OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2021 - December 2021 (4th Quarter)

JURISDICTION

Consumer §681.102(4), F.S.

H & I Gallery Inc. and Arutyon Stambolyan v. Mercedes-Benz USA, LLC, 2021-0019/WPB (Fla. NMVAB October 8, 2021)

The Manufacturer asserted that the corporation and Consumers do not meet the definition of "consumer" contained in Section 681.102(4), Fla. Stat. The Manufacturer stated that neither of the Consumers could be considered a "consumer" under Section 681.102(4), Florida Statutes, arguing that pursuant the definition, the vehicle must be "primarily used for personal, family, or household purposes." The Manufacturer alleged that the vehicle was leased by a corporation and used for business purposes.

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.

The Manufacturer asserted that the Consumers were not qualified for relief under the Lemon Law because the vehicle was registered to a corporation and used for business purposes. However, the Manufacturer's argument failed to consider the third category of individuals entitled to relief under the Lemon Law – "any other person entitled by the terms of the warranty to enforce the obligations of the warranty." The Consumers fell under the third category of individuals eligible for relief as the Consumers were "entitled by the terms of the warranty to enforce the obligations of the warranty"; thus, the Manufacturer's argument was rejected by the Board.

With respect to the circumstances surrounding his acquisition of the subject vehicle, the Consumer testified that he wanted a particular model and after not being satisfied with the few he located for sale in Georgia, he expanded his search and located the subject vehicle at Jaguar Fort Lauderdale, located in Fort Lauderdale, Florida. The Consumer, a Georgia resident, testified that he contacted the dealership where the vehicle was located via telephone from his home in Georgia, and a price was agreed upon. Thereafter, he flew to Florida and went to Jaguar Fort Lauderdale. At the dealer, he was shown the car in question and then went on a test drive. He then completed the purchase paperwork, handed the dealership the down payment check, and took delivery of the vehicle. He added that he signed for and was given the Consumer Guide to the Florida Lemon Law Booklet and received a temporary Florida registration at the time. The vehicle was then driven by him back to his home in Georgia where he subsequently registered the vehicle and was given a Georgia license plate.

The Manufacturer asserted the vehicle failed to meet the definition of "motor vehicle" per Section 681.102(14), Florida Statutes, as it was not sold in this state. No testimonial evidence was presented by the Manufacturer. The Manufacturer asserted that because the Consumer was not a resident of Florida, and because the purchase agreement did not indicate the Consumer paid the $2.00 Florida Lemon Law fee, the purchase should be considered a Georgia sale. The Manufacturer theorized that the Consumer had Lemon Law rights in Georgia and should use that forum for any potential remedy.

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

> a new vehicle, propelled by power other than muscular power, which is <u>sold in this state</u> 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, but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds, electrical bicycles, or the living facilities of recreational vehicles ....

Based on the totality of the circumstances, the Board found that the Consumer's vehicle was sold in this state and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The Board found particularly compelling that the selling dealer was located in Florida, the Consumer took delivery of the vehicle in Florida, the vehicle was originally registered in Florida with a temporary plate, and that the Consumer signed for and was given a Florida Lemon Law Booklet. Having determined that the subject vehicle did meet the statutory definition of a "motor vehicle" under the Lemon Law, the Manufacturer's assertion to the contrary was rejected.

NONCONFORMITY 681.102(15), F.S.

D'Angelo v. American Honda Motor Company, 2021-0073/PEN (Fla. NMVAB October 25, 2021)

The Consumer complained of a musty odor in her 2018 Honda Odyssey. The Consumer testified that the musty odor was most pronounced after the vehicle had been driven for 25 – 30 minutes. She added that the musty odor had caused her to have sneezing fits, watery eyes, and postnasal drip. With regard to her purchase of the vehicle and the disclosures made to her at that time, she testified that it was not until after she had already signed the paperwork and given the dealership her trade-in vehicle that she was made aware of the water damage to the vehicle. She explained that prior to completing the sale documents, she was told by the salesman that one of the vehicle's windows had been replaced because it had been scratched during Hurricane Michael. She testified that, in response, she told the salesman that she was allergic to mold, and sought assurance from him that the vehicle had not incurred water damage. She said that the salesman assured her that no water had gotten into the vehicle. However, following completion of the purchase transaction, she was approached by a different dealership employee, who informed her that water had gotten into the vehicle as a result of Hurricane Michael, and that the vehicle's carpet needed replacing. She pointed out to the Board that the section on page 1 of her Buyer's Order, where the seller can identify a vehicle as "a flood vehicle," was left blank, supporting her position that the water damage was not disclosed prior to purchase.

The Manufacturer asserted the alleged defect or condition did not substantially impair the use, value or safety of the vehicle; any alleged defect or condition was repaired within a reasonable number of attempts; and the Consumer's complaint of the musty odor 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 witness testified that following Hurricane Michael, he completed an "Internal Repair Order" for the vehicle that noted "minor hurricane damage," and claimed he provided that information to the Consumer prior to her completion of the purchase documents. However, there was no "Internal Repair Order" submitted as part of the record, and his verbal description of his notation made no mention of "water damage" to the vehicle. Another Manufacturer's witness testified that on October 22, 2018, approximately two weeks after Hurricane Michael hit the Panama City area, he inspected the subject vehicle on the lot at Honda of Bay County. At that time, he noticed that the rear driver's side window had shattered resulting in at least three inches of water getting into the vehicle. On November 5, 2018, he testified that Honda of Bay County replaced the broken window, used a shop vac to vacuum the carpet, and sealed the vehicle to prevent moisture from getting in or out of the vehicle. He acknowledged that vacuuming the carpet did not get all the water out of the carpet and agreed that some amount of water remained in the vehicle from the time of Hurricane Michael in October of 2018, through February 28, 2019, when the carpet and dash pad were replaced. Shortly after the window was replaced, the vehicle was sent to an out-of-state body shop for repairs to other damage caused by Hurricane Michael. He testified that the vehicle was then returned to Honda of Bay County in February of 2019, and that the vehicle was then sold to the Consumer prior to replacing the carpet and dash pad. The Manufacturer's representative testified that he performed the final repair attempt on June 11, 2020. Prior to

inspecting the vehicle, he testified that he was aware the vehicle had suffered damage due to Hurricane Michael. During the inspection, he performed a water test to make sure the vehicle did not have any leaks, which it did not. He further testified that he did not detect a musty odor during the inspection and that he visibly did not detect any mold. Two different Manufacturer representatives both testified that any damage to the vehicle that was caused by Hurricane Michael was not covered by the Manufacturer's warranty because they considered it to be an outside influence or an "Act of God."

The Board found that the evidence clearly established that the musty odor substantially impaired the use, value and safety of the vehicle. The Manufacturer asserted, however, that the musty odor was caused by Hurricane Michael, and was therefore the result of "an accident … by someone other than the Manufacturer or its authorized service agent," exempting the complaint from the Lemon Law definition of "nonconformity." The Board, while not disputing the impact of Hurricane Michael in October of 2018, found the musty odor complained of by the Consumer was the result of neglect by the manufacturer's authorized service agent, specifically the fact that water was allowed to remain in the vehicle for approximately four months. The Board further noted that the vehicle was sold to the Consumer prior to completion of repairs for the water damage, and that there was no credible evidence provided to show the Consumer was made aware of any water damage to the vehicle prior to sale. Accordingly, the musty odor constituted a nonconformity 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.

Kosches v. Tesla Motors, Inc., 2021-0065/MIA (Fla. NMVAB November 8, 2021)

The Board found that the Consumer's complaints of a defective automatic steering wheel adjustment and defective driver assistance features to be nonconformities. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective automatic steering wheel adjustment on July 5, 2019, when the steering wheel column was removed and replaced; and March 9, 2020, when no repair work was performed. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective driver assistance features condition on July 5, 2019, when no repair work was performed; and October 7, 2020, when a firmware update of the driver assistance system electronic control unit was performed.

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 but did not contact the Consumer to schedule a final repair attempt. The defective automatic steering wheel adjustment and defective driver assistance features condition continued to exist after the written notification.

The Manufacturer asserted the Manufacturer was not provided a reasonable number of repair attempts. No testimonial evidence was presented by the Manufacturer. In support of its argument that it was not provided a reasonable number of repair attempts, the Manufacturer pointed out that the Consumer's complaint of the loose driver's seat was the only complaint reported to the Manufacturer's authorized service agent at least three times prior to the Consumer completing the motor vehicle defect notification form. The Manufacturer further argued that each of the Consumer's driver assistance feature complaints should be considered separately by the Board, and did not constitute a condition as defined in Rule 2-30.001(2)(a), F.A.C.

A majority of the Board found that the evidence established that the defective automatic steering wheel adjustment and defective driver assistance features condition substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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 the nonconformities were subjected to repair by the Manufacturer's service agent a total of two times each, prior to the Manufacturer's receipt of written notice. With regard to the steering wheel nonconformity, a majority of the Board found, based on both the failure to perform any repair work at the second repair visit and the Manufacturer's failure to perform a final repair attempt, that the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. With regard to the driver assistant feature nonconformity, due to the problem involving numerous different features that were still not repaired, in addition to the Manufacturer's failure to perform a final repair attempt, a majority of the Board found that under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. The Manufacturer's arguments to the contrary were denied. Accordingly, the Consumer was 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.

Kristjansson v. Jaguar Land Rover North America, LLC., 2021-0196/TLH (Fla. NMVAB December 17, 2021)

The Board found that the Consumer's complaint of a driver's side rattle, a cracked windshield, and an electrical short to be nonconformities. The vehicle was out of service by reason of repair of those defects August 24 – October 7, 2020 (45 days); March 26 – April 6, 2021 (12 days); and November 11-18, 2021 (8 days), for a total of 65 cumulative out-of-service days.

The Manufacturer asserted that because the driver's side rattle repair, which took place from August 24 – October 7, 2020, occurred during the stay period created by Board Emergency Order 20-002, those days should not be considered days out of service.

The Board found that the evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the required written notification was sent to the Manufacturer. Following receipt of the notification, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. The Manufacturer's argument that the driver's side rattle repair visit, lasting from August 24 – October 7, 2020, should not count as "out of service days" was rejected by the Board. The vehicle was accepted by the authorized service agent for repair. Numerous repairs were performed by the authorized service agent over the course of the visit. The Manufacturer provided no evidence that the repairs performed during that time period were in anyway delayed due to COVID-19. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. Accordingly, the Consumer was awarded a refund.

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

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

Beller v. BMW of North America, LLC., 2021-0104/FTL (Fla. NMVAB October 29, 2021)

The Consumer complained of a one-time illumination of a malfunction warning light for the vehicle's SOS system, and an Apple Car Play connectivity issue in her 2019 BMW 330. Regarding the Apple Car Play connectivity issue, the Consumer indicated that when she ended a phone call using the Apple Car Play system, the phone did not disconnect.

The Manufacturer asserted the alleged nonconformities did not substantially impair the use, value or safety of the motor vehicle. With regard to the SOS malfunction light illumination, the Manufacturer's witness testified that the complaint was presented to the authorized service agent on only one occasion, at which time there was no fault found with the system, and that the Consumer never complained of it again. He also advised that the SOS system was not related to Apple Car Play; it was an independent call system for emergency situations. The Manufacturer's representative confirmed that the SOS system was completely independent of both Apple Car Play and the Consumer's phone, and testified that if there were a fault in the SOS system, the vehicle would display a message and store a code. With regard to the Apple Car Play complaint, he said that the Consumer was not required to use Apple Car Play to make or receive calls. He explained that the vehicle had a system called "iDrive" which allowed a cellular phone to be used with the vehicle's handsfree Bluetooth system, independent of Apple Car Play. He testified that Apple Car Play was an Apple product, not a BMW product. He explained that BMW simply provided the ability to use the vehicle's display screen as a mirror of the Consumer's phone; any problems the Consumer was experiencing with Apple Car Play were a result of problems with the Consumer's phone, not BMW's product. He testified that following the final repair attempt, he was advised that the Consumer was again complaining of the problem, so he authorized replacement of the vehicle's radio head unit. He explained that the fact that the Consumer was

still having the same issue after replacement of the radio head unit confirmed that the problem was with the Consumer's phone.

A majority of the Board found that the evidence failed to establish that the one-time illumination of a malfunction warning light for the vehicle's SOS system, and the Apple Car Play connectivity issues, 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.

Angulo v. BMW of North America, LLC., 2021-0146/MIA (Fla. NMVAB November 19, 2021)

The Consumer complained of a vibration/brake noise condition in her 2019 BMW X3. The Consumer testified that on June 16, 2019, while she was driving home from work at a speed of approximately 35 miles per hour, a dog ran into the street, causing her to swerve to the left to avoid hitting the dog. As a result of the quick swerve to the left, she testified that the vehicle struck the median.

The Manufacturer asserted that the Consumer's complaint 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 witness testified that on June 17, 2019, the Consumer called the dealership to let them know that her vehicle had been in an accident and was being towed there for repair. According to the witness, the authorized service agent replaced the steering rack, the left lower control arm, the left outer tie rod, the left ball joint, the left front wheel and tire, and the fender liner. He testified, however, that after the Consumer repeatedly reported vibration issues, the authorized service agent examined and replaced the wheel bearings on February 22, 2020. He opined that the bearings had been damaged in the accident, with the damage becoming progressively worse over time, leading to the vibration problem the Consumer described with the vehicle. The Manufacturer's representative testified, with regard to the June 16, 2019, accident, that based on the repairs performed to the vehicle, the impact of the vehicle hitting the median had caused severe damage to the suspension components. He further testified that after the wheel bearings were replaced on February 22, 2020, the vibration while braking could not be reproduced, leading him to the conclusion that the wheel bearings were the cause of the vibration, and that the wheel bearings had been originally damaged in the accident. He added that damage to wheel bearings can cause other damage to brake components, which would explain why numerous brake repairs were performed on the Consumer's vehicle. He testified that he test drove the Consumer's vehicle on December 4, 2020, and again at the final repair attempt on February 4, 2021, and did not experience any vibration or any abnormal brake noise during either test drive.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>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</u>." §681.102(15), Fla. Stat. (emphasis added). A

"condition" is defined as "a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." Rule 2-30.001(2)(a), F.A.C.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the vibration/brake noise condition was the result of an accident, specifically the accident that occurred on June 16, 2019, when the Consumer's vehicle struck a median. Accordingly, the problem complained of by the Consumer 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.

JBB Service Corp and Maria Olid v. BMW of North America, LLC., 2020-0254/FMIA (Fla. NMVAB November 22, 2021)

The Consumers' 2020 BMW M5 was declared a "lemon" by the Board due to a water leak from the sunroof; and an electrical malfunction that manifested in the check engine light illuminating, the air conditioner blowing warm air, the dash instrument cluster going dark, the traction control warning light illuminating, the drive train malfunction light illuminating, the vehicle shutting down while driving on one occasion and not restarting, and a loss of power when driving. The Consumers requested reimbursement of $22,800.00 for the purchase of a new engine, $7,361.58 for the installation of the new engine, and $18,000.00 for rental car charges, as incidental charges. The Manufacturer objected to the incidental charges. The Board awarded the Consumers' $22,800.00 for the purchase of a new engine and $7,361.58 for the installation of the new engine, as reasonable incidental charges. The Consumers' request for $18,000.00 for rental car charges was denied by the Board.

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

Kosches v. Tesla Motors, Inc., 2021-0065/MIA (Fla. NMVAB November 8, 2021)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $71,200.00. Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing was 34,496 miles (34,762 odometer miles reduced by 50 miles at delivery, and 216 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $20,467.63. With regard to the mileage to be used in calculating the offset, the Consumer testified that his owner's manual instructed him that he could file a case with NCDS, as that was an arbitration program that Tesla utilized to try to resolve disputes. Therefore, he argued that the mileage used to calculate the offset for use should be frozen on the date of the NCDS documents-only hearing. The Manufacturer argued that the mileage attributable to the Consumer for purposes of calculating the offset for use should be the mileage as of the day of the hearing because, as stated in the owner's manual, filing a case with NCDS was optional for consumers. The Board rejected

the Manufacturer's argument and utilized the mileage as of the NCDS hearing for purposes of calculating the offset for use.

Sirang v. Porsche Cars North America, Inc., 2021-0032/FTL (Fla. NMVAB November 3, 2021)

The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $72,840.23. Mileage attributable to the Consumer up to the date of the CAP-Motors Program hearing was 5,049 miles (5,530 odometer miles reduced by 77 miles at delivery, and 404 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $3,064.75. The Manufacturer objected to using the mileage as of the CAP-Motors Program hearing and requested that the mileage as of the Florida New Motor Vehicle Arbitration Board hearing be used. The Manufacturer's objection to using the mileage as of the CAP-Motors Program hearing for the calculation of the reasonable offset for use was denied by the Board. The Manufacturer was entitled to a reasonable offset for use of $3,064.75. §681.102(20), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES

Eilbigli v. Mercedes-Benz USA, LLC, 2021-0254/FTL (Fla. NMVAB October 29, 2021)

The Manufacturer's Answer raised several affirmative defenses, including that the Consumer's case should be dismissed because it was not timely filed with the Florida New Motor Vehicle Arbitration Board. Section 681.109(4), Florida Statutes, states that "[a] consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months after the date of original delivery of a motor vehicle to a consumer." However, as a result of the COVID-19 pandemic, *Board Emergency Order 20-002* was entered on March 20, 2020, retroactive to March 9, 2020, providing that "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED and SUSPENDED." That Order was subsequently superseded by *Board Emergency Order 20-006*, entered on October 27, 2020, which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." In order to determine whether the Consumer's claim was timely filed, the Board first calculated the expiration of the Lemon Law rights period, and then the 60-day deadline for filing the claim. In this case, the date of delivery of the subject vehicle was December 31, 2018. Applying the two Board Emergency Orders, as well as Rule 2.514 (a)(1)(A) and (a)(1)(C), Florida Rules of Judicial Administration, regarding the computation of time, the Board found that the Lemon Law rights period expired on September 9, 2021, and therefore, the 60-day filing deadline was November 8, 2021, making the Consumer's Request for Arbitration, filed on June 8, 2021, timely filed. The Manufacturer's assertion to the contrary was rejected by the Board.