OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2021 - March 2021 (1st Quarter)

NONCONFORMITY 681.102(15), F.S.

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

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

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

The Board found that the evidence established that the malfunction of the infotainment system components substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was awarded a refund.

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

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

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

The Board found that the evidence established that the intermittent malfunction of the audio/display screen system substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was awarded a refund.

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

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

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

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

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

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

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

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

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

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

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

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

vehicle to Lexus of Orange Park for routine maintenance. While she was there, her service advisor informed her of a recall that was issued pertaining to the fuel pump. She testified that that the service advisor told her that the part needed to repair the vehicle was unavailable and the Manufacturer did not know when the part would be available. The service advisor offered her a rental vehicle, free of charge if she agreed to park her vehicle and not drive it until the part became available, which the Consumer did, parking the vehicle in her garage. She testified that she was contacted in May of 2020 by a representative from the Manufacturer who told her that the part to repair her vehicle was available at Lexus of Orange Park. She stated that on May 26, 2020, the vehicle was towed to Lexus of Orange Park for replacement of the fuel pump per the recall. On April 30, 2020, the Consumers sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification on May 4, 2020. On May 27, 2020, the fuel pump was replaced per the recall by the Manufacturer's authorized service agent, correcting the problem.

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

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

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

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

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

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

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

The Board found that the evidence failed to establish that a protrusion in the driver-side seat's bottom cushion, as complained of by the Consumer, substantially impairs the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

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

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

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

The Board found that the evidence failed to establish that the brakes squealing and scraping when stopping, as complained of by the Consumers, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

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

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

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

Collateral Charges §681.102(3), F.S.

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

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

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

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

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

MISCELLANEOUS PROCEDURAL ISSUES:

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

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

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