OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2005 - March 2005 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer, a U.S. military service member on active duty who was stationed in North Carolina at the time of the hearing, was a resident of Florida, and was stationed in Korea at the time he began the process of purchasing this vehicle. He ordered the vehicle through the Overseas Military Sales Corporation, an authorized distributor for Ford Motor Company, through Ford's special program for military personnel stationed overseas. He took delivery of the vehicle and signed the Retail Installment Contract at Tropical Ford in Orlando, Florida, at which time he received the "Consumer Guide to the Florida Lemon Law," and a written, limited warranty from Ford Motor Company with a term of coverage applicable only to vehicles delivered in Florida and Puerto Rico. The Manufacturer argued the vehicle was not a "motor vehicle" under the statute because it was not sold in Florida. The Board rejected this contention, reasoning that the Consumer signed the purchase contract in Florida, took physical delivery of the vehicle in Florida, was given Florida's Consumer Guide to the Lemon Law, and a written warranty from Ford with a term of coverage applicable only to vehicles sold in Florida.

In addition, the Consumer was awarded a refund which included reimbursement for collateral charges of $622.18 for North Carolina vehicle sales taxes and licensing fees, and incidental charges of $9.25 for postage, and $103.41 for rental car insurance incurred while the vehicle was out of service for repair. Hotel expenses of $96.14 and $51.36 for fuel which were incurred for travel to this hearing from Fayetteville, North Carolina were also reimbursed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Rodriguez v. Isuzu Motors America, Inc., 2004-0899/MIA (Fla. NMVAB January 18, 2005).
The Consumers complained that the air conditioner stopped working one week after they took delivery of the vehicle, and it had not worked properly since then. The air conditioner blew cool air only when the vehicle was moving; it blew hot air when the vehicle was stopped or idling. The Manufacturer agreed the vehicle had a problem with the air conditioner not cooling

properly, but contended the problem was corrected with repairs that were made prior to the final repair attempt, and therefore no repairs were necessary at the final repair. Almost five months after the final repair, the air conditioner compressor had to be replaced. Accordingly, the Consumers were awarded a refund.

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

Ward v. American Honda Motor Company, 2004-0918/WPB (Fla. NMVAB January 20, 2005). The Manufacturer was scheduled to conduct the final repair attempt on September 29, 2004; however, due to conditions caused by the hurricanes, the Manufacturer's representative who was to conduct the final repair was unable to travel from Orlando to Delray Beach to do so. The Service Manager at the designated repair facility testified he offered to keep the consumer's vehicle at the dealership and provide the Consumer a rental car, but because the Consumer refused to pay the insurance charge for the rental, the Consumer was not given a rental. The Consumer would not agree to reschedule the final repair. At the hearing, the Consumer argued by not keeping the scheduled appointment, the Manufacturer waived its right to the final repair. A majority of the Board concluded the Manufacturer did not waive its final repair opportunity; rather, under the circumstances, the Manufacturer had not yet had a final opportunity to attempt to repair the alleged defect. The Board made no ruling as to whether or not the Consumer's complaint constituted a "nonconformity" as defined by the statute.

Marcelli v. Isuzu Motors America, Inc., 2004-0929/FTL (Fla. NMVAB January 12, 2005). After receiving written notification from the Consumer, the Manufacturer sent the Consumer a letter informing her where and when the final repair attempt would be held. The Consumer's attorney faxed a letter to the Manufacturer advising that the Consumer would be unable to attend the final repair at the designated authorized service agent. Rather, the Consumer asked that the final repair be conducted at an alternate location, but on the same date and time. The Manufacturer advised their representative would not be able to accommodate the Consumer's request as he had other appointments scheduled at the original location. The Manufacturer suggested an alternate date for the location the Consumer requested. No final repair was conducted. The Consumer argued by "refusing" to conduct the final repair on the original date at the location requested by the Consumer, the Manufacturer waived its right to a final repair. The Board found the attempts by the Manufacturer to arrange for the final repair at the facility preferred by the Consumer on a different date did not constitute a "waiver" of the final attempt, and dismissed the case.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair§681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

Williams v. Nissan Motor Corporation, USA, 2004-0927/WPB (Fla. NMVAB January 19, 2005). The Consumer complained the warning lights that indicate a brake failure continually came on. The Consumer testified that while the vehicle was out of service he asked that he be allowed to drive his vehicle until the brake parts on order arrived and the vehicle could be repaired. The Manufacturer's authorized service agent said the vehicle was unsafe to drive, and would not

release the vehicle to the Consumer unless he signed a waiver of liability, which he declined to do. The vehicle was out of service for a cumulative total of 44 days. The Consumer filed a claim with BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Nissan. The Manufacturer declined to arbitrate the Consumer's complaint and the Program did not require the Manufacturer to submit to arbitration. The Manufacturer did not appear at the Lemon Law proceeding, either. The Board found a reasonable number of attempts had been undertaken to conform the vehicle to the warranty, and further found the warning lights indicating a brake failure continually coming on was a defect that substantially impaired the use, value and safety of the vehicle.

Alfonso v. Ford Motor Company, 2005-0007/MIA (Fla. NMVAB February 22, 2005).
The Consumer complained the vehicle had a rough engine idle and stalling defect. The Consumer testified he brought the vehicle to the Manufacturer's authorized service agent at Midway Ford for the first four repair attempts, and took the vehicle to the Manufacturer's authorized service agent at Palmetto Ford for the fifth repair of the rough idle/stalling problem on November 22, 2004, where the vehicle remained, waiting for parts ever since. As of the day of the hearing, the vehicle had been out of service for a cumulative total of 106 days. At the hearing, the Manufacturer argued when it received the written notification from the Consumer, the vehicle had been out of service for less than 30 days, but the Consumer refused to accord it a "final repair." The Consumer relations Manager at Midway Ford testified the Manufacturer notified her of the impending Lemon Law proceeding on November 22, 2004, and asked her to contact the consumer to set up an appointment for a "final repair" to be held at Midway Ford. When she spoke with the Consumer he informed her the vehicle was at Palmetto Ford awaiting repairs. The Consumer relations Manager relayed the information to the Manufacturer. The Manufacturer never contacted the Consumer. The Board found the evidence established the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle after receipt of written notification, but failed to do so. The Consumer was awarded a refund.

DEFINITION OF NONCONFORMITY §681.102(16), F.S.

Scott v. General Motors Corporation, Chevrolet Motor Division, 2004-0971/TLH (Fla. NMVAB February 14, 2005).
The Consumers complained of a vibration and concurrent rattling or "rumbling" noise which appeared to emanate from underneath the vehicle, and which was most noticeable when the vehicle was driven at steady speeds between 45-60 miles per hour. After three repair attempts, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. At the hearing, the Consumer testified a person identifying themself as Ken Moneghan advised that the Manufacturer would not conduct a final repair, because there was no current definite fix for the vibration and concurrent rattling/rumbling noise. A witness for the Manufacturer testified that pursuant to a GM Technical Service Bulletin, the rear coil springs were replaced during a prior repair attempt, dampeners were installed on the exhaust system pipe and the exhaust system was realigned in an attempt to diminish the resonance. According to this witness, on a scale of one to 10, with 10

being the loudest, the resonance in the Consumers' vehicle was a "10" before the repair, and a "9" after the repair. The Board found the problem to be a nonconformity that was not corrected by the Manufacturer after a reasonable number of attempts. The Consumers were awarded a refund.

Lauda v. DaimlerChrysler Motors Corporation, 2005-0158/FTL (Fla. NMVAB March 16, 2005).
The Consumer testified approximately six weeks after he took delivery of the vehicle it developed an engine oil leak, and the engine continued to leak oil. The vehicle was taken to the Manufacturer's authorized service agent for repair of the oil leak six times and the following occurred: 1) the inner cooler charge tube was not sealed properly; 2) the Consumer was told it was "normal" for oil to "sweat" from the intake plenum; 3) no work performed; 4) the clamp on the left front turbo line was found to be leaking oil and residue was cleaned off the intercooler hose; 5) PCV valve replaced; and 6) residual oil seepage was found on the bottom hose. When the vehicle was presented to the manufacturer's designated repair facility for the final repair attempt, a slight amount of residual oil film was found at the turbo intercooler hose. The Consumer was told this was a "condition" that would occur during rapid acceleration and/or performance driving, and he must monitor the engine oil. When the Consumer brought the vehicle in for repair of the oil leak two weeks later, he was advised to install a custom "oil catch can" for the oil "overflow" problem. At the hearing, the Manufacturer testified it was "normal" for there to be "oil seepage, at times," and a slight amount of oil seepage was necessary to prevent an excessive amount of oil vapors from re-entering the engine. The Board concluded the engine oil leak was a defect or condition that substantially impaired the use, value and safety of the vehicle, and awarded the Consumer a refund, including reimbursement of the incidental charge of $79.00 for purchase of the "oil catch can."

Rule 2-30.001(2)(a), F.A.C., Definition of "Condition"

Bender v. Mercedes-Benz USA, Inc., 2004-0802/TPA (Fla. NMVAB February 9, 2005).
The Board concluded the intermittent rough idle which required the driver to apply throttle pressure to avoid an engine stall, the engine running rough at times during acceleration like the transmission was hanging up and not shifting, the transmission constantly searching for a gear, the vehicle going into "limp home" mode, and the intermittent illumination of the "check engine" warning light were evidence of a poor engine performance condition that substantially impaired the use and safety of the vehicle. The Board rejected the Manufacturer's contention there were two separate problems with the vehicle, the problem of the transmission not shifting, which the Manufacturer alleged was "cured" at the final repair attempt, and the rough idle problem, which the Manufacturer contended was not subjected to a reasonable number of repair attempts.

Mascellino v. Ford Motor Company, 2004-0946/ORL (Fla. NMVAB January 19, 2005).
The Consumers complained of a vibration in their Ford F150 pickup truck, which was felt in the vehicle's seats when driving at speeds of 45 to 60 miles per hour. The vibration was most severe when the vehicle maintained a speed of about 50 miles per hour, the speed at which the Consumers commonly drove. The Consumers owned several Ford F-150s in the past and had no complaints about the quality of the ride of those vehicles. There currently were two Ford Technical Service Bulletins ("TSB") addressing the vibration in the seats, but they had not yet been performed on the vehicle. One of the bulletins required the use of special equipment each time the vehicle's tires were rotated and balanced. The availability of the equipment was limited, and it would increase the cost of routine maintenance for the vehicle. The Board considered as evidence of substantial impairment the existence of the TSB which required special maintenance, and the Consumers' satisfaction with previously owned pickups, to overcome the Manufacturer's testimony the vibration was "normal" for a pickup.

Kuba v. Toyota Motor Sales, USA, Inc., 2005-0034/TPA (Fla. NMVAB February 24, 2005).
The Consumer complained of an intermittent squeak in the left front suspension which could be heard when the vehicle was traveling at speeds less than 20 miles per hour; road noise obscured the squeak at higher speeds. The Manufacturer's representative did not dispute the existence of the noise, but believed it was "repairable." A majority of the Board concluded the defect substantially impaired the value of the vehicle, reasoning that the Manufacturer's or its authorized service agent's inability to diagnose and repair the noise after nine attempts would cause a subsequent purchaser to pay less than full value for the vehicle. 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.

Early v. General Motors Corporation, Chevrolet Motor Division, 2004-0950/FTL (Fla. NMVAB January 26, 2005).
The Consumer complained the automatic window on the driver's side squeaked whenever it went up or down. The Consumer testified that on three occasions the Manufacturer's authorized service agent greased the window channels and each time the window stopped squeaking, but a month later the squeak returned. The Consumer said he was a smoker and drove with the windows down 25 percent of the time. The Manufacturer's witness argued there were no contaminants on any of the passenger side windows, but there was a film on the driver's side window. The witness explained the film on the driver's side window was caused by nicotine attaching to that window, and that contaminants were found on the window and in the window channel. The Manufacturer contended the problem with the window squeaking was due to poor maintenance. The Board inspected the window during the hearing. The windows on the vehicle were dirty, inside and outside, and a gray residue was observed inside the door panel. Further, when the windows were operated no objectionable noise was heard. The case was dismissed.

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

Ray v. DaimlerChrysler Motor Corporation, 2005-0028/ORL (Fla. NMVAB February 22, 2005). The Consumer complained of transmission failure because the transmission would not shift out of first gear. Two fault codes were identified so the transmission solenoid pack was replaced. Following the repair, a 92-mile test drive was conducted; the transmission operated properly. The Consumer continued to report problems with the transmission not shifting out of first gear and downshifting harshly. On one occasion when the vehicle was towed to the Manufacturer's authorized service agent, "event data" was retrieved showing the transmission had been placed in reverse, the brake depressed, and 85 percent throttle had been applied. The transmission fluid had reached a temperature of 340 degrees, and the engine coolant had reached 248 degrees, both of which were extremely excessive temperatures. At the hearing, the Manufacturer's witness testified the authorized service agents' inability to duplicate or diagnose a problem after the replacement of the transmission solenoid, coupled with the "event data" retrieved from the vehicle's computer, indicated the vehicle was subjected to "power braking," causing the transmission to overheat. The Manufacturer's representative conceded the first two repairs were legitimate problems with the transmission, but argued the transmission problems experienced thereafter were the result of abuse by persons other than the Manufacturer or its authorized service agent. The Board found the Manufacturer established by the greater weight of the evidence that the transmission problems complained of by the Consumer were the result of abuse by persons other than the Manufacturer or its authorized service agent and the claim was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Henry v. General Motors Corporation, Chevrolet Motor Division, 2005-0083/FTM (Fla. NMVAB March 10, 2005).
Included in the Consumer's down payment was $750.00 in the form of a "goodwill certificate" received from the Manufacturer in settlement of a class action lawsuit on a vehicle previously owned by the Consumer. A majority of the Board concluded the Consumer was entitled to a refund of $750.00 for the goodwill certificate. The goodwill certificate was not a purchase price reduction in the form of a rebate available to any purchaser; rather, it was personal to the Consumer to apply as a down payment toward the purchase of any General Motors vehicle of his choosing. He lost the value of the certificate because the vehicle he chose turned out to be a "lemon."

Pronto Auto Sales Corporation/Welcome Realty Corporation v. Mercedes-Benz USA, Inc., 2005-0061/MIA (Fla. NMVAB March 8, 2005).
Although the Consumer paid cash to purchase the vehicle, he did so by obtaining a home equity loan on which he made payments. The Consumer sought reimbursement of $5,124.92, which represented the interest paid on that loan. The Manufacturer objected. The Board granted the Consumer's request for reimbursement of the interest paid on the home equity loan that was attributable to the purchase of the vehicle.

Collateral Charges §681.102(3), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer, a U.S. military service member on active duty who was stationed in North Carolina at the time of the hearing, was awarded a refund that included reimbursement for collateral charges of $622.18 for North Carolina vehicle sales taxes and licensing fees**.** After taking delivery of the vehicle in Florida, his state of residence, the Consumer was transferred by the military to North Carolina.

Incidental Charges §681.102(8), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer was awarded incidental charges of $9.25 for postage, and $103.41 for rental car insurance incurred while the vehicle was out of service for repair. The Board rejected the Manufacturer's contentions that postage was "only" $4.42, and that the Board "universally" denies reimbursement for rental car insurance. Hotel expenses of $96.14 and $51.36 for fuel which were incurred for travel to the hearing from Fayetteville, North Carolina were also reimbursed over the Manufacturer's objections.

De La Rosa v. Ford Motor Company, 2004-1028/TPA (Fla. NMVAB February 17, 2005).
The Board awarded $143.88 paid by the Consumer for unreimbursed damage waiver and personal accident insurance on rental cars while the vehicle was undergoing repair. The Board rejected the Manufacturer's argument that rental vehicle insurance is not reasonable because it is "optional."

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005)**.**
The Consumers sought and were awarded reimbursement for the following disputed incidental charges: $2.88 for copies and $2.06 for faxes to send documents to BBB/AUTOLINE, the Manufacturer's sponsored informal dispute settlement mechanism to which the Consumers were required to resort prior to arbitration by the Board. The Manufacturer's argument that the Consumers could have filed the documents via the internet was rejected.

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

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005).
The Consumers were not satisfied with the $8,143.75 trade-in allowance reflected in the purchase contract. The Manufacturer provided a copy of the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, which indicated a retail price for the Consumer's trade-in of $22,775.00. A lien in the amount of $7,106.25 existed against the trade-in, resulting in a net trade-in allowance of $15,668.75. The Manufacturer argued the phrase "inclusive of any allowance for a trade-in vehicle" in the definition of "purchase price" found in Section 681.102(19), Florida Statutes (2003), means the purchase price for calculating the reasonable offset for use should be recalculated by the Board to include the "windfall" given to the Consumers when they "required" the Board to use the NADA retail price for the net trade-in

allowance. The Board reasoned the plain language of the definition of "purchase price," including the reference to the definition of "cash price" found in Section 520.31(2), Florida Statutes (2003), did not contemplate adjusting the purchase price utilized to calculate the reasonable offset for use because a party found the net trade-in allowance, as reflected in the purchase contract, to be an unacceptable means of determining the dollar amount to be refunded for the trade-in vehicle. The Board thus held the purchase price established by a seller and agreed to by a consumer at the time of sale to be the "purchase price" contemplated in Section 681.102(19), Florida Statutes (2003). In addition, the Consumers paid off the purchase price of the vehicle by taking out a home equity loan on which they had been making payments. The Consumers sought reimbursement of the interest paid on that loan. The Board denied that request.

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

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005). The Board rejected the Manufacturer's argument that, because consumers are "required" to provide manufacturers with a reasonable number of attempts to correct nonconformities, miles driven to and from the authorized service agent for repair constituted "miles attributable to a consumer" under the definition of the "reasonable offset for use" in Section 681.102(20), F.S. In reaching the amount of the offset, miles attributable to repair were not considered to be miles attributable to the consumer.

Heilman v. DaimlerChrysler Motors Corporation, 2004-0909/FTM (Fla. NMVAB March 17, 2005).
The Manufacturer did not dispute the merits of the Consumer's claim; rather, the parties were unable to agree to the mileage attributable to the Consumer as of the date of the hearing. The Consumer sought reduction of miles for the six trips she said she made to the Manufacturer's authorized service agent for repairs, and estimated it was 40 miles each way. The Manufacturer's representative testified he generated a "Mapquest" inquiry utilizing the Consumer's home address and the address to the service agent, which showed a distance of 7.64 miles one way, and a total of five trips. The Consumer also asked the Board to include the miles driven to Sears for an alignment, which she estimated to be 50 miles one way. The Board accepted the "Mapquest" results as more credible, and calculated the total miles attributable to repair trips to the authorized service agent to be 80 miles. The Board declined to further reduce offset by miles for the trip to and from Sears.

PROCEDURAL ISSUES

Manufacturer's Pre-arbitration Vehicle Inspection ¶¶(9)-(14), *Hearings Before the Florida New Motor Vehicle Arbitration Board.*

Martinson v. Toyota Motor Sales, USA, 2005-0170/WPB (Fla. NMVAB March 30, 2005). When the Consumers objected to the admission of the Manufacturer's prehearing vehicle inspection report due to various issues involving the method by which the inspection was conducted, the Manufacturer voluntarily withdrew the report from consideration.