OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2009 - December 2009 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Fantasy Flooring Inc. v. Chrysler Group LLC, 2009-0349/FTL (Fla. NMVAB December 1, 2009)
The Consumer purchased a new 2008 Dodge Ram 2500 pickup truck and in his Request for Arbitration, indicated that the vehicle was not purchased in Florida and listed Russwood South, in Crete, Nebraska, as the selling dealer. However, during the hearing the Consumer testified that he found the vehicle online on Ebay.com and at no time did he ever leave South Florida to complete the purchase of the subject vehicle and that every part of the purchase and finance transaction was done via UPS to and from his Florida address. He added that he did not pay sales tax in Nebraska but did pay sales tax once the vehicle was delivered to Florida. The Consumer paid $7.00 to title the vehicle in Nebraska prior to its delivery in Florida and further testified that he did recall seeing the original certificate of title being from the State of Nebraska. The Consumer received the Nebraska Lemon Law booklet and had to go to the Florida Chrysler dealer to get a copy of the Florida Lemon Law booklet. The Manufacturer asserted the Consumer was not qualified for repurchase relief because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. The Manufacturer's representative argued that the purchase order for the vehicle as well as the finance agreement originated from Nebraska. The Manufacturer further contended that the sale of the vehicle could not be completed until the buyer's order and finance agreement reached Nebraska and therefore it was not purchased in Florida. The Board concluded that the vehicle was not sold in Florida; therefore, the Consumer's case was dismissed.

Defect First Reported During the Lemon Law Rights Period §681.103(1), F.S.

O'Neal v. Mitsubishi Motors North America Inc., 2009-0252/FTM (Fla. NMVAB October 30, 2009)
The parties stipulated that the Consumer purchased a new 2006 Mitsubishi Raider on May 18, 2007. The Consumer and his girlfriend testified that the Consumer contacted Palm Mitsubishi on May 18, 2009, and reported an engine problem. The Consumer testified that, several days later, when he arranged to have the truck towed to the authorized service agent, the engine was running. The Manufacturer contended that the Consumer's claim should be dismissed because the defect was not first reported during the Lemon Law rights period. The Service Manager at O'Brien Mitsubishi, at first confused about the actual date, later testified that he spoke with the Consumer regarding the defective engine on May 22, 2009. Although O'Brien Mitsubishi did not do any

work on the vehicle, he saw a hole in the engine block on the driver's side. The Parts Manager at Palm Mitsubishi testified that he spoke with the Consumer for the first time on May 23, 2009, regarding transfer of the vehicle to Palm Mitsubishi for repair of the defective engine. Section 681.102(10), Florida Statutes, establishes the "Lemon Law rights period" as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." In order to qualify for relief under the Lemon Law, a consumer must first report a nonconformity or nonconformities to the Manufacturer or its authorized service agent during the Lemon Law rights period. §681.103(1), Fla. Stat. The Manufacturer's assertion that the Consumer did not first report the defective engine nonconformity during the Lemon Law rights period was rejected by the Board. The Consumer's Lemon Law rights period expired on or about May 18, 2009, the date 24 months after the date of the original delivery of the vehicle to the Consumer. While there was conflict in the testimony regarding the date the Consumer first reported the nonconformity, the Board found more credible the Consumer's testimony that he reported the nonconformity on the date that it first occurred, May 18, 2009, which was within the Lemon Law rights period.

NONCONFORMITY 681.102(16), F.S.

Linus Fla. LLC v. BMW of North America LLC, 2009-0301/FTL (Fla. NMVAB November 3, 2009)
The Consumer complained of a malfunctioning I-drive system in his new 2008 BMW 535i. He testified that the I-Drive screen in his vehicle controls the bluetooth, radio and navigation system. The I-Drive screen would intermittently blank out, disabling the radio, bluetooth or SOS button which summons emergency help from BMW. The Manufacturer contended that the alleged defect does not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness, testified that the Consumer's complaint with the I-Drive system was a software problem and not an electrical problem. He further testified that the Manufacturer fixed the software problem that was causing the I-Drive screen to intermittently blank out when it reprogrammed and recoded the entire vehicle. He also testified that he inspected the vehicle when it came in for the final repair attempt, and found no faults or problem with the I-Drive software at that time. The Board concluded that the malfunctioning I-Drive system was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity. Accordingly, the Consumer was awarded a refund.

O'Neal v. Mitsubishi Motors North America Inc., 2009-0252/FTM (Fla. NMVAB October 30, 2009)
The Consumer complained of a defective engine in his 2006 Mitsubishi Raider. The Consumer testified that the vehicle began making a loud tapping sound from under the hood as he drove home from a doctor's appointment. He thought the sound was possibly caused by a belt, so he got out and checked under the hood, but did not see anything amiss. As he continued driving to his home, which was nearby, he saw smoke coming from the vehicle. Once he arrived at home the Consumer asked his neighbor to look at the vehicle. At the hearing, his neighbor testified that when he started up the engine, he heard what sounded like an engine rod to him, and he then observed a hole in the side of the engine. The Consumer denied that he operated the vehicle under circumstances that would have caused the engine to ingest water. In its Manufacturer' s Answer

filed prior to the hearing, the Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of accident, abuse or neglect by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer asserted that the engine seized as a result of water intrusion caused by accident, abuse or neglect by the Consumer. The Manufacturer's witness testified that he inspected the vehicle in response to receipt of the defect notification form from the Consumer. After he drained the oil and found water in it, he steered the Consumer to his insurance company. The witness acknowledged that the vehicle did not show any other signs of water intrusion or water damage. The Board concluded that the defective engine was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. The Manufacturer's evidence was found to be insufficient to support its affirmative defense. 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.

De La Torre v. BMW of North America LLC, 2009-0287/FTL (Fla. NMVAB October 23, 2009)
The Consumer complained of an intermittent shudder and hesitation in his new 2007 BMW 328i. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent shudder and hesitation on May 19, 2008, when no faults were found and no repairs were made, and on July 6, 2009, when the vehicle's software was updated. The Manufacturer, through its counsel, argued that it was not given a reasonable number of attempts to correct the problem, if one existed. The alleged intermittent shudder and hesitation was only presented for repair on two occasions. Under the circumstances, the Board found that was not a reasonable number of attempts as contemplated by the statute. The Board declined to rule as to whether the complaint constitutes a "nonconformity" as defined by Section 681.102(16), Florida Statutes. The Consumer's case was dismissed.

Charles v. General Motors Company, Buick Division, 2009-0384/FTL (Fla. NMVAB December 15, 2009)
The Consumer complained that the handle to the door on the glove compartment fell off and the door would not stay closed, causing everything in the glove box to fall out in his 2007 Buick LaCrosse. In addition, the light in the glove box stayed on when the door was open, so the Manufacturer's authorized service agent put tape on the glove compartment door to hold it closed so it would not drain the battery. A new glove compartment handle and door were on order, but each time the Consumer called or went to the Manufacturer's authorized service agent, he was told it would be another month before the parts were available. According to the Consumer, he was told the parts would not be in until at least June, and it was suggested he should go to a junkyard or a "side" mechanic to get a new glove handle and door. The Consumer went to an independent shop and was able to get the parts and paid for them himself. The evidence established the nonconformity with the glove compartment door was a defect the Manufacturer's authorized service agent did not repair, because the parts were not available from the supplier.

Yet, upon direction from the service agent, the Consumer was able to acquire the needed parts himself. Under the circumstances, the Board found that was not reasonable and awarded the Consumer a refund.

Final Repair Attempt §681.104(1)(a), F.S.; §§681.104(1)(a), 681.104(3)(a)1., F.S.

Martinez v. American Honda Motor Company, 2009-0352/FTL (Fla. NMVAB December 1, 2009)
The Consumer complained of a loud squealing noise when turning left or right in his 2007 Honda Civic, which the Board found to be a nonconformity. On March 13, 2009, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the Manufacturer identified the problem and tried to repair the vehicle; however, it was unable to perform the repairs, because the Consumer called the repair facility and asked that all repairs on his vehicle to be stopped immediately. At the hearing, the Consumer and his wife testified that they ordered the final repair stopped because they believed they were going to be charged for the repair. The Manufacturer contended it was denied its final opportunity to repair the vehicle. The Manufacturer's witness testified that, during a test drive of the vehicle with the Consumer's wife at the final repair, he noticed the vehicle pulling to one side and also noticed the loud squeak noise when turning right or left. He placed the vehicle on a lift and noticed damage to the bumper and also noticed the plate on the ball bearing was causing the noise he experienced upon turning right or left. He pointed out to the Consumer's wife that the plate on the ball bearing was causing the noise and told her the Manufacturer would make that repair without charge. When he inquired about the damage to the bumper, the Consumer's wife advised him that she had run over a tire on the highway causing the damage. Apparently, a misunderstanding occurred when the dealer gave the Consumer an estimate of how much it would cost to repair the damage to the bumper. The Board found that the Manufacturer responded to the Consumer's written notification in a timely manner and the vehicle was presented for the scheduled final repair attempt. Diagnosis by the Manufacturer confirmed the existence of the nonconformity and the Manufacturer was ready and willing to attempt a repair; however, the Consumer prevented the Manufacturer from completing the final repair. Consequently, it was concluded that the Manufacturer had not yet had a reasonable number of attempts to correct the nonconformity and the case was dismissed.

Scott v. American Honda Motor Company, 2009-0324/JAX (Fla. NMVAB November 5, 2009)
The Consumers' 2008 Acura RL had a transmission nonconformity that manifested itself in rough shifting, gears slipping, and the vehicle jumping out of gear. On August 4, 2009, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on August 7, 2009. The Manufacturer did not contact the Consumers until August 21, 2009, 14 days after receipt of the Consumers' notification. Since the Manufacturer failed to respond within the 10 days required by statute, the Board concluded that the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply and the Consumers were awarded a refund.

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

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

Brewer v. Mitsubishi Motors North America Inc., 2009-0351/PEN (Fla. NMVAB December 1, 2009)
The Consumer complained of the engine overheating in her 2008 Mitsubishi Endeavor. The Consumer testified that, while she and her husband were driving the vehicle in Tennessee during a return trip to Florida, the air conditioner stopped working. They attempted to drive home the next day; however, while driving on the Interstate, the "Service Engine" warning light illuminated followed by a loud noise, the engine overheated and stalled. The vehicle was towed to Pete's Auto Service who then towed it back to the Manufacturer's authorized service agent in Pensacola. At the hearing, the owner and technician of Pete's Auto Service, testified that he inspected the vehicle after it was towed to his shop. He noticed the radiator hose had blown off. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of an accident by persons other than the Manufacturer or its authorized service agent. At the hearing, the Manufacturer's representative testified that he inspected the radiator that had been on the Consumer's vehicle. The radiator had been in a parts bin located at the Manufacturer's authorized service agent. According to the representative, the lower part of the radiator had two nicks in it, which would cause a leak. He believed the nicks were caused by road debris coming up under the vehicle and hitting the radiator; not due to a manufacturing defect. The damaged radiator resulted in the power train control module shutting the vehicle's air conditioning system down to prevent damage to it, as well as the engine overheating and the radiator hose coming off the vehicle. The Board concluded that the engine overheating was the result of an accident by someone other than the Manufacturer or its authorized service agent. Specifically, that the nicks in the vehicle's radiator were the cause, and the nicks were most likely caused by road debris hitting the lower portion of the radiator. Accordingly, the radiator leak and resulting engine failure did not constitute a nonconformity as defined by the statute and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Santos v. Mazda Motors of America Inc., 2009-0363/ORL (Fla. NMVAB November 22, 2009)
The Board found the Consumers' 2007 Mazda 3 to be a lemon. The Consumer requested $35.98 for rental car insurance as an incidental charge. The Board granted the request and awarded the rental car insurance reimbursed to the Consumer.

Reasonable Offset for Use §681.102(20), F.S.

Armor Glass 1 Inc. v. Chrysler Group LLC, 2009-0150/WPB (Fla. NMVAB December 16, 2009)
The Board found the Consumer's 2007 Dodge Ram 2500 to be a lemon and awarded the Consumer a refund. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumer up to May 21, 2009, the date the claim was stayed as a result of the

bankruptcy of Chrysler LLC, was 62,305 miles. The Manufacturer argued the Consumer should be charged for the miles driven after the stay was lifted which was approximately July 17, 2009, through October 29, 2009, when the Board continued the hearing on its own motion. The Consumer countered it was never put on notice of such request, and thus was not accorded the option of not putting additional miles on the vehicle. The Board denied the Manufacturer's request and used the mileage up to May 21, 2009.

Gonzalez v. Ford Motor Company, 2009-0380/TPA (Fla. NMVAB December 18, 2009)
The Board found the Consumer's 2008 Ford Taurus to be a lemon and awarded the Consumer a refund**.** For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumer up to the date of the BBB proceeding was 7,232 miles. The Manufacturer objected to the mileage utilized for calculation of the offset, and asserted that the Board should utilize the mileage at the time of the final repair attempt as the Consumer was "not eligible" for consideration of his claim by the BBB, because he had not yet had a final repair attempt when he filed his claim. The Manufacturer's assertion was rejected.

MISCELLANEOUS PROCEDURAL ISSUES:

Santos v. Mazda Motors of America Inc., 2009-0363/ORL (Fla. NMVAB November 22, 2009)
The Manufacturer sought to assert the affirmative defense that 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 defense was not raised in the Manufacturer's Answer or any subsequent amended Answer. Pursuant to *Paragraph (8), Hearings before the New Motor Vehicle Arbitration Board*, any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer filed within the prescribed time periods may not be raised at the hearing, except as otherwise permitted by the Board. The Consumer objected due to her inability to prepare for the defense. Upon consideration, the Manufacturer was not permitted to raise the affirmative defense at the hearing.

Creel v. Kia Motors America Inc., 2009-0329/TPA (Fla. NMVAB November 3, 2009)
The Manufacturer submitted to the Consumer documents, a DVD and a prehearing inspection report, all of which was information gathered at the Manufacturer's prehearing vehicle inspection, less than seven business days prior to the hearing. The Manufacturer's counsel argued that the Consumer should not be surprised by the documents since she was present at the prehearing inspection. Paragraph (16), *Hearings Before the New Motor Vehicle Arbitration Board*, states in pertinent part: "All information gathered as a result of the prehearing inspection will be provided to the consumer **in writing** as soon as it is available, but no later than ***7 business days*** before the date of the hearing. If the manufacturer fails to provide the information to the consumer as required, evidence or testimony related to the vehicle inspection may not be considered by the board at the hearing." The information was not timely received; therefore, it was not considered by the Board.