**OFFICE OF THE ATTORNEY GENERAL**
**FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

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

## JURISDICTION:

### Consumer §681.102(4)F.S.

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

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

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

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

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

Further, section 681.102(4), Florida Statutes defines a "Consumer" as:

> the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

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

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

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

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

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

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

In order to be eligible for the refund or replacement remedies set forth at Section 681.104(2), the person seeking such relief must be a "consumer." Section 681.102(4), Florida Statutes defines a "consumer" as:

> the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights

period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.

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

**Motor Vehicle §681.102(14), F.S.**

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

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

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

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

**NONCONFORMITY 681.102(15), F.S.**

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

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

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

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

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

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

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

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

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

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

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

The Board found that the evidence established that the water intrusion into the trunk that resulted in moisture and standing water in the trunk, and the left-rear door rattle noise, substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformities. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that both the water intrusion into the trunk that resulted in moisture and standing water in the trunk and the left-rear door rattle noise nonconformities were subjected to repair by the Manufacturer's authorized service agent a total of *three times*, and the nonconformities continued to exist after the third attempt. The defect notice was sent to the Manufacturer after the third repair attempt had been initiated, but before it had been completed. The evidence established that the Manufacturer received the statutory written notification from the Consumer on November 13, 2020. "When a manufacturer responds to the written notification of a final repair opportunity set forth in Section 681.104(1)(a), F.S., the consumer must receive such response within 10 days from the date the manufacturer received the written notification from the consumer." Rule 2-30.001(3), F.A.C. The Manufacturer failed to respond to the notification. In its defense, the Manufacturer asserted that because the Consumer sent the defect notice before completion of the third repair attempt, the notice should be treated as a nullity. In so arguing, however, the Manufacturer treated the elements of the presumption set forth in Section 681.104(3)(a), Florida Statutes, as mandatory. The Board rejected this argument. The Manufacturer failed to respond to the Consumer's written notice. Therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Under the circumstances of the case, the Board found that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty, as contemplated by the Lemon law. The Manufacturer having failed to correct the nonconformity after a reasonable number of attempts, the Consumer was entitled to the requested relief under the Lemon Law.

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

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

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

The Board found that the evidence established that the "Collision Mitigation System Problem" warning message illuminating intermittently substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken to correct the "Collision Mitigation System Problem" warning message nonconformity. The Board unanimously found the evidence established that the nonconformity was corrected at the seventh repair attempt for the problem on February 19-23, 2021, which was the Manufacturer's final repair attempt following written notification from the Consumer, when a steering wheel alignment, a four-wheel alignment, and a complete radar and multiuse camera aim were performed.

The question remaining is whether the nonconformity was corrected within a reasonable number of attempts. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The Board unanimously concluded that based on the repair history, the Manufacturer, through its authorized service agent, failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law, and concluded that the case should therefore be decided in favor of the Consumer.

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

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

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

The Board found that the evidence established that the noise upon making sharp turns substantially impaired the use, value and safety of the vehicle, thereby constituting one or more

nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected.

The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformity. The Board found that the evidence established that the nonconformity was subject to repair by the Manufacturer's service agent on two occasions, February 17, 2020, and April 14, 2020, prior to the Manufacturer's receipt of written notification, and was then subject to repair by the Manufacturer at the final repair attempt on January 25, 2021. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. At the February 17, 2020, service visit, the front control arm bolts were torqued, and one bolt was replaced. At the April 14, 2020, service visit, the rotors and mounting points were cleaned and retorqued. At the January 25, 2021, final repair attempt, the rims and hubs were cleaned, and the front suspension was retorqued. The noise when making sharp turns nonconformity continued to exist after the final repair attempt. The Board found that because the same type of unsuccessful repairs were performed at the February 2020, and April 2020, repair visits, as well as the January 2021, final repair attempt, it was not necessary for the Consumer to bring the vehicle back for a third repair visit, prior to sending the motor vehicle defect notice to the Manufacturer. Under the circumstances of the case, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty and as to this nonconformity, the Consumer was qualified for the requested relief under the Lemon Law.

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

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

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

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

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

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

The Board found that evidence failed to establish that the air conditioning taking too long to cool and the air conditioning noise, as complained of by the Consumers, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumers' case was dismissed.

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

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

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

The Manufacturer asserted the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its

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

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the loss of engine power when driving was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the loss of engine power when driving complaint did not constitute a "nonconformity" as defined by the statute and the Consumer's case was dismissed.

**REFUND §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(7), F.S.**

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

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

**Collateral Charges §681.102(3), F.S.**

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

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

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

The Consumer's 2021 BMW 330e was declared a "lemon" by the Board. The Consumer requested reimbursement of $100.00 for window tinting as a collateral charge. The Manufacturer objected to the request on the basis that the Consumer did not produce a receipt for same. The Board awarded the Consumer the requested amount for the window tinting and denied the Manufacturer's objection.

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

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

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

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

**MISCELLANEOUS PROCEDURAL ISSUES:**

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

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