# OFFICE OF THE ATTORNEY GENERAL
# FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

## QUARTERLY CASE SUMMARIES

July 2005 - September 2005 (3rd Quarter)

**JURISDICTION:**

**Motor Vehicle §681.102(15), F.S.**

*Worth-Doney v. Mercedes-Benz,* 2005-0442/TPA (Fla. NMVAB July 11, 2005)

The Manufacturer contended this case should be dismissed, because the vehicle was purchased as a used vehicle and as such was not a "motor vehicle" as defined by Section 681.102(15). The Retail Purchase Agreement, the Bill of Sale and the Certificate of Title/ Registration Application for the subject vehicle all stated that the vehicle was "used." Further, the Certificate of Title for the vehicle indicated that, prior to its purchase by the Consumer, the vehicle was leased as a new vehicle to a different purchaser with 23 miles on the odometer. The vehicle was returned by the initial lessee to Mercedes-Benz of Tampa with 1,473 miles on its odometer. The Consumer testified that she considered the vehicle to be new, because it was purchased at a new car dealership. The Board found that the vehicle was purchased by the consumer as a used vehicle. Accordingly, the vehicle was not a "motor vehicle," and the claim was dismissed.

*Schlemovitz v. Ford Motor Company,* 2005-0483/FTL (Fla. NMVAB August 30, 2005)

The Consumer purchased a new 2005 Ford F-350 pickup truck**.** The Manufacturer asserted that the subject vehicle was not a "motor vehicle" as defined by Section 681.102(15), Florida Statutes (2005), because it was a truck that weighed more than 10,000 pounds gross vehicle weight. The gross vehicle weight given on the State of Florida Registration Certificate was 13,000 pounds. This was the only evidence of gross vehicle weight that was presented to the Board. Accordingly, the Board concluded that the vehicle was not a "motor vehicle" as defined by Section 681.102(15), Florida Statutes (2005), and the Consumer was not qualified for repurchase relief under the Lemon Law.

**WARRANTY §681.102(23), F.S.**

*Deehl v. DaimlerChrysler Motors Corporation*, 2005-0475/TPA (Fla. NMVAB August 3, 2005)

The Consumer purchased a new 2005 GEM E4 neighborhood electric vehicle. The Consumer was provided with Global Electric Motorcars, LLC's written express, limited warranty. The

Consumer complained that the vehicle would not achieve 25 miles per hour at all times and did not travel 30 miles on each charge as he was verbally promised by the dealer sales person at the time of purchase. The vehicle's maximum speed was 23 or 24 miles per hour. On one occasion the vehicle only traveled 17.8 miles on a charge. The Board found that the verbal promise made by the dealer sales person at the time of purchase did not constitute a warranty as defined in the statute**.** Additionally, the Board concluded that no nonconformity existed, and the claim was dismissed.

**NONCONFORMITY 681.102(16), F.S.. (2005)**

*Schuppe v. Mazda Motor of America Inc.,* 2005-0480/ORL (Fla. NMVAB July 18, 2005)

The Consumer complained that the climate control system did not operate as it was supposed to. When operating in the "feet alone" mode, a large volume of air flowed to the windshield, and when the "face and feet" mode was engaged, with the defrost mode off, defrost air "seeped" out through the air vents on the dashboard, causing condensation to form on the outside of the windshield, obstructing the driver's view. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The climate control system was inspected on both the inside and the outside of the vehicle by the Board during the hearing. The air conditioner was operated in varying configurations and fan speeds. When operated on "face and feet" mode with the defroster off, a large area of condensation formed on the windshield that was about the size of a medium pizza and obstructed the view of the driver. The Board found the faulty operation of the climate control system to be a condition that substantially impaired the use, value and safety of the vehicle, and the Consumer was awarded a refund.

*Chickering v. DaimlerChrysler Motors Corporation,* 2005-0460/FTL (Fla. NMVAB July 20, 2005)

The Consumer complained that when he took delivery of the vehicle there was a dent in the rear passenger door. The Manufacturer's authorized service agent was asked to remove the dent but not paint the door. However, the door was painted, leaving "pits," "scratches" and "swirls" in the newly painted surface. The service agent tried to repair the damage to the paint on two more occasions, but the paint continued to show scratches and streaks, and the door was a different shade of the paint color. The Manufacturer argued that "spider webs" in the paint were visible, and agreed there was a "slight" discoloration of the paint on the passenger door; however, there was no damage to the paint, there was nothing abnormal about the paint job that could be considered a nonconformity. During the hearing, the Board observed the spider webbing in the paint, and also observed that the paint on the rear passenger door was a noticeably different shade of paint color from the rest of the vehicle. The Board concluded that the paint mismatch between the rear passenger door and the rest of the vehicle substantially impaired the value of the vehicle and was a nonconformity within the meaning of the statute. Accordingly, the Consumer was awarded a refund.

*Duran v. Toyota Motor Sales U.S.A.*, 2005-0508/ORL (Fla. NMVAB July 28, 2005)

The Consumer complained that the vehicle failed to start if it was not driven for a period of three or four days. Because of the ongoing nature of the problem the Consumer checked the vehicle's lights and accessories when she parked the vehicle to make sure nothing was left on. Her husband also checked the vehicle when he jump-started it and found nothing on that would cause the battery to drain. The Manufacturer contended that the alleged defect was the result of the Consumer's neglect or misuse of the vehicle. The Manufacturer witness testified that the Manufacturer's authorized service agent was never able to find a problem with the vehicle that would cause the failure to start problem. A Manufacturer representative testified that, at the prehearing inspection, he found two interior lights in the "on" position which could cause a battery drain over a three to four day period. The Board was not persuaded by the Manufacturer's assertion that the nonconformity must be the fault of the Consumer, because the authorized service agent was unable to diagnose the problem. 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.**

*Riopelle v. General Motors Corporation*, 2005-0511/TPA (Fla. NMVAB July 20, 2005)

The day after purchasing the vehicle, the Consumer began to experience a variety of problems. She reported the brake pedal intermittently sticking, a poorly aligned driver's door, and an intermittent popping noise on many occasions to three separate Manufacturer's authorized service agents. On some occasions the Consumer received a written repair order, but as time passed personality conflicts developed and the authorized service agents either declined to accept the vehicle for repair or would accept the vehicle and not perform repairs. On many occasions the authorized service agents did not provide written repair orders, in violation of Section 681.103(4), Florida Statutes (2005). The Consumer did not keep a record of her visits to the authorized service agents. At the hearing the Consumer provided the testimony of a witness who often assisted the Consumer in dropping off and picking up the vehicle, and the witness recalled at least 10 occasions when repair orders were not provided to document visits to the authorized service agents. The Manufacturer contended that the Consumer failed to establish a reasonable number of repair attempts. The Consumer's testimony about her repeated unsuccessful attempts to have the nonconformities repaired was corroborated by her witness and no evidence was presented by the Manufacturer to rebut the Consumer's testimony. Under the circumstances, the Board found that the Manufacturer was afforded a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. The Consumer was awarded a refund.

*Lovette v. DaimlerChrysler Motors Corporation*, 2005-0542/MIA (Fla. NMVAB September 9,

2005)

The Consumer brought his vehicle in once to the Manufacturer's authorized service agent for squealing, tapping and/or cracking noises in the engine before sending written notification to the Manufacturer. The vehicle was brought in a second time after receipt of the written notice, and at that time the Manufacturer duplicated the problem, acknowledged that the engine was under strain causing a chattering noise from the serpentine/tensioner belt, but maintained the noises were a "normal characteristic" of the vehicle and that nothing could be done to fix the problem. The Manufacturer contended at the hearing that the case should be dismissed, because the Manufacturer was not been afforded the required number of repair attempts. Section 681.1095(8), Florida Statutes (2005), provides that "the Board shall grant relief if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities." Here, the Manufacturer verified the presence of the problem and stated that nothing could be done to fix it. The problem was deemed a nonconformity. Under the circumstances, the Board found one repair attempt followed by written notice and a last opportunity to repair the nonconformity were sufficient to afford the Manufacturer a reasonable number of attempts. The Consumer was granted the requested relief.

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

*Camacho v. Ford Motor Company*, 2005-0373/MIA (Fla. NMVAB September 1, 2005)

A final repair attempt was scheduled for January 3, 2005, but the Consumer did not present her vehicle for repair on that date. The Consumer testified she was too busy at work during that time and she was not able to bring the vehicle in for the final repair. A manufacturer's representative testified she called the Consumer on January 4, 2005, and again on January 20, 2005, and the Consumer said she still did not have the time to bring the vehicle in for repair. The Consumer testified she told the Manufacturer she would call when she was able to bring the vehicle in for the final repair. The Consumer finally brought the vehicle in for repair on March 1, 2005; however, she did not notify the dealership or anyone else that she was bringing the vehicle in for the Manufacturer's final repair attempt. The Manufacturer requested that the claim be dismissed because the Manufacturer was not afforded a final repair attempt. The Board found that the Manufacturer did not have a final repair attempt, because the Consumer failed to keep the January 3, 2005, appointment and failed to notify the Manufacturer that she was presenting the vehicle for the final repair attempt on March 1, 2005. The claim was dismissed for failure to provide a final repair attempt.

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

*Morganelli v. DaimlerChrysler Motor Corporation*, 2005-0517/ORL (Fla. NMVAB July 26, 2005)

The Manufacturer asserted that the Consumers' claim should be dismissed for failure to provide the Manufacturer with the written notification and opportunity for a final repair attempt required by the statute. The Consumers relied upon a copy of a letter dated April 20, 2005, from the law firm of Krohn & Moss to DaimlerChrysler Corporation's legal department as proof of written notification to the Manufacturer. The Consumers did not provide documentary proof of receipt of the letter by the Manufacturer, and they had no personal knowledge of the letter's mailing and receipt, because it was mailed by their attorney and directed all responses to be made to the attorney. Included as evidence was a blank receipt for certified mail which contained a tracking number. The Manufacturer utilized that tracking number on the U.S. Postal Service website and received a response that there was "no record of this item." The Board found that the required written notification was not received by the Manufacturer; consequently, the Manufacturer was unable to avail itself of the final repair opportunity. The Consumers' claim was dismissed.

*Pastore v. DaimlerChrysler Motors Corporation*, 2005-0474/STP (Fla. NMVAB August 24, 2005)

On April 25, 2005, the Consumer sent written notification to the Manufacturer addressed to "Daimler-Chrysler, 26311 Lawrence Ave., Centerline, MI 48015" to provide the Manufacturer with a final opportunity to repair the vehicle. The Consumer got the address for the Manufacturer from a business card in his possession for one "J.E. Goodwin, Manager Wholesale Sales & Parts Brand Protection." The Consumer testified that he believed he met with Mr. Goodwin in October 2004 about a problem with his previous Dodge Viper and received the business card at that time. The Manufacturer did not respond to the Consumer's written notification. The Manufacturer requested the dismissal of the Consumer's claim on the grounds that the Manufacturer was not afforded written notification and a final repair attempt, because the Manufacturer did not receive the written notification. The address to which the Consumer sent the written notification was not the address for correspondence regarding warranty problems set forth in the materials provided to consumers by the Manufacturer at the time of vehicle acquisition. The Manufacturer submitted into evidence three publications provided to consumers with all DaimlerChrysler vehicles. The publication "Owner's Rights Under State Lemon Laws, Disclosure Notice for Florida," directed consumers to notify the Manufacturer of problems with vehicles at "DaimlerChrysler Motors Company LLC, Customer Center, P. O. Box 21-8004, Auburn Hills, MI 48321-8004." The Owner's Manual and Warranty booklet also directed customers in the United States to write to the Manufacturer at the Auburn Hills, Michigan, address. The Board found that the Consumer's failure to send the written notification to the correct address prevented the Manufacturer from taking advantage of its statutory final repair attempt, consequently, the Consumer's claim was dismissed.

**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.**

*Deehl v. DaimlerChrysler Motors Corporation*, 2005-0475/TPA (Fla. NMVAB August 3, 2005)

The Consumer purchased a new 2005 GEM E4 neighborhood electric low-speed vehicle. The Consumer complained that the vehicle would not achieve 25 miles per hour at all times and would not travel 30 miles on each charge as he was verbally promised by the dealer sales person at the time of purchase. The maximum speed the vehicle would attain was 23 or 24 miles per hour. On one occasion the vehicle only traveled 17.8 miles on a charge. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that, as the charge diminished, the maximum speed of the vehicle also would diminish and that many variables would impact the number of miles achieved per charge. The Board concluded that the Consumer's complaint was not a substantial impairment, and the claim was dismissed.

*Hemphill v. Toyota Motor Sales, U.S.A.*, 2005-0450/TLH (Fla. NMVAB July 1, 2005)

The Consumer complained that the brake pedal traveled all the way to floor when applying the brakes. According to the Consumer, when he "mashed" down on the brake pedal or continued to apply pressure to the pedal after the vehicle came to a stop, the pedal traveled to the floor and there was a feeling of a "tapered release" of brake pressure. The brakes never failed to slow the vehicle's speed or stop. The vehicle did not roll or move after the brake pedal was depressed. The brake warning light never illuminated, nor was there any evidence of the brake fluid leaking. The Consumer's biggest concern was that he did not know where the brake fluid went as the pressure was released. The Manufacturer contended that there was no defect with the brake pedal or the braking system. The brake lines, hoses, calipers and master cylinder were all inspected. There was no evidence of any damage, leaks or air in the system. The brake pads were intact and exhibited only "normal wear and tear," according to the witnesses. The brake warning light never illuminated in the Consumer's vehicle; thus, there was never any evidence of any problem with the Consumer's brake pedal or braking system. The Board concluded that there was no nonconformity; consequently, the case was dismissed.

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

*Central Parking System v. Ford Motor Company*, 2005-0424/FTM (Fla. NMVAB July 6, 2005)

The Consumer complained of engine sludge. The Manufacturer argued at the hearing that the defect was the result of abuse or neglect by persons other than the Manufacturer or its authorized service agent; specifically, the vehicle was not properly maintained. The Manufacturer's witness testified that the manner in which this vehicle was operated, i.e., frequent short trips on local streets, was "severe"; hence, the vehicle's oil should have been changed every 3,000 miles or three months, according to the Owner's Manual. The first oil change was performed eight months after purchase, and subsequent oil changes were performed every seven months. The

Manufacturer's witness testified that the constant heating and cooling of the engine oil caused by short-distance travel caused the engine oil to degrade, resulting in the engine sludge problem. The witness inspected the subject engine and found its condition to be consistent with lack of maintenance. The Board found that the Manufacturer established its affirmative defense by the greater weight of the evidence and that the engine sludge problem was the result of abuse or neglect in the form of lack of proper maintenance, by persons other than the Manufacturer or its authorized service agent. The engine sludge problem was not a nonconformity within the meaning of Section 681.102(16), Florida Statutes (2005); consequently, the Consumer was not entitled to repurchase relief under the Lemon Law.

**REMEDIES §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(8), F.S.**

*Yadav v. Ford Motor Company,* 2005-0354/ORL (Fla. NMVAB July 1, 2005)

The Consumer requested $164.86 for rental vehicle insurance charges as an incidental charge. The Manufacturer objected, contending that because those charges were optional they were "unreasonable." The Manufacturer's assertion that the purchase of rental vehicle insurance was unreasonable was rejected. Accordingly, the Consumer was awarded $164.86 for rental vehicle insurance as an incidental charge.

*Espinoza v. Ford Motor Company,* 2005-0559/TPA (Fla. NMVAB August 25, 2005)

The Consumer requested the following incidental charges as a result of the nonconformities: $758.05 for three tires which were worn prematurely due to the vibration nonconformity; $14.73 for postage; and $106.87 for the cost of fuel to drive to and from the Manufacturer's authorized service agent for repair. The Manufacturer objected to reimbursement for the tires, arguing that the tire replacement was "normal maintenance." The Manufacturer also argued that the Consumer should not be reimbursed for the cost of fuel attributable to trips to the authorized service agent, because the Consumer had already received the "benefit" of having those miles excluded from the reasonable offset for use calculation. The Board rejected the Manufacturer's argument and awarded the Consumer the incidental charges requested.

*Dillehay v. Ford Motor Company,* 2005-0552/JAX (Fla. NMVAB August 15, 2005)

The Consumer requested $13.93 for postage. The Manufacturer objected to reimbursement of postage in excess of $4.42. The Board rejected the Manufacturer's argument and awarded the Consumer $13.93 for postage.

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

*Silsbe v. DaimlerChrysler Motors Corporation,* 2005-0406/FTM (Fla. NMVAB July 1, 2005)

The net trade-in allowance of $1,800.00 reflected in the purchase contract was not acceptable to the Consumers. The trade-in vehicle was a 1995 Oldsmobile Ninety-Eight. The trade-in vehicle was not listed in the applicable NADA Official Used Car Guide (Southeastern Edition) because of the age of the vehicle. The Consumers provided a copy of the NADA Official Older Used Car Guide for January through April 2005 which reflected a retail price of $4,375.00 ($4,175.00 plus $200.00 for low mileage) for the Consumers' trade-in vehicle. The Manufacturer objected to the use of the Older Used Car Guide, arguing that Section 681.102(19), Florida Statutes, (2005) clearly authorizes only the use of the NADA Official Used Car Guide (Southeastern Edition), and if the vehicle is not listed in the "authorized" NADA guide, the Board is controlled by the trade-in value in the purchase contract. The Manufacturer asserted that a "national" guide should not be used in a Florida Lemon Law proceeding, that the statute is unambiguous and does not need interpretation, and use of the Older Used Car Guide would place a burden on manufacturers to subscribe to and maintain used car guides not contemplated by the Legislature. The Board found that the Legislature, in providing an alternative for valuing a trade-in vehicle, did not contemplate the situation presented in this case that, due to the age of the trade-in vehicle, it was not reflected in the Southeastern Edition of the NADA Official Used Car Guide. The Board concluded that the Legislature intended to exclude other brands of published used car guides in favor of NADA brand publications, and that use of the NADA Older Official Used Car Guide to determine the retail price of the trade-in vehicle carried out the legislative intent. Accordingly, the Consumers received a $4,375.00 net trade-in allowance.

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

*Espinoza v. Ford Motor Company*, 2005-0559/TPA (Fla. NMVAB August 25, 2005)

The Consumer argued that 1,023 miles driven by her to and from the Manufacturer's authorized service agent for repairs and the prehearing inspection should not be miles attributable to the Consumer when determining the offset for use. The Manufacturer argued that miles driven to and from the authorized service agent should be attributable to the Consumer, because she "chose" to take the vehicle back to the selling authorized service agent rather than the one closest to her home. The Board rejected the Manufacturer's argument and did not attribute those miles to the Consumer.