into evidence in support of the Manufacturer's position that the complaint was a normal

characteristic for the model vehicle. He explained that the authorized service agent first inspected the Consumer's vehicle for the complaint on April 1, 2022, when the third-row seat operated normally and no repairs were performed. Additionally, he testified that the authorized service agent inspected the Consumer's vehicle for a second time on September 8, 2022. During that visit, the third-row seat in the Consumer's vehicle was compared to the third-row seats in four like model vehicles, all of which appeared and functioned the same. He concluded that the third-row seat was operating normally, noting that no technical service bulletins or safety recalls had been released concerning the issue. He also opined that the complaint may be an "inconvenience related concern," but not a safety concern.

The Board found that the evidence failed to establish that the third-row seat not lying flat when folded down in the stored position, 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 was not entitled to repurchase relief under the Lemon Law and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Placilla v. Subaru of America, Inc., 2021-0476/JAX (Fla. NMVAB July 15, 2022)

The Consumer's 2020 Subaru Ascent was decaled a "lemon" by the Board. The Manufacturer requested that $1,020.00 for a dent and paint protection policy, which was included in the gross capitalized cost of the vehicle, be deducted from the Consumer's refund. The Manufacturer's request that $1,020.00 for a dent and paint protection policy be deducted from the Consumer's refund was denied by the Board.

Incidental Charges §681.102(7), F.S.

Jackson v. Jaguar Land Rover North America, LLC, 2022-0110/FTM (Fla. NMVAB September 13, 2022)

The Consumer's 2019 Land Rover Discovery Sport was declared a "lemon" by the Board. The Consumer requested reimbursement of $30.00 for express mail postage incurred in mailing the motor vehicle defect notification form to the Manufacturer; and $8.95 for mailing the motor vehicle defect notification form to the Office of the Attorney General, as incidental charges. The Manufacturer objected to the $30.00 for express mail on the basis that it was an excessive amount. The Manufacturer objected to the $8.95 for postage to the Office of the Attorney General on the basis that the motor vehicle defect notification form could be provided to the Lemon Law program through standard U.S. mail and did not require additional charges. The Board rejected the Manufacturer's arguments and awarded the Consumer $30.00 for express mail postage incurred in mailing the motor vehicle defect notification form to the Manufacturer; and $8.95 for mailing the motor vehicle defect notification form to the Office of the Attorney General. §681.102(7), Fla. Stat.

Feldman v. Jaguar Land Rover North America, LLC, 2022-0054/MIA (Fla. NMVAB July 29, 2022)

The Consumer's 2019 Jaguar I-Pace was declared a "lemon" by the Board. The Consumer requested reimbursement of an unspecified amount for the sales tax to purchase a new vehicle; an unspecified amount of insurance payments made for a new vehicle; and an unspecified amount paid to transfer the title of the used vehicle, as incidental charges. The Manufacturer objected, arguing that sales tax to purchase a new vehicle, insurance payments made for a new vehicle, and fees to transfer title of the used vehicle were not incidental costs under Florida Statute 681. The Board denied the Consumer's requested incidental charges. §681.102(7), Fla. Stat.

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

Posojewitsch v. Volkswagen/Audi of America, Inc., 2022-0115/TPA (Fla. NMVAB August 24, 2022)

The Consumer traded in a used 2013 Nissan Pathfinder encumbered by debt in the amount of $6,200.62, for which a gross allowance of $7,500.00 was assigned, resulting in a net trade-in allowance of $1,299.38, according to the lease agreement. The net trade-in allowance reflected in the lease agreement was not acceptable to the Consumer. 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 J.D. Power/NADA Guide presented by the Consumer as it was printed out from the internet and therefore was not a "book." The Manufacturer further asserted that because a date of August 5, 2022, was present at the top of the printout that it was not the "retail price of the trade-in at the time of the trade-in." The Manufacturer argued that §681.102 (18) specifically stated 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;" and further argued that §681.102 (18) states "[t]he manufacturer shall be responsible for providing the applicable NADA *book.*" The Consumer's attorney explained that the J.D. Power/NADA Guide website required that the actual date of the trade-in be input and that the August 5, 2022, date was most likely the date that the page was printed out. The Board took note that exhibit specifically stated that the "period" was November 20, 2021, the date of the trade-in. According to the J.D. Power/NADA Guide, the trade-in vehicle had a base retail price of $15,525.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a total retail price of $14,275.00. Deduction of the debt resulted in a net trade-in allowance of $8,074.38.

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

Viton-Garcia v. Volkswagen/Audi of America, Inc., 2021-0485/MIA (Fla. NMVAB July 15, 2022)

The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $61,481.76 ($62,481.76 reduced by a manufacturer rebate of

$1,000.00). Mileage attributable to the Consumer up to the date of the Better Business Autoline hearing was 6,558 miles (6,769 odometer miles reduced by 20 miles at delivery, and 191 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $3,359.98. The Consumer argued that the $7,500.00 electric vehicle tax credit given to him at lease-signing should be treated as a rebate for purposes of calculating the offset for use. The Manufacturer argued that the tax credit was given to the Consumer by the federal government and therefore, was not a Manufacturer or dealer incentive or rebate and should not be treated as such in the offset for use calculation. Upon consideration, the Board found that the $7,500.00 electric vehicle tax credit was not a rebate and consequently, was not utilized in calculating the offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Killick v. Mercedes-Benz USA, LLC, 2022-0029/TPA (Fla. NMVAB July 1, 2022)

The Manufacturer raised several affirmative defenses in its Answer, 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 the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Tuesday, June 11, 2019. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Tuesday, June 11, 2019, the next day that is "not a Saturday, Sunday, or legal holiday" on which to begin the count is Wednesday, June 12, 2019. To then determine the expiration of the Lemon Law rights period, a majority of the Board looked to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to 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, and SUSPENDED" (the "Stay Order"). That majority of the Board then looked to *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." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on June 11, 2021; rather, it was extended 248 days from June 11, 2021, until February 14, 2022. Accordingly, the Consumer's

Request for Arbitration, filed on February 1, 2022, during the Lemon Law rights period, was timely filed. The Manufacturer's assertion to the contrary was rejected.

Davis v. Nissan Motor Corporation, USA, 2021-0465/TPA (Fla. NMVAB August 12, 2022)

The Manufacturer's Answer was filed on July 12, 2022, one day beyond the date required for timely filing. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer did not assert why the Answer was filed untimely. Upon consideration, the Board declined to admit the Manufacturer's Answer and the Manufacturer was not permitted to present evidence in support of its defenses. The Manufacturer's representative was permitted to cross-examine the Consumer and make a closing statement on behalf of the Manufacturer. However, the Manufacturer raised a jurisdictional issue, citing the Consumers' 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 the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Saturday, March 23, 2019. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Saturday, March 23, 2019, the next day that was "not a Saturday, Sunday, or legal holiday" on which to begin the count is Monday, March 25, 2019. To then determine the expiration of the Lemon Law rights period, a majority of the Board looked to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to 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 and SUSPENDED" (the "Stay Order"). That majority of the Board then looked to *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." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on March 24, 2021; rather, it was extended 248 days from March 24, 2021, until November 27, 2021. Accordingly, the Consumer's Request for Arbitration, filed on November 16, 2021, during the Lemon Law rights period, was timely filed. The Manufacturer's assertion to the contrary was rejected.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2022 - December 2022 (4th Quarter)

NONCONFORMITY 681.102(15), F.S.

Soler v. Tesla Motors, Inc., 2022-0196/MIA (Fla. NMVAB November 1, 2022)

The Consumer complained of an unknown condition manifesting in less than expected driving range from the vehicle's battery in his 2022 Tesla Model Y. The Consumer explained that his salesperson told him that the vehicle's mileage range should be 330 miles for a fully charged battery but that he only got 100 to 150 miles per a fully charged battery. He said that his vehicle got approximately 1.3 miles per battery percentile. He said that he tested two other Model Y vehicles both of which got 2.5 miles per battery percentile. He explained that he had a co-worker and a neighbor who also had similar vehicles and who each got 260 miles per a fully charged battery. He said that, at the time of the hearing, the battery range was still only 100 to 150 miles for a fully charged battery.

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 "no abnormal range loss was found." When asked, he was unable to explain what a normal or abnormal range loss would be. He acknowledged that the Consumer's representation of 1.3 miles for every one percent of battery use, when compared to another similar vehicle whose battery use was 2.5 miles per one percent, would be considered abnormal. However, he was unable to say how many miles the vehicle should get per percentile of battery use. He acknowledged that Tesla's advertisements asserted that the vehicle's expected range was 330 miles for a fully charged battery.

The Board found that the evidence established that the unknown condition manifesting in less than expected driving range 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 replacement vehicle.

Giacaman v. Toyota Motor Sales, U.S.A., Inc., 2022-0229/FTL (Fla. NMVAB November 28, 2022)

The Consumer complained of a rear passenger window condition manifesting itself with the weather stripping popping out in his 2020 Toyota Tacoma. The Consumer testified that the rear weather stripping had continually popped out of place. Further, on one occasion, he testified that he could smell what he believed was mold, possibly from water intruding into the cabin

through the broken window seal. He testified that, after the final repair attempt in September of 2021, he noticed the problem again in July of 2022, so he immediately proceeded to file a Lemon Law case. At the hearing, he highlighted the problem to the Board utilizing photographs that were taken on September 28, 2022, and submitted into evidence. In addition, at the hearing during his testimony and with the Board's permission, he brought his computer's camera into his driveway where his vehicle was parked and was able to show the Board on camera the weather stripping popped out of place on the rear passenger window.

The Manufacturer asserted any nonconformity was corrected within a reasonable number of repair attempts. The Manufacturer's representative testified that he inspected the Consumer's vehicle at the final repair attempt on September 1, 2021. He stated that the window moved up and down properly, he did acknowledge that he noticed the window seal was popped out of place. Consequently, he replaced the window seal, the window regulator and the window glass. He opined that the vehicle had been repaired, referencing the fact that the vehicle had not been presented for repair since the final repair attempt. However, he did notice the window seal was popped out of place when the Consumer demonstrated the problem for the Board on camera during the hearing.

The Board found that the evidence established that the rear passenger window condition manifesting itself with the weather stripping popping out 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.

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.

George *v. Nissan Group of North America, Inc.,* 2022-0179/STP (Fla. NMVAB November 14, 2022)

The Consumer complained of an improper hood alignment in his 2022 Nissan Frontier. He testified that in December 2021, he noticed that a rubber gasket that sat between the hood and the grille was "popping up," which prompted him to take a closer look at the hood of the vehicle. According to him, the hood appeared to sit "slightly higher" on the passenger side than on the driver side of the vehicle. He explained that the authorized service agent attempted to repair the problem during the January 10 through February 5, 2022, repair visit; however, he said there appeared to be "no change" to the hood alignment following that visit. He submitted into evidence a recent photograph of the vehicle that he took in October 2022, asserting that it depicted a slightly larger gap between where the hood and the headlight met on the passenger side than on the driver side. When questioned by the Board, he acknowledged that the problem was only cosmetic, but he believed that the problem affected the value of the vehicle. He also noted that the hood had always opened and closed properly.

The Manufacturer asserted that the complained-of improper hood alignment did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative explained that he personally inspected the vehicle on two occasions, January 10, 2022, and July 19, 2022. He stated that during the January 10, 2022, repair visit, the Consumer first pointed out his concern with the vehicle's hood and then they both inspected the hoods of several like vehicles on the lot for comparison purposes. According to him, regarding the Consumer's vehicle, the complained-of gap between where the hood and the headlight met on the passenger side was a little more "spacious" than on the driver side, but it was within the Manufacturer's specifications. He testified that at his directive, for customer satisfaction only, the authorized service agent removed the parts relating to the radiator support core and performed a "micro adjustment" of the hood, during the January 10, 2022, repair visit. He asserted that when he inspected the vehicle a second time on July 19, 2022, the hood again measured within the Manufacturer's allowable specifications and no repairs were deemed necessary.

The Board unanimously found the evidence failed to establish that the improper hood alignment, 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.

Omega Marketing and Management LLC and Apostolou v. Jaguar Land Rover North America, LLC, 2022-0166/ORL (Fla. NMVAB October 27, 2022)

The Consumers complained of a vibration at highway speeds in their 2020 Land Rover Range Rover. One of the Consumers testified that when the vehicle traveled at highway speeds of 60 to 79 miles per hour, the vehicle vibrated. When the vibration occurred, it could be felt by the driver and passenger from the floor, in the seats, and from the steering wheel. Approximately one year after purchasing the vehicle, in August 2021, he purchased larger tires and rims which were installed by Ultimate Auto, which was not a Manufacturer's authorized service agent. He detailed that he continued to experience the vibration following the installation of the bigger tires. Several months later, in an attempt to correct the problem, he purchased factory tires which were installed by the authorized service agent. He contended that the vibration continued to occur and acknowledged that almost all the repair work completed regarding the vibration complaint was not covered by any warranty following the initial installation of the larger after-market tires and rims.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that he has test driven and worked on the subject vehicle multiple times. He explained that during a repair visit on November 4, 2021, the Consumers' larger after-market tires and rims that were installed in August 2021 by Ultimate Auto, were removed from the vehicle and four tires and rims that met

factory specifications and were known to be good were put on the vehicle as a test. He further explained that the test tires were road force balanced and he did not experience excessive vibration when he drove the vehicle; as a result, he concluded that any unusual noises or vibrations experienced by the Consumers were due to the larger after-market tires and rims. During a repair visit on November 30, 2021, new factory specified tires and rims were finally purchased by the Consumers and installed on the vehicle in an effort to correct the complained-of problem.

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. (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 contention that the vibration complained of by the Consumers 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 problem complained of by the Consumers did not constitute a "nonconformity" as defined by the statute and the case was dismissed.

Acquaviva v. FCA US LLC, 2022-0126/ORL (Fla. NMVAB December 19, 2022)

The Consumer complained of an engine oil leak at the rear main seal, a brake condition, a clutch condition, the fan always on high and the vehicle overheating at highway speeds in her 2021 Jeep Wrangler Rubicon. When questioned by the Board, the Consumer testified that she has never driven the vehicle off-road or submerged the vehicle in water. She stated that she had driven the vehicle under 20 miles per hour on clay roads and when it rained, the roads had been "loose" and "soupy." She acknowledged that, on occasion, she had to utilize four-wheel drive on those roads. She also noted that she had a snorkel installed on the vehicle in September 2021 for aesthetic purposes.

The Manufacturer asserted the alleged nonconformities were the result of abuse or neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Regarding the complained-of engine oil leak at the rear main seal; the brake condition; the clutch condition; and the vehicle overheating at highway speeds, the Manufacturer's witness testified that those problems were all caused by sand, mud and foreign debris built up on those components during off-road driving and then never properly cleaned. He explained that the authorized service agent removed the transmission and inspected the vehicle during the December 20, 2021, repair visit. He utilized photographs submitted into evidence to depict significant sand, mud and debris built up in the brake system, resulting in the inability for the calipers to move or the slide pins to move. He also showed photographs portraying considerable clutch material, sand and mud caked inside the bell housing that housed the clutch assembly, which sat about five inches above the axles. He opined that driving on a clay road, as testified to by the Consumer, would not have caused the complained-of brake and clutch conditions; rather,

he asserted that the vehicle was likely submerged in sandy water up above the axles and then not cleaned properly after the fact. In further support, he used photographs to show water marks under the hood on the hood liner, explaining that the vehicle must have been in water up to the cooling fan area, which then could have sprayed water "all over," including on the hood liner. With respect to the oil leak complaint, he stated that the rear main seal wore prematurely due to significant sand and debris on the rear main seal, resulting in the oil leak at roughly 4,000 miles and the seal having to be replaced. He testified that an extensive amount of sand wore out the rear main seal again, requiring its replacement a second time only 3,500 miles later. Regarding the vehicle overheating at highway speeds complaint, he testified that the authorized service agent observed, during the June 13, 2022, repair visit, that the radiator and condenser were packed full of mud and dirt, causing no air to flow through the system and the vehicle to overheat. He used photographs to portray mud and dirt encased in the radiator and condenser. He noted that the Consumer declined to have the authorized service agent clean or replace the radiator and condenser during that visit. He concluded that the vehicle was not properly maintained and cleaned by a professional after the vehicle was driven off-road, with fluid or any sort of debris above the axles, as set forth in the Owner's Manual.

In addition, the Manufacturer's representative also opined that this was a case of abuse, concurring with the testimony of their witness. He detailed that the oil leak was caused because the vehicle was submerged in sandy water; the water was then sucked up into the rear main seal, wearing a groove in the seal and resulting in the oil leak. He testified that both the Owner's Manual and the Warranty Guide provide that "if you go into water, you have to inspect, clean and drain your fluids, because that's how seals work – they will suck in water. If you go and submerge the vehicle, the centrifugal force and the heat exchange difference will suck up into seals and into the engine potentially, into the transfer case, into the transmission, and into the axles."

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. (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 unanimously found that the greater weight of the evidence supported the Manufacturer's affirmative defense that the engine oil leak at the rear main seal; the brake condition that manifested itself as the calipers not functioning properly, a squeal noise, and pulling left or right while braking; the clutch condition that manifests itself as clutch chatter and the gears not engaging properly; and the fan always on high and the vehicle overheating at highway speeds, were the result of abuse or neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent, specifically the vehicle was used in such a manner off-road and then was not properly maintained and cleaned after the fact that resulted in damage to several vehicle components. As such, those complained-of problems did not constitute a "nonconformity" as defined by the statute and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Giacaman v. Toyota Motor Sales, U.S.A., Inc., 2022-0229/FTL (Fla. NMVAB November 28, 2022)

The Consumer's 2020 Toyota Tacoma was declared a "lemon" by the Board. The Consumer requested reimbursement of $230.57 for a bed cover purchased from *Amazon* as a collateral charge. The Manufacturer objected, stating that they did not reimburse for non-OEM equipment that had been installed by an agent not authorized by them. The Manufacturer's objection was rejected by the Board and the Consumer was awarded the $230.57 for a bed cover purchased from *Amazon* as a collateral charge.

MISCELLANEOUS PROCEDURAL ISSUES:

Iuteri v. Mitsubishi Motors North America, Inc., 2022-0112/JAX (Fla. NMVAB November 22, 2022)

The Manufacturer's Answer was due to be filed August 23, 2022, but was not filed until November 4, 2022. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer stated that the Answer was untimely due to errors within the Manufacturer's corporate facilities which delayed notification of receipt of the Request for Arbitration to the appropriate individuals. The Consumer objected to the Board accepting the untimely filed Answer. Upon consideration, a majority of the Board declined to admit the Manufacturer's Answer and the Manufacturer was not permitted to present evidence in support of its defenses. The Manufacturer was permitted to cross-examine the Consumer and her witness.

Dar v. Mitsubishi Motors North America, Inc., 2022-0182/TLH (Fla. NMVAB November 1, 2022)

The Manufacturer's Answer was filed two days before the hearing, on November 7, 2022, while the deadline for filing the Manufacturer's Answer was October 17, 2022. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer's representative stated that she was just assigned this case last week, and did not have an explanation why the Answer was submitted late. In response to a Board member question trying to get more information, she stated that Mitsubishi's Customer Affairs Department was short staffed at the moment, which she opined may have contributed to the lateness. The Consumer

objected to the inclusion of the late filed Manufacturer's Answer. Upon consideration, the Board found that the Manufacturer's participation in the hearing would be limited to cross-examining the Consumer and his witness and giving a closing statement.

The Manufacturer's Prehearing Information Sheet was also submitted two days before the hearing, which listed Heather McGee as a witness. Paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, provides that "[t]he original Manufacturer's Prehearing Information Sheet, with any attachments, must be *received* by the Board Administrator no later than 5 days before the hearing, and a copy with all attachments must be *received* by the consumer or their attorney no later than 5 days before the hearing." Paragraph (10) further provides that if the Manufacturer fails to provide the completed Prehearing Information Sheet to the Board Administrator and the opposing party or attorney within the specified time, witnesses may not be allowed to testify unless good cause is shown for the failure to comply. The Board, having already limited Ms. McGee's participation due to the late filed Answer as noted above, did not accept the late filed Manufacturer's Prehearing Information Sheet.