OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2021 - June 2021 (2nd Quarter)

JURISDICTION:

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

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

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

Section 681.108(1), Florida Statutes, requires that a consumer must first resort to a manufacturer-sponsored informal dispute settlement procedure if the procedure was certified by the State of Florida on or before the date of acquisition of the subject motor vehicle, and if the consumer was informed at the time of vehicle acquisition, in writing, how and where to file a claim with the procedure. Moreover, Section 681.109, Florida Statures, provides that if the consumer submits to such a program and the program fails to render a decision within 40 days of the date the claim is filed, or if the consumer is dissatisfied with the decision rendered, the consumer may request arbitration of the dispute by this Board.

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

Motor Vehicle §681.102(14), F.S.

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

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

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

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

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

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

> [A] new vehicle, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a recreational vehicle or a vehicle used as a demonstrator or leased vehicle if a manufacturer's warranty was issued as a condition of sale, or the lessee is responsible for repairs, <u>but does not include</u> vehicles run only upon tracks, off-road vehicles, <u>trucks over 10,000 pounds gross vehicle weight</u>, motorcycles, mopeds or the living facilities of recreational vehicles.

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

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

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

NONCONFORMITY 681.102(15), F.S.

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

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

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

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

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

The Consumer complained of a trim and fit condition affecting the doors on the left side of his 2019 Ford Fusion. The Consumer testified that the day after he purchased the vehicle, he noticed that the doors on the driver's/left side of the vehicle were not aligned with the surrounding panels. During the hearing, the Consumer presented two photographs of the left/driver's side of the vehicle. The Consumer explained that the first photograph showed the rear door's window frame was not aligned with the vehicle's valance window frame. He pointed out that there was a large gap between the rear door window frame and the valance window frame. The Consumer explained that the second photograph showed there was also a gap between the front door and the rear door. He also pointed out that the front door "sticks out more than" the rear door. He stated that he believed the vehicle's left side doors were not aligned because the vehicle was in an accident, and subsequently repaired prior to his purchasing the vehicle.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he was familiar with the subject vehicle and that he inspected the vehicle during the prehearing inspection. Although he acknowledged that the doors on the left or driver's side of the vehicle were not aligned with the vehicle's surrounding panels, he asserted that the misalignments were within the "tolerances as outlined in the workshop manual." He explained that during the final repair inspection, the technician measured the "gaps" or "margins" and "flushness" on the vehicle's left side. He stated that the technician found that the upper right corner of the rear window had a gap between the window frame and the window run. Additionally, the technician found that the front door had a flushness variant compared to the rear door. However, the technician found that both the gap and the flushness variant were "within the Manufacturer's specifications." He stated that when he inspected the vehicle during the prehearing inspection, like the technician who performed the final repair attempt, he found that the misalignments of the doors on the left side of the vehicle were within the Manufacturer's specifications. However, he acknowledged that during his inspection of the vehicle, he did not use any instrument or tool to measure the "gaps" or "margins" and "flushness" on the vehicle's left side.

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

A majority of the Board found that the evidence established that the trim and fit condition affecting the doors on the left side of the vehicle substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was awarded a refund.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(15), Fla. Stat. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the diesel fuel contamination was the result of abuse and neglect, specifically the presence of DEF in the fuel system. Accordingly, the problems complained of by the Consumer did not constitute "nonconformities" as defined by the statute, and the Consumer's case was dismissed.

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

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

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

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

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

REFUND §681.104(2)(a)(b), F.S.

Incidental Charges §681.102(7), F.S.

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

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

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

Collateral Charges §681.102(3), F.S.

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

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

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

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

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

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

MISCELLANEOUS PROCEDURAL ISSUES:

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

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