OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2020 - March 2020 (1st Quarter)

JURISDICTION

Consumer §681.102(4) F.S.

Ark Gutters of Central Florida, Inc., & Peters v. Mercedes-Benz USA, LLC, 2019-0522/TPA (Fla. NMVAB March 12, 2020)

The Manufacturer asserted the Consumers were not qualified for relief because the vehicle was registered to a corporation and used for business purposes, and therefore did not meet the definition of "consumer" under the Lemon Law.

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:

> [T]he 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. (emphasis added).

The Manufacturer had 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 ignored the third category of individuals entitled to relief under the Lemon Law. The Manufacturer presented no evidence showing that the Consumers were not entitled by the terms of the warranty to enforce the obligations of the warranty; thus, the Manufacturer's argument was rejected by the Board. *Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc.*, 505 So.2d 587 (Fla. 2d DCA 1987).

NONCONFORMITY 681.102(15), F.S.

Teems v. American Honda Motor Company, 2019-0373/ORL (Fla. NMVAB January 13, 2020)

The Consumer complained of a rattling noise from the dashboard area in her 2019 Honda Accord. The Consumer testified that, almost immediately after purchasing the vehicle, she first heard a rattling noise from the dashboard area that lasted for about three minutes. She explained that she heard this noise approximately twice a week while driving and at idle, and that the noise

seemingly “moves around,” emanating from different locations within the dashboard area. She noted that the noise seemed louder when she was driving over bumpy surfaces and, at times, the noise was so loud that it could be heard over the radio. The Consumer testified, and the repair orders admitted into evidence reflected, that she brought the vehicle to the authorized service agent for repair of this problem on eight occasions, all while the vehicle had less than 2,300 miles on the odometer; and that at seven of these repair visits, she was informed that a rattling noise was verified and repairs were performed in an effort to eliminate the complained-of noise.

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 and test drove the vehicle on June 25, 2019. He stated that he did not hear any rattling noise from the dashboard area during his test drive, but noted that he did detect a rattling noise from the rear of the vehicle, so the rear parcel cover was replaced at that visit. He opined that the complained-of rattling noise from the dashboard area was likely the result of the vehicle’s dual climate control system. He explained that the system’s air box case contained a divider that actually floated between the case halves for the driver’s side and the passenger’s side. He explained further that the reason for this design was so that, when the plastic inside the air box case expands and contracts, the divider does not bind up on the doors inside the air box case and affect the use of the air conditioner controls. However, he testified that, under certain driving conditions and especially when the air box case was cold, the Consumer may sometimes hear a “harmonic vibration-type of noise that sounds like a rumble” from the divider in the air box case. He concluded that the complained-of rattling noise was a normal characteristic of the vehicle that was present in other Accord vehicles. In addition, he acknowledged that, on seven occasions, the authorized service agent verified a rattling noise in the Consumer’s vehicle and made repairs on each of these occasions to eliminate the noise. When questioned as to why these repairs were performed if the complained-of noise was a normal characteristic, he testified that the authorized service agent tried to identify and fix all rattling noises for customer satisfaction, “not realizing they were chasing a normal characteristic of the vehicle.”

During the hearing, the Board inspected and test drove the vehicle. The parties waived their right to be present in the vehicle during the test drive. The Board drove the vehicle four miles on local roads, reaching speeds in excess of 40 miles per hour. The Board performed numerous brake applications and accelerations from a stop, including driving over some uneven cobblestone roads, to replicate the Consumer’s brake and transmission complaints. As to the brake and transmission complaints, the Board noted that it did not hear any unusual rattling noises or brake noises during the test drive, and felt no abnormal hesitation from the transmission.

The Board found that the evidence established that the rattling noise from the dashboard area 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.

Scola v. Tesla Motors, Inc, 2019-0420/FTM (Fla. NMVAB February 4, 2020)

The Consumer complained of an offensive odor from the ventilation system in his 2018 Tesla Model 3. The Consumer testified that he first began smelling the offensive odor in late March 2019. He said the odor smelled like a combination of mold, vomit, and human feces, and noted that the odor was worse when the weather was hot and humid, just after it had rained, or when the vehicle was driven through a puddle. He explained that his phone acts as the "key" to the vehicle, and the vehicle's ventilation system starts running as he walks up to the vehicle with his phone, so he smells the odor as soon as he gets into the car. He stated that he has to open the windows to try to dissipate the odor, which can take ten minutes or more. According to him, the odor was so bad in May and June of 2019 that one person who rode in his vehicle would "dry heave" like she was going to "throw up." He asserted that, even though the evaporator has been cleaned multiple times, the smell always returns, usually within a day of picking up the vehicle from the authorized service agent.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle, and "is a product of the climate/environment"; one or more of the alleged nonconformities have not been presented for the required three repairs plus a final repair attempt; "the vehicle has not been in service for 15 or more days for any alleged nonconformity"; "there is no warrantable issue that is substantially impairing to use, value or safety that remains unresolved after a reasonable number of repair attempts"; no repair attempts have occurred because no defects in workmanship or materials have ever been identified; and the claim "is expressly excluded or disclaimed per the applicable written limited warranty...." No evidence was presented in support of those defenses.

The Board found that the evidence established that the offensive odor from the ventilation system substantially impairs 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 assertions to the contrary in its written Answer and attachment were rejected. Accordingly, the Consumer was awarded a refund.

Turcotte v. General Motors, LLC, 2019-0464/STP (Fla. NMVAB February 3, 2020)

The Consumer complained of squeaking brakes in his 2018 GMC Sierra Denali 2500. The Consumer testified that within a few weeks of purchasing the vehicle, he began hearing a loud squeaking noise when he applied the brakes. He stated that, over time, the brake noise had become more frequent and continued for the whole time he was pressing on the brakes. He also noted that sometimes the noise would come back "if he let[] up on the brakes and then reapplie[d] them." He said that he heard the brakes squeaking on almost every single drive, and he last heard the noise on the way to the hearing. During the hearing, he played for the Board several videos demonstrating the complained-of brake squeaking noise.

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 Consumer's vehicle on December 3, 2019. He checked the vehicle for diagnostic trouble codes and did not find any. He did a visual inspection of the rotors, which he stated

"looked good." He road-tested the vehicle in stop-and-go traffic for about 12 or 13 miles and testified that he did not duplicate the brakes squeaking. He then took the vehicle for another test drive with the Consumer driving, and on one occasion heard a high-pitched squeal noise for a couple of seconds. He explained that the vehicle is a medium-duty pick-up truck and there is "a little heavier metallic [sic] inside of the brake pads for stopping heavier loads," which helps with the stopping power and helps dissipate heat. He stated there could be an occasional squealing depending on the driving conditions. During his inspection, he did not find any abnormal conditions that caused him to believe there was a defect in this vehicle.

The Board found that the evidence established that the squeaking brakes substantially impaired the 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.

Symington v. Nissan Motor Corporation, USA, 2019-0499/TPA (Fla. NMVAB February 12, 2020)

The Consumer complained that the air conditioner fan motor sped up during left and right turns while the vehicle was moving forward in her 2017 Nissan Rogue. The Consumer's witness, who also drove the vehicle, testified that the problem with the fan speed did not begin occurring until the vehicle had been driven approximately 8,000 miles. He said that the occurrence of the problem was "very pronounced," especially on left-hand turns. He estimated that, when the vehicle was turning left, the fan speed increased "almost two speeds up," based on the increase in the velocity of the air flow and the sound the fan motor made as it blew air out of the vents. After the turn was completed, the fan speed and air flow returned to the level it was at before the turn. Although the same thing occurred when the vehicle was being turned to the right, the increase in the fan speed was not as pronounced. He said that he was told there was no fix for these unexplained fluctuations in the fan speed and asserted that he would not have bought the vehicle had it exhibited the problem at the time of purchase.

The Manufacturer asserted the vehicle had not been subjected "to an unreasonable number of repairs for any warrantable concerns that would substantially impair this vehicle...." The Manufacturer's representative testified that there was never a repair on the vehicle because the blower motor speeding up while turning was a "normal characteristic," so there was no need for a repair to occur. He said that he inspected and test drove the Consumer's vehicle following the Manufacturer's receipt of written notice from the Consumer. He acknowledged that he duplicated the Consumer's complaint during the test drive; however, he concluded it was a "normal characteristic" of these vehicles and recommended no repair because he drove a like vehicle and found it exhibited the same characteristic.

The Board found that the evidence established that the air conditioner fan motor speeding up during left and right turns while the vehicle was moving forward substantially impaired the 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.

The Consumer complained the heating elements in the front seats failed to heat the seats in her 2019 Nissan Altima. The Consumer testified that when she first test drove the vehicle prior to purchase, the heating elements in the front leather seats did not warm the seats at all. She explained that when she pressed the buttons on the instrument panel to turn on the heated seats, the buttons illuminated, but she could not feel any heat emitting from the seats. She said that she advised the authorized service agent of the problem prior to purchase and was told that they would repair the problem; as a result, she purchased the vehicle. She explained that she brought the vehicle to the authorized service agent for the first repair visit three days after taking delivery; at that time, she was told that the seats had too much padding and that the problem could not be fixed unless more powerful heating elements were installed that would require switches to be added to the sides of the front seats. She said that she told the authorized service agent that she did not want switches added to the seats; rather, she wanted the heated seats fixed so that she could operate them by pressing the buttons on the instrument panel as designed. She returned to the authorized service agent for a second repair visit at which time padding was removed from the seats and she could feel the seats warming for the first time, but then the heating coils were visible through the leather seat bottoms. She stated that she returned to the authorized service agent for a third repair visit when padding was added back into the seats to cover the heating coils; thereafter, she could no longer feel any heat from the seats. She explained that the authorized service agent told her for the first time, at the fourth repair visit that the leather seat covers were installed aftermarket at the direction of the authorized service agent, and not covered under the Manufacturer's warranty. She testified that she would not have purchased the vehicle had she known that the heated seat feature would not work, explaining that she used the heated seat feature every time she rode in a vehicle, due to a back injury that she sustained years ago.

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 the vehicle was initially assembled at the factory with dark cloth seat covers; however, he acknowledged that the red leather seat covers currently in the vehicle were installed aftermarket at the authorized service agent's direction, prior to the Consumer purchasing the vehicle. He testified that the Manufacturer "recommended" that the authorized service agent not have aftermarket seat covers installed, due to "a lot of reasons, mostly, which could be safety related." He testified that the authorized service agent realigned the heating elements in the front seats during the first repair visit. He noted that the seat frames and the heating elements in the front seats were manufactured by Nissan and have never been changed. He also testified that, during the June 5, 2019 repair visit, the authorized service agent determined that the heating elements in the front seats were operating as designed, but noted that the aftermarket leather seat covers were thicker than the dark cloth seat covers initially installed at the factory.

During the hearing, the Board inspected the vehicle in the presence of the Consumer and the Manufacturer. During the inspection, the Board operated the buttons on the instrument panel to turn on the heated front seats. The Board noted that the buttons illuminated when pressed, but that the seats were already hot from the sun shining into the vehicle so they could not determine

if the heated seats were operating. The Board added that the leather upholstery in the front seats appeared to fit normally, and that the heating coils were not visible through the seat bottoms.

A majority of the Board concluded that the evidence established that the heating elements in the front seats failing to heat the seats 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.

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.

Elder v. FCA US, LLC, 2019-0498/FTL (Fla. NMVAB January 29, 2020)

The Consumer complained of poor gas mileage in her 2019 Chrysler Pacifica. The Consumer's husband testified that he was the primary driver of the vehicle and that the vehicle averaged between 13 to 14 miles per gallon when driving in the city. He explained that he purchased the vehicle based on the Monroney label, which displayed that the vehicle's average gas mileage for city driving was 19 miles per gallon. He also explained that he primarily drove the vehicle for short city trips, to and from doctor appointments and for errands in the cities of Hallandale Beach, Fort Lauderdale, and Aventura, Florida. He stated that the vehicle has never averaged 19 miles per gallon. He conceded that he did not speak to the dealership regarding the vehicle's average gas mileage for city driving prior to purchasing the vehicle and that he solely relied on the Monroney label.

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 vehicle and test drove the vehicle at the prehearing inspection. He stated that the information on the Monroney label relied on by the Consumer and her witness was simply a fuel economy estimate by the Environment Protection Agency (EPA), which tests like-model vehicles in a laboratory. He opined that real-world driving has varying factors that impact gas mileage, including the length of the drive, outdoor temperatures, and driving style. He emphasized that short trips contribute to poor fuel economy because the vehicle never reaches proper operating temperatures, resulting in the vehicle burning more fuel. He explained that at each repair attempt, the technician checked the vehicle for diagnostic trouble codes, checked the vehicle's fluids and tire pressure, inspected the brakes, inspected the fuel delivery system and the fuel pressure system, and checked for technical service bulletins. During each repair attempt, the technician also test-drove the vehicle at various speeds and on both the highway and on city roads. He did not find any problems concerning the drivability of the vehicle or any concern with the gas mileage during each test drive and concluded that the vehicle was operating as designed. The representative further explained that when he test-drove the vehicle during the prehearing inspection, he drove on the highway and the city road, both manually and on cruise control, and did not experience any drivability or gas mileage concerns. Based on the repair

orders, the technician's findings for each repair attempt, the testimony of the Consumer's witness, and his own test drive, he concluded that the vehicle was operating as designed. He asserted that the Consumer's allegations of poor gas mileage could be explained by the witness's driving style and the short lengths of his drives.

The Board found that the evidence failed to establish that the poor gas mileage 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.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Butler v. Mercedes-Benz USA, LLC, 2019-0490/STP (Fla. NMVAB February 14, 2020)

The Consumer's 2019 Mercedes-Benz C300 was declared a "Lemon" by the Board. The Consumer requested reimbursement of $508.98 for airfare to attend an out-of-state funeral while the vehicle was in for repair, $218.50 for a rental car for local transportation while at the out-of-state funeral; $284.60 for airfare to attend a ship commissioning that also took place while the vehicle was in for repair, and $247.75 for a rental car for local transportation while attending the ship commissioning, all as incidental charges. The Manufacturer objected to reimbursement for the airfare and rental car charges, arguing that the charges were not directly caused by the nonconformity, and that "it is a dangerous precedent and a slippery slope" and not reasonable to reimburse a consumer for trips to other parts of the country. The Consumer explained that he intended to drive his own vehicle to the out-of-state funeral of a family member; however, he was given a rental vehicle as a loaner while his vehicle was in for repair and was told at the last minute that he could not take the rental vehicle out of Florida, so he ended up having to fly to the funeral, and he then rented a vehicle to use while he was out-of-state. In addition, he would have driven his own vehicle to the ship commissioning but decided to fly and rent a vehicle for local transportation because he knew he could not take the loaner out of Florida.

The Board awarded the Consumer reimbursement of $508.98 for airfare to attend an out-of-state funeral while the vehicle was in for repair, $218.50 for a rental car for local transportation while at the out-of-state funeral, and $247.75 for a rental car for local transportation to attend the out-of-state ship commissioning, as reasonable incidental charges. The Manufacturer's objection to reimbursement for those amounts was denied. The Consumer's request for $284.60 for airfare to attend the ship commissioning was denied by the Board. §681.102(7), Fla. Stat.

The Recovery Zone Cryogenic Therapy, Inc., Newkirk and Newkirk v. Ford Motor Company, 2019-0529/JAX (Fla. NMVAB February 20, 2020)

The Consumers' 2017 Ford F-250 was declared a "Lemon" by the Board. The Consumers requested reimbursement of $20.55 for postage incurred in sending certified mail on three occasions, $887.67 for rental car charges, and $1,119.77 for the portion of the repair to the fuel

line on December 15, 2017, that was not covered by insurance (inclusive of an insurance deductible payment of $500.00), as incidental charges. The Manufacturer objected to reimbursement for any postage incurred other than for the statutorily required written notification to the Manufacturer. The Manufacturer also objected to reimbursement of the rental car charges, asserting that the charges were incurred as a business expense for the Consumers. In addition, the Manufacturer objected to reimbursement of the fuel line repair costs that had not been covered by insurance, asserting that those repairs were caused by water in the gas, which it asserted was not the result of a manufacturing defect.

The Board awarded the Consumers $20.55 for postage, $887.67 for rental car charges, and $1,119.77 a repair to the fuel line as incidental charges. The Manufacturer's objections were rejected. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Behne v. Ford Motor Company, 2019-0508/TPA (Fla. NMVAB January 14, 2020)

The Consumers' 2018 Ford F-350 was declared a "Lemon" by the Board. The Consumers requested reimbursement of $1,498.22 for Front HD Bumper with Grille Guard and HD Headache Rack (hereinafter referred to as the "Bumper and Rack"); and $763.07 for fifth wheel trailer hitch installed on the vehicle (hereinafter referred to as the "Hitch"), as collateral charges. The Manufacturer objected to reimbursement of the Bumper and Rack, on the basis that they have been removed from the vehicle and the Consumers could use them on another vehicle. The Consumer then testified that he removed the Bumper and Rack because the authorized service agent told him they were causing a vibration, that he purchased the Bumper and Rack for this specific vehicle, and that he agreed to return the Bumper and Rack with the vehicle upon repurchase. The Manufacturer also objected to reimbursement of the Hitch, arguing that the credit card receipt that the Consumer showed to the Board in support of the charge did not specify the item purchased, only that the Consumer paid $763.07 to Greenway Ford. The Consumer then testified that he purchased the Hitch on October 12, 2018, which was the purchase date on the receipt; thereafter, the Hitch was back-ordered until January 2019, which was corroborated by the January 10-14, 2019 Greenway Ford repair order that referenced the Hitch, stating the "customer purchased hitch from parts department and will install themselves."

The Board found that the $1,498.22 for Front HD Bumper with Grille Guard and HD Headache Rack; and $763.07 for fifth wheel trailer hitch installed on the vehicle, were appropriate to award as collateral charges. §681.102(3), Fla. Stat. The Consumers agreed to return the Front HD Bumper with Grille Guard and HD Headache Rack with the vehicle upon repurchase. The Manufacturer's objections to reimbursement for those collateral charges were denied.

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

Rosen v. Jaguar Land Rover North America, LLC, 2019-0365/FTM (Fla. NMVAB March 30, 2020)

The agreed upon value of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $65,052.82 ($66,552.82 reduced by a manufacturer rebate of $1,500.00). Mileage attributable to the Consumer up to December 30, 2019, which was the date of the written settlement offer from the Manufacturer, was 22,328 miles (22,500 odometer miles reduced by 15 miles at delivery, and 157 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $12,104.16. The Board concluded it was appropriate to utilize the date of December 30, 2019, as the point from which to calculate the mileage attributable to the Consumer based on the fact that the Consumer's case was originally scheduled for hearing on December 10, 2019, but the hearing was postponed on December 9, 2019, as the Manufacturer contacted the Consumer's Attorney and offered to repurchase the vehicle. A written offer, dated December 30, 2019, was subsequently received by the Consumer's Attorney. However, after the offer was received by the Consumer's Attorney, the Manufacturer failed to move forward and finalize the settlement despite repeated attempts by the Consumer's Attorney to contact the Manufacturer. The Manufacturer's failure to respond resulted in the hearing having to be rescheduled to a time almost three months later than the original hearing, a delay which resulted in additional mileage being accrued on the vehicle, which the Board found should not be attributable to the Consumer.

Teems v. American Honda Motor Company, 2019-0373/ORL (Fla. NMVAB January 13, 2020)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $23,283.28 ($23,783.28 reduced by a dealer incentive of $500.00, as testified to by the Consumer during the hearing and agreed to by the parties). Mileage attributable to the Consumer up to the date of the National Center for Dispute Settlement (NCDS) hearing on July 30, 2019 was not specified in the NCDS decision. The Manufacturer objected to cutting off the mileage as of the date of the NCDS "documents only" hearing, as no mileage was specified in the NCDS decision, and requested that the mileage be cut off as of the date of the New Motor Vehicle Arbitration Board hearing. Upon consideration of the evidence, the Board utilized the "mileage out" listed on the July 24-31, 2019 repair order to calculate the offset, as the vehicle was at the authorized service agent for repair at the time of the NCDS hearing. Mileage attributable to the Consumer up to the date of the NCDS hearing was 2,029.5 miles (2,281 odometer miles reduced by 30 miles at delivery, and 221.5 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $393.78.

MISCELLANEOUS PROCEDURAL ISSUES

McDonald v. Mercedes-Benz USA, LLC, 2019-0493/WPB (Fla. NMVAB February 12, 2020)

During the Consumer's testimony, the Consumer stated that she was not able to bring her vehicle to the hearing. She explained that she had come to the hearing directly from taking her daughter to school in a different vehicle, which she was using because she did not feel safe driving her daughter in the subject vehicle. The Board Attorney read the provision that is set out in both the Notice of Arbitration and the Notice of Hearing, instructing the Consumer to bring the vehicle to the hearing and if she was unable, to immediately notify the Board Administrator. The Manufacturer objected to any continuance of the hearing. Upon consideration, the Board ruled that they did not find good cause to continue the hearing for the purpose of giving the Consumer the opportunity to bring the vehicle to the hearing.

Critchett and Kirkland Event & Destination, Inc. v. Mercedes-Benz USA, LLC, 2019-0510/WPB (Fla. NMVAB March 27, 2020)

The Manufacturer's Answer in this case was due to be filed on January 12, 2020, but was not filed until January 24, 2020. 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 the hearing, counsel for the Manufacturer asserted that the Manufacturer's untimely answer was due to a vacancy in the position of the employee who prepares the answers. The Consumers objected to the untimely Answer being considered by the Board. Upon consideration, the Manufacturer was not permitted to present evidence in support of its defenses.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2020 – December 2020 (4th Quarter)

NONCONFORMITY 681.102(15), F.S.

Williams v. Nissan Motor Corporation, USA, 2019-0550/ORL (Fla. NMVAB October 9, 2020)

The Consumer complained of a mold/musty odor emanating from the HVAC system in her 2017 Nissan Murano. The Consumer testified that she began noticing the mold odor coming out of the air conditioner vents about five or six months after purchasing the vehicle. She said the odor, which was worse in hot weather, occurred when she first started the vehicle and the air conditioner started blowing air out of the vents. She stated the odor was so bad that she opened the sunroof and windows until it dissipated. She asserted that the chemical that the authorized service agent used to address her complaint "was almost a worse smell than the mold," and noted that the chemical simply "masked the problem because the mold smell was back with a vengeance when the chemical smell went away." When the cabin filter was replaced, she asked the authorized service agent to give it to her so that she could have it tested for the presence of mold; however, the filter was not retained by the authorized service agent. After the final repair attempt, she continued to be concerned that the mold odor meant that mold was present in her vehicle, and she subsequently obtained two mold assessment tests of the vehicle. On October 19, 2019, a sample was taken from under the carpet near the dashboard on the passenger side of the vehicle, and on August 31, 2020, the cabin air filter was removed and submitted for testing. Both tests revealed the presence of mold in the vehicle.

The Manufacturer did not believe the vehicle had been subject to an unreasonable number of repairs for any warrantable concerns that would have substantially impaired the vehicle within the "Florida established Lemon Law Presumption." The Manufacturer's representative testified that the replacement of the paper cabin filter, which can help eliminate or trap odors and mold spores, was done "at the dealership level" during the first repair attempt. At the second repair attempt, an "a/c fresher kit" was performed on the Consumer's vehicle. He explained that there are "a lot of solutions out there for [a] musty smell in an air conditioning" that will clean the system because the air conditioner system "is a cold, dark place," where odors can develop because of moisture and differences in temperature. After the Consumer sent written notification to the Manufacturer, he met with her at the final repair attempt. He told the Consumer about the owner's manual, which recommends that the air conditioner be set to fresh air to "help reduce the inside odor." According to him, the Consumer said that "she never uses fresh air," so her complaint "is not covered under the warranty." During the final repair attempt, the dashboard was removed and there was no water intrusion found behind the dash. The HVAC box was removed, and some leaves were found inside. He said, "it is not uncommon for some leaves to get by the filter," which could cause an odor, especially when the leaves get wet and stay wet. The leaves were removed, and an odorless antimicrobial soap was used to hand-wash the box. In the Manufacturer's view, a good faith effort was made to resolve the Consumer's

complaint about the air conditioner odor, but "mold comes from outside; it's everywhere," and it was not a defect because "it is an environmental condition," and "that is something that the Manufacturer can't stop."

A majority of the Board concluded that the evidence established that the mold/musty odor emanating from the HVAC system substantially impaired the use of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Price v. Toyota Motor Sales, U.S.A., Inc., 2020-0146/FTL (Fla. NMVAB December 23, 2020)

The Consumer complained of poor fuel economy in his 2018 Toyota Camry. The Consumer testified that after driving the vehicle for three or four months, he observed that he was getting poor fuel economy and not achieving anywhere close to the EPA fuel economy posted on the vehicle by the Manufacturer. He stated that the Manufacturer advertised that the vehicle would get 22 miles per gallon city, 32 miles per gallon highway and 26 miles per gallon combined city/highway. The Consumer provided a data log of his commute to work on both city and highway roads between June 2018 and March 2019, which revealed that he was only able to achieve between 16-21 miles per gallon combined city/highway, in contrast to the 26 miles per gallon advertised by the Manufacturer. He explained that he relied on the miles per gallon displayed on the front dashboard of the vehicle and currently, he cannot achieve more than 19-20 miles per gallon combined city/highway. He lamented that the vehicle's poor fuel economy was costing him more money in fuel than what he expected when he purchased the vehicle.

A majority of the Board found that the evidence established that the poor fuel economy substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

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

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Smith v. General Motors, LLC, 2020-0136/WPB (Fla. NMVAB December 8, 2020)

On February 5, 2020, the Consumer sent written notification by certified mail to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. Although they did not receive the signed "green card" back from the United States Postal Service (USPS), the Consumer did track delivery on the USPS's website and submitted into evidence a one-page delivery confirmation printout that showed that the mailed item was "delivered" at 1:16 PM on February 10, 2020. The tracking number on the delivery confirmation printout matched the tracking number listed on the USPS certified mail receipt and matched the tracking number on the envelope that the notification was mailed in. The Manufacturer did not contact the Consumer after delivery of the written notification.

The Manufacturer asserted they did not receive written notification of the need to perform a final repair attempt pursuant to Section 681.104(1)(a), Florida Statutes; and the alleged defects or conditions do not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that General Motors, LLC, never received the Consumer's written notification pursuant to Section 681.104(1)(a), Florida Statutes, for the subject vehicle. In support of that defense, she argued that the Consumer never received the signed "green card" back from the USPS. She also argued that the zip codes on the delivery tracking page and the original envelope containing the written notification did not match and upon further inquiry, she ascertained that other employees at General Motors, LLC, were unable to locate the Consumer's written notification. She stipulated that the address where the Consumer sent the written notification was the Manufacturer's correct address and that the USPS tracking number on the envelope matched the USPS tracking number on the delivery tracking page.

Section 681.104(1)(a), Florida Statutes, requires:

> After three attempts have been made to repair the same nonconformity, the consumer shall give written notification, by registered or express mail, to the manufacturer, of the need to repair the nonconformity to allow the manufacturer a final attempt to cure the nonconformity. The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the consumer's receipt of the response. The manufacturer shall have 10 days, ... commencing upon the delivery of the motor vehicle to the designated repair facility by the consumer, to conform the motor vehicle to the warranty. If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

The Manufacturer stipulated that the address used by the Consumer on the written notification was the correct address. The Consumer submitted evidence that, according to the USPS tracking system, the written notification was "delivered" on February 10, 2020. The tracking number on the USPS tracking delivery confirmation matched the tracking number on the envelope containing the written notification. Based on the foregoing, a majority of the Board concluded that the Consumer sent written notification to the Manufacturer by certified mail on February 5, 2020, pursuant to Section 681.104(1)(a), Florida Statutes, and that the Consumer has met their obligation to provide notification to the Manufacturer, as required in Section 681.104(1)(a), Florida Statutes. The third Board Member found the Manufacturer failed to meet its burden, in the face of the Consumer's evidence, to show that the notice was not received, therefore finding for the Consumer on that issue as well.

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.

Ramazio v. Tesla Motors, Inc., 2020-0116/WPB (Fla. NMVAB November 6, 2020)

The Consumer complained of the battery failing to charge to 240-mile range in his 2019 Tesla 3. The Consumer testified that, at the time of the vehicle purchase, he paid an extra $2,500.00 fee to upgrade the vehicle's battery from a 220-mile range to a 240-mile range. He testified that he has never gotten the battery to reach the full 240-mile range, even when fully charged at 100%. According to him, the mile range has topped out at 232 miles. He added that a factor in purchasing the vehicle was being able to drive from his home in Boca Raton to Orlando without having to charge the vehicle on the way, a trip he estimated being approximately 180-200 miles.

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 the 240-mile range that the Consumer was expecting was merely an estimate by the Environment Protection Agency, which tests like-model vehicles. He explained that there was an algorithm engineered by Tesla which utilized numerous factors that set the actual mile range to which the battery will charge. In addition, he testified that there will be some battery degradation, especially in the first few months of vehicle ownership. He added that data for the vehicle's batteries was reviewed remotely at Tesla's office in California and in person at the Tesla repair facility in Florida. According to him, no one at either Tesla location was ever able to duplicate any problem with the battery and concluded that the vehicle's battery pack was in "good health."

The Board found that the evidence failed to establish that the battery failing to charge to 240 mile-range 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.

Grant v. Mercedes-Benz USA, LLC, 2020-0086/FTL (Fla. NMVAB November 30, 2020)

The Consumer complained of an intermittent interior rattle noise in his 2019 Mercedes-Benz E63s. The Consumer explained that he heard rattling noises inside his vehicle that seemed to come from different spots in the vehicle. He said that the noise was a squeaking or rattling noise and described it as sounding like "dit-dit-dit" when it occurred. He acknowledged that the noise cannot be heard over the radio. He stated that he was "very meticulous" about his vehicles and was concerned because during repair attempts the authorized service agent used felt tape in various places throughout the vehicle in an attempt to mitigate any noise.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative explained that felt tape was used to reduce noise where one surface meets another and that all Mercedes-Benz vehicles have felt tape applied during the manufacturing process to reduce any potential noises. He advised the Board that when he rode in the vehicle at the final repair attempt, the only noise he heard was a creaking from the door seals. He stated that he had the door, trunk and sunroof

seals lubricated and that the lubrication of the seals resolved the noise. He explained that lubricating seals is a maintenance issue which was sometimes necessary if the seals are cleaned or become dried out. He stated that he made an effort to address any noise that he could find, no matter how minor, and as a result felt tape was applied to the "grab handles," and an umbrella was moved from the cargo carrier. He stated that any noises that may still be present in the vehicle were "trivial." He advised that all repair efforts were made simply to try to "optimize" the noise level in the vehicle. He expressed that in his opinion, after all the efforts that have been made to reduce any noise, the Consumer's vehicle was now the quietest vehicle in Florida.

The Board found that the evidence failed to establish that the intermittent interior rattle noise 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.

Tazhibov v. Mitsubishi Motors North America, Inc., 2020-0106/PEN (Fla. NMVAB December 11, 2020)

The Consumer complained of a squeaking noise from the front of the vehicle when driving over speed bumps in his 2018 Mitsubishi Mirage. The Consumer said that when he drove quickly over a bump the noise only lasted for a short period of time. He described the noise as sounding like something rubbing against something else and that it seemed to come from the right front of 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 involved with the vehicle at the final repair attempt on February 25, 2020. He stated that he was told that the authorized service agent had been unable to find any noise but had made a variety of repairs in an effort to address any possible reason for a noise. He said that he personally drove the vehicle for 10 miles at the final repair attempt but did not hear any noise. He explained that he intentionally drove over bumps, up and down a ramp and a variety of other driving conditions to try to recreate the noise but was unable to do so. He stated that he then contacted the Consumer and asked him to come to the authorized service agent so they could drive the vehicle together and he could demonstrate the noise. They drove together for 10-15 minutes over gravely surfaces, ramps and a variety of other conditions but the Consumer was unable to duplicate the noise. The Consumer then drove the vehicle to a neighboring car dealership that had "5 mile per hour" speed bumps in their lot and was able to demonstrate the noise under that specific condition. Although no problem was found with the vehicle that could have caused the noise to occur, in an abundance of caution the entire strut assembly was then replaced. He asserted that, based upon the repair history and his own experience with the vehicle, the noise did not occur under normal driving conditions. He further stated that when the noise did occur, it was a very minor and brief squeak or creak.

The Board found that evidence failed to establish that the noise from the front of the vehicle 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.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

McGinn v. Jaguar Land Rover North America, LLC, 2020-0041/WPB (Fla. NMVAB November 12, 2020)

The Consumer's 2017 Land Rover Discovery Sport was declared a "Lemon" by the Board. The Consumer requested reimbursement of the following as incidental charges: $1,029.67 for a new cellular telephone, $20.00 for a cellular telephone vehicle charger, $2,261.84 for the monthly payments on the 2020 Honda Civic she leased to replace the subject vehicle, and $346.00 for the increased cost to insure both the 2020 Honda Civic and the subject vehicle.

The Board found that the award shall include reimbursement of the following as reasonable incidental charges: $2,261.84 for the monthly payments on the 2020 Honda Civic she leased to replace the subject vehicle, and $346.00 for the cost of the insurance between the 2020 Honda Civic and the subject vehicle. The Consumer's request to be reimbursed for a new cellular telephone and for a cellular telephone vehicle charger were denied by the Board. §681.102(7), Fla. Stat.

Rozo v. Ford Motor Company, 2019-0450/MIA (Fla. NMVAB October 30, 2020)

The Consumer's 2019 Ford F150 was declared a "Lemon" by the Board. The Consumer requested reimbursement of the following as incidental charges: $450.00 for a rental car from May 7 – 22, 2019; $10.85 for postage to the Lemon Law Arbitration Program; $10.85 for postage to BBB/Autoline; $21.70 for postage to the Lemon Law Arbitration Program; $6.85 for postage to Ford; $6.85 for postage to a Ford dealership; $6.05 for postage to various authorized service agents requesting copies of repair orders; $0.55 for postage to Ford Motor Credit; $8.44 for postage to Ford; $7.00 for postage to Parks Ford; and $2,770.63 for Uber charges. The Manufacturer objected to the $6.85 postage charge to a Ford dealership, the $6.05 postage to various authorized service agents, the $0.55 postage to Ford Motor Credit, the $8.44 postage to Ford, and the $7.00 postage to Parks Ford on the basis that those charges were not "required" charges under Chapter 681, Florida Statutes. Concerning the $2,770.63 in Uber charges, the Consumer testified that he utilized Uber whenever he thought the vehicle was "not operable," regardless of when it was in for repair. The Consumer further testified that his girlfriend worked for a local Ford dealership and provided him with vehicles to drive. In response to Board questions, the Consumer was unable to provide any factual testimony as to why he paid for Uber charges during the time period that he had a rental vehicle for which he was also requesting reimbursement. Although the Manufacturer initially objected only to Uber charges that were not specifically associated with a repair attempt, or that were incurred while the Consumer had a rental car or a loaner vehicle, after the Consumer's testimony the Manufacturer amended its objection to include all Uber-related charges.

The Board found that the award shall include reimbursement of the following as reasonable incidental charges: $450.00 for a rental car; $10.85 for postage to the Lemon Law Arbitration Program; $10.85 for postage to BBB/Autoline; $21.70 for postage to the Lemon Law Arbitration Program; $6.85 for postage to Ford; $6.85 for postage to a Ford dealership; $6.05 for

postage to various authorized service agents requesting copies of repair orders; $0.55 for postage to Ford Motor Credit; $8.44 for postage to Ford; and $7.00 for postage to Parks Ford. A majority of the Board denied the Consumer's request for $2,770.63 for Uber ride share charges, finding that the greater weight of the evidence did not support the Consumer's assertion that the charges were directly caused by the nonconformity. The Manufacturer's objections to the various postage charges were rejected. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Rozo v. Ford Motor Company, 2019-0450/MIA (Fla. NMVAB October 30, 2020)

The Consumer's 2019 Ford F150 was declared a "Lemon" by the Board. The Consumer requested reimbursement of the following as collateral charges: $2,021.23 for a "Roll N Lock"; $491.03 for various automobile accessory items purchased for the vehicle from Parks Ford, more specifically a dashboard camera, a sunshade, a hitch and ball, "wheel" nut covers, and an additional item listed as "net asy"; $64.49 for a truck bed net; $299.92 for installation of a dashboard camera; $34.95 for a "Ford Performance" license plate frame; $14.34 for a "Ford" hitch cover cap; $42.77 for a tow recovery strap; and $59.97 for a gun mount and "bullet antenna." The Manufacturer objected to reimbursement for the hitch and ball, the license plate frame, the hitch cover cap, the tow recovery strap, the gun mount, and the "bullet antenna" on the basis that these items can all be easily removed from the vehicle and used with a future vehicle.

A majority of the Board concluded that the award shall include reimbursement of the following as reasonable collateral charges: $2,021.23 for a "Roll N Lock"; $491.03 for the various automobile accessory items purchased for the vehicle from Parks Ford; $64.49 for a truck bed net; $299.92 for installation of a dashboard camera; $34.95 for a "Ford Performance" license plate frame; $14.34 for a "Ford" hitch cover cap; $42.77 for a tow recovery strap; and $59.97 for a gun mount and "bullet antenna." The Manufacturer's objections were rejected. §681.102(3), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Rivera and Rivera Jr. v. Mazda Motor of America, Inc., 2019-0514/WPB (Fla. NMVAB October 2, 2020)

The Manufacturer's Answer was due to be filed on February 6, 2020, but was not filed until February 14, 2020. 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 the hearing, the Manufacturer asserted that he experienced confusion regarding the filing deadlines because the Consumers' case was his first participation with the Florida Attorney General's Office. The Consumers objected to the untimely Answer being considered by the Board. Upon consideration, the Manufacturer's Answer was not accepted, and the Manufacturer was not permitted to present evidence in support of its defenses

Khan v. American Honda Motor Company, 2020-0118/TPA (Fla. NMVAB December 11, 2020)

Prior to the hearing, the Manufacturer filed a Motion to Dismiss, alleging that the Consumer's case should be dismissed because it was not timely filed. 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 . . ." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." In this case, the date of delivery of the vehicle was January 24, 2018, and the Consumer filed the Request for Arbitration with the Board on March 25, 2020. At the outset of the hearing, the Manufacturer argued that the Lemon Law rights period expired on Friday, January 24, 2020, and that the filing deadline in this case was therefore March 24, 2020; as a result, the Consumer's Request for Arbitration was filed one day late and the case should be dismissed. In response, the Consumer asserted that all Lemon Law time requirements and deadlines, including but not limited to consumer deadlines for filing cases with the Board, were stayed, suspended and tolled, pursuant to Board Emergency Order 20-002, issued by the Board on March 20, 2020; therefore, the Consumer's case was timely filed while the stay was in effect. Board Emergency Order 20-002 was issued following the Governor of the State of Florida's issuance of a declaration of public health emergency, as set forth in Executive Order 20-52 dated March 9, 2020, in response to the emergence of the COVID-19 virus. Board Emergency Order 20-002 provides in pertinent part that, "pursuant to the authority granted by Executive Order 20-52: 1. Retroactive to and including March 9, 2020, until and through the date of expiration of Executive Order 20-52, including any extension thereof, all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED, SUSPENDED and TOLLED." Thereafter, on October 27, 2020, the Board issued Board Emergency Order 20-006, which provided in pertinent part that, "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." Upon consideration, the Board concluded that the Consumer's case was timely filed on March 25, 2020, while the Stay Order was in effect, and denied the Manufacturer's Motion to Dismiss.

Little v. Mercedes-Benz USA, LLC, 2020-0256/JAX (Fla. NMVAB December 23, 2020)

Prior to the hearing, the Manufacturer filed a "Brief in Support of Defendant Mercedes-Benz USA, LLC's Motion to Dismiss Proceedings." The Manufacturer asserted that the current proceeding should be dismissed because the Consumer was bound by a federal court judgment approving settlement in a class action lawsuit, and that the Consumer's continued pursuit of her Lemon Law claim was in violation of that judgment. Having reviewed the pleadings and heard arguments from the parties, upon consideration, Mercedes' Motion was denied by the Board.

The Manufacturer also argued that the Consumer's case should be dismissed because it was not timely filed with the Florida New Motor Vehicle Arbitration Board. Section 681.109(4), Florida Statutes, states that "[a] consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later." The Lemon Law rights period is defined under 681.102(9), Florida

Statutes, as "the period ending 24 months after the date of original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board had to first calculate 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 took place on Wednesday, February 21, 2018. The expiration of the Lemon Law rights period, "the period ending 24 months after the date of original delivery of a motor vehicle to a consumer," was Thursday, February 20, 2018. To then calculate the 60-day filing deadline, the Board looked to *Board Emergency Order 20-002*, entered on March 20, 2020 but retroactive to March 9, 2020 which states "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED and SUSPENDED." The Board then looked to Board Emergency Order 20-006, entered on October 27, 2020 which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." Applying the two Board Emergency Orders, the 60 days to file were stayed and suspended on March 9, 2020 until they resumed on November 11, 2020, making the Consumer's Request for Arbitration, filed on July 21, 2020, timely filed. The Manufacturer's assertion to the contrary was rejected by the Board.