OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2009 - March 2009 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Barrett and Baker v. Ford Motor Company, 2008-0624/FTL (Fla. NMVAB February 27, 2009)
The Consumers purchased a new 2008 Ford F-450 truck. One of the Consumers was the owner of a company that transported vehicles from south Florida to the northeastern USA using the 2008 Ford F-450 truck which was the subject of the claim. That Consumer testified that he typically transported three vehicles using a fifth-wheel trailer attached to the truck, and that most of the approximately 65,000 miles on the vehicle at the time of the hearing were incurred after he started transporting vehicles to the Northeast. The hitch of the fifth-wheel trailer was attached inside the cargo bed of the truck. The Consumer approximated the weight of the trailer, without any cargo added, to be 4,000 pounds. During the Manufacturer's prehearing inspection of the truck, it was weighed with the driver in the vehicle, a quarter tank of fuel and the fifth-wheel hitch attached in the cargo bed. The vehicle weighed 9,120 pounds. The Manufacturer also submitted evidence showing one gallon of gasoline equaled 5.8 pounds. The vehicle had a fuel tank capacity of 40 gallons. The Manufacturer's witness testified that having a fifth-wheel trailer attached to a vehicle such as this one adds weight to the truck separate and apart from the weight of the trailer and cargo within the trailer. Specifically he testified that a percentage of the weight of the trailer and cargo is generally added to the gross weight of the truck itself. The Board found that the totality of the testimony and evidence presented in the case supported a conclusion that the gross vehicle weight of the truck exceeded 10,000 pounds. Since the gross vehicle weight exceeded the limit set forth in the statute, the truck was not a "motor vehicle" as defined by statute. Accordingly, the Consumers' case was dismissed.

NONCONFORMITY 681.102(16), F.S.

Sprague v. Mitsubishi Motors North America Inc., 2008-0656/FTL (Fla. NMVAB February 27, 2009)
The Consumer complained of a "pungent" odor emanating from the air conditioner vents when the air conditioner was turned on in her 2008 Mitsubishi Outlander. The Consumer testified that when the air conditioner was running in the outside air circulation mode, the odor that came from the vents smelled like a "cow pasture." When the air conditioner was in the inside circulation mode, there was no odor, but her clothes got a "garage" odor. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. The Manufacturer's representative testified that, while the vehicle's cabin was not "air proof," the

Manufacturer was never able to detect an odor coming from the air conditioner vents. The Board found the problem to substantially impair the use, value and safety of the vehicle, thereby constituting a nonconformity. Accordingly, the Consumer was awarded a refund.

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
The Consumer complained of a defective electrical system in his 2007 Chevrolet Silverado. The Consumer testified that the cigar lighter fuse in the vehicle blew and on that day, he replaced the fuse with an extra fuse that was provided with the vehicle at the time of purchase. Two days later, the same fuse blew again while the vehicle was parked in the Consumer's driveway and resulted in a small fire under the hood of the vehicle, damaging many wires. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective electrical system on one occasion. At that time, the Consumer gave the blown cigar lighter fuse to a Service Advisor at the Manufacturer's authorized service agent. The Manufacturer contended that the alleged nonconformity was the result of an unauthorized modification of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer argued the alleged defect in the vehicle was caused by the Consumer replacing the blown cigar fuse in the vehicle with an "aftermarket" fuse or jumper and further contended that the blown fuse was not turned in to the service agent. A majority of the Board rejected the Manufacturer's assertion that the nonconformity was a result of an unauthorized modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. The Manufacturer produced no direct testimony from any employee who was present when the Consumer brought his vehicle in to refute the Consumer's testimony that he did provide the blown cigar lighter fuse to the service agent on that day. Accordingly, the Consumer was awarded a refund.

Scamard v. Nissan Motor Corporation USA, 2008-0627/TPA (Fla. NMVAB February 3, 2009)
The Consumer complained of a powertrain condition that caused the engine to be sluggish and the transmission to shift improperly in his 2006 Infiniti QX56. The Manufacturer asserted that the alleged nonconformity was the result of an unauthorized modification of the motor vehicle by persons other than the manufacturer or its authorized service agent. According to the Manufacturer's representative, the supercharger was the cause of the Consumer's complaints about the sluggish engine and improperly shifting transmission. While acknowledging that Infiniti of Tampa, the selling and servicing dealership which installed the supercharger on the Consumer's vehicle, was an authorized service agent of Nissan Motor Corporation USA, the Manufacturer argued that it should not be held accountable for this modification, which it did not authorize. Citing to the statutory definition of "nonconformity": "a defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent," the Board rejected the Manufacturer's assertion, since it was the Manufacturer's authorized service agent that installed the offending supercharger. 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.

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
The Consumer complained of a defective electrical system in his 2007 Chevrolet Silverado. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective electrical system on May 29, 2008. At that time, the Consumer's request to repair the vehicle was refused by the Manufacturer and its authorized service agent. 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; however, it did not contact the Consumer to schedule any further repair attempt. As of the date of the hearing, the defective electrical system in the vehicle had not been repaired. The Board found that, under the circumstances presented in the case, one repair attempt was sufficient to afford the Manufacturer a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumer was awarded a refund

Carter v. American Suzuki Motor Corporation, 2008-0580/ORL (Fla. NMVAB February 25, 2009)
The Consumer complained of a gear shifter problem in her 2007 Suzuki XL7. The Board found the problem substantially impaired the use, value and safety of the vehicle, and as such, constituted a nonconformity. The evidence established that the Manufacturer was given a total of four opportunities to repair the gear shifter nonconformity, two such attempts occurring after the Manufacturer's receipt of written notification of the defect from the Consumer, and the nonconformity was not repaired. Under the circumstances in this case, the Board found the Manufacturer had a reasonable number of attempts to repair the subject vehicle and failed to do so. Accordingly, the Consumer was awarded a refund.

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

Bermudez v. Chrysler LLC, 2008-0589/MIA (Fla. NMVAB January 16, 2009)
The Consumer complained that all four power windows were inoperable in his 2006 Jeep Liberty, which the Board found to be a nonconformity under the statute. The Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on October 27, 2008. On October 31, 2008, the Manufacturer responded to the Consumer and scheduled a final repair attempt for December 11, 2008. The Consumer did not appear on December 11th, because he did not believe the final repair was scheduled within a reasonable time after the Consumer received the Manufacturer's response, as the statute requires. The Manufacturer requested that the claim be dismissed on the grounds it did not have a final repair attempt. The Manufacturer's representative argued the Consumer never requested that the final repair be set for an earlier date, and when he did not show for the scheduled appointment, the Consumer never called to reschedule the final repair. According to the representative, the final repair was scheduled when it was probably because the

technical assistant who addressed those repairs was "busy"; nevertheless, it was the Manufacturer's contention that it was within a "reasonable" time. Section 681.104(1)(a), Florida Statutes, states, in part "…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 Consumer sent the required written notification to the Manufacturer; however, the Manufacturer's response failed to direct the Consumer to a repair facility for the final repair attempt within a reasonable time. Accordingly, the Board rejected the Manufacturer's contention that it was denied a final repair opportunity and concluded that a reasonable number of attempts was undertaken to conform the vehicle to the warranty. 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), F.S.

Rivera v. Land Rover of North America, 2009-0020/WPB (Fla. NMVAB March 16, 2009)
The Consumer complained of an air suspension malfunction, a transmission hesitation and a security alarm malfunction in his 2006 Land Rover LR3. The Board found all three problems substantially impaired the use, value and safety of the vehicle, and as such, were nonconformities. The Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification and thereafter the vehicle was inspected and diagnostic tests were performed by the Manufacturer and its authorized service agent for a total of three days. The Manufacturer contended that the three days it spent exercising its post-notice opportunity to inspect or repair the vehicle should not "count" as days out of service for purposes of application of the statutory presumption of a reasonable number of attempts. Florida Administrative Code Rule 2-30.001(2)(c), defines an "out-of-service day," in pertinent part, as, "Any day, including weekends and holidays, when the motor vehicle is left at an authorized service agent or manufacturer's designated repair facility for an examination or repair of one or more nonconformities." It was undisputed that the Manufacturer examined and performed diagnostic tests on the Consumer's vehicle for three days for the nonconformities. There was no other reason for the vehicle to have been out of service during that time. Accordingly, the Board rejected the Manufacturer's argument and concluded the vehicle was out of service for a total of 32 cumulative days. The Consumer was awarded a refund.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Wheeler v. Chrysler LLC, 2008-0509/FTL (Fla. NMVAB January 12, 2009)
The Consumer purchased a 2007 Dodge 3500 Quad cab pickup truck. The Consumer complained and the Manufacturer stipulated that a fuel system condition that caused the vehicle not to start was a defect or condition that substantially impaired the use, value or safety of the vehicle; therefore, the Consumer was awarded a refund. The Consumer requested reimbursement as

incidental charges of $2,900.00, which was the cost to repair an inoperable engine in a secondary vehicle that was necessary for transportation, and $1,452.96, which represented the amount the Consumer paid to maintain insurance on the lemon vehicle during the time he did not have use of it. The Manufacturer objected to both requests. The Board awarded the Consumer $2,900.00 for the cost of repairing the engine in the secondary vehicle; however, the request for reimbursement of the cost of insurance on the lemon vehicle was denied, because such cost was not directly caused by the nonconformity.

Duenas v. Chrysler LLC, 2008-0561/MIA (Fla. NMVAB February 6, 2009)
The Manufacturer stipulated that the Consumer's 2006 Jeep Commander had a wind noise coming from the dash when the vehicle was driven at high speed and that this was a defect or condition that substantially impaired the use, value or safety of the vehicle; therefore, the Consumer was awarded a refund. The Consumer requested reimbursement as an incidental charge of ongoing public transportation costs of $6.00 per day for each business day starting from the day after the hearing, until the replacement or repurchase of the vehicle. The Manufacturer objected to reimbursement of the public transportation charges. The Board awarded the Consumer the $6.00 per day as requested.

Net Trade-in Allowance §681.102(19), F.S.

Henderson v. Chrysler LLC, 2008-0586/TLH (Fla. NMVAB February 25, 2009)
The Board found the running gear vibration and noise, malfunctioning gauges and a transmission leak in the Consumers' 2007 Dodge Ram 2500 to be nonconformities and awarded the Consumers a refund. At the time of purchase, the Consumers traded in a 1985 Chevrolet Suburban with no existing lien. The purchase contract reflected a net trade-in allowance of $1,000.00, which was not acceptable to the Consumers. Because of the age of the trade-in vehicle, it was not listed in the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in. The Consumers provided a copy of a printout from the NADA website which listed the current high, average and low retail values for the vehicle from the NADA Classic Car Guide, and requested that the "average" retail value be awarded as the net trade-in allowance. The Manufacturer objected to the use of the NADA Classic Car Guide to determine the net trade-in allowance, arguing that Section 681.102(19), Florida Statutes, authorizes the Board to use only the NADA Official Used Car Guide (Southeastern Edition). The Manufacturer asserted that, because the Consumers' trade-in vehicle was too old to appear in that publication, the Board must award the net trade-in allowance reflected in the purchase contract. The Board rejected the Manufacturer's argument and awarded a net trade-in allowance of $3,019.00, which was the low retail value reflected in the NADA Classic Car Guide.

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

Henderson v. Chrysler LLC, 2008-0586/TLH (Fla. NMVAB February 25, 2009)
In addition to the net trade-in allowance summarized above, there was an issue in this case related to the statutory reasonable offset for use awarded to the Manufacturer. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the date of the hearing was 12,779 miles. The Consumers sought reduction of that mileage, asserting

that, during the course of repairs, they were instructed to "put mileage on the vehicle in order to make the problem go away." The Board rejected this contention.

MISCELLANEOUS ISSUES:

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
At the start of the hearing, the Board considered the Manufacturer's "Motion to Dismiss" the case, which asserted that the Board "lacked jurisdiction" to hear the claim. The Manufacturer argued that, because the Consumer's claim was premised on a fire that resulted in property damage, matters relating to causation, negligence, products liability and insurance were necessarily at issue in the case, and the Board was without jurisdiction to make findings on those issues. Citing to Section 681.1095(8), Florida Statutes, which states, "[t]he Board shall grant relief, if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities," the Board concluded that the case presented by the Consumer required the Board to make findings that there was a nonconformity for which a reasonable number of attempts was undertaken, matters well within its jurisdiction. Based upon the foregoing, the Board denied the Manufacturer's "Motion to Dismiss."

Scamard v. Nissan Motor Corporation USA, 2008-0627/TPA (Fla. NMVAB February 3, 2009)
The Consumer purchased a new Infiniti QX56 in Florida on July 22, 2008. The Consumer filed a claim with BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Nissan Motor Corporation. On October 28, 2008, the program declined to consider the Consumer's complaint on the grounds that it was without jurisdiction to do so. On December 1, 2008, the Consumer filed his request for arbitration by the Board. The Manufacturer contended that the Consumer's Request for Arbitration was not filed with the Board within 30 days after the final action by the BBB. The Board rejected the Manufacturer's contention that the Consumer's Request for Arbitration was untimely because it was not filed within 30 days of the final action by the BBB. Section 681.109(4), Florida Statutes, requires that the Request for Arbitration be filed no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days <u>after</u> the final action of a certified procedure, whichever date occurs later. In this case, the date 30 days after the final action of the BBB occurred on Thanksgiving Day, Thursday, November 27, 2008, a legal holiday. In addition, the day following Thanksgiving Day, Friday, November 28, 2008, was also a legal holiday. §110.117, Fla. Stat. (2008). Taking into account the intervening Saturday and Sunday, which were not included in the time computation, the Consumer's Request for Arbitration was timely filed if filed no later than Monday, December 1, 2008. Accordingly, the Manufacturer's request that the case be dismissed was denied.