OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2005 - December 2005 (4th Quarter)

JURISDICTION:

Consumer §681.102(4)F.S.

Veilleux v. Volkswagen/Audi of America, Inc., 2005-0669/MIA (Fla. NMVAB November 8, 2005)

The Manufacturer contended that the Consumer was not qualified for relief under the Lemon Law, because he used his vehicle for business "95 percent of the time." The Board rejected the Manufacturer's argument on the basis of Results Real Estate v. Lazy Days R.V. Center, 505 So.2d 587 (Fla. 2d DCA 1987). The evidence established that the Consumer was a "consumer" under the Lemon Law because he was entitled by the terms of the warranty to enforce its obligations. The Consumer was awarded a refund because the air conditioner odor in the vehicle was a nonconformity.

Motor Vehicle §681.102(15), F.S.

Ingraham v. Mercedes-Benz USA Inc., 2005-0703/FTL (Fla. NMVAB November 7, 2005)

The Motor Vehicle Retail Sales Agreement for the sale of the Consumer's vehicle identified the vehicle as a "used " vehicle. The Certificate of Title issued listed the name of the previous registered owner. The Consumer testified that, when he purchased the vehicle, he was told by the selling dealer that it was a demonstrator. The Manufacturer contended that, because the vehicle was purchased as a used vehicle, it was not a "motor vehicle" within the meaning of Chapter 681, Florida Statutes, and the Consumer was not qualified for repurchase relief. The Board found that the subject vehicle was sold to the Consumer as a used vehicle, and not as a new or demonstrator vehicle; therefore, it did not constitute a "motor vehicle" as defined by statute. Accordingly, the Consumer's case was dismissed.

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

Mumtaz v. Nissan Motor Corporation USA, 2005-0626/FTL (Fla. NMVAB October 5, 2005)

The Consumer testified that both front windows produced a variety of noises during operation,

including a cracking sound that was not eliminated when the authorized service technician replaced the motor and stabilizer in both windows over the course of repair attempts. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's authorized service agent replaced the right front window motor because the window would not go down properly. Grease marks on the right and left front windows were addressed in a Technical Service Bulletin that called for the replacement of the inside door stopper, which was performed on the left front window during a repair attempt. While the Manufacturer's representative asserted that the window defect had been cured, he said that additional weather stripping had been ordered at the time of the final repair attempt to reduce the window cracking noise. The Board concluded that the grease marks on the windows and the window noises were a "condition" that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumers were awarded a refund.

Murray v. Toyota Motor Sales USA, Lexus Division, 2005-0699/ORL (Fla. NMVAB October 24, 2005)

The Consumer complained of an intermittent clunking sensation when decelerating which was more pronounced on long trips and at times felt as if someone had hit the vehicle in the rear. The Consumer used the vehicle to transport business clients, and the clunking sensation was noticeable to them. The Manufacturer contended that the alleged defect was a "characteristic" of the vehicle and did not substantially impair its use, value or safety. A Manufacturer Field Technical Specialist testified that the vehicle was equipped with a two-piece drive shaft, and at times the compression and release could be felt, which was "normal" for this vehicle. The Manufacturer issued a "Technical Service Information Bulletin" entitled "Rear Driveshaft Clunk/Thump Noise" which stated: "Some 2003 and 2004 model year GX 470 vehicles may experience a clunk/thump noise from the rear of the vehicle just before a complete stop. A new propeller shaft assembly has been introduced to improve this concern." The Board concluded the Manufacturer's assertion that the problem was "normal" was not a defense to the Lemon Law claim, particularly in this case where the service bulletin clearly indicated that only "some" vehicles exhibited the problem. 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.

Baznik v. Nissan Motor Corporation, 2005-0856/ORL (Fla. NMVAB December 19, 2005)

A vibration when the brakes were applied which caused a shimmy in the vehicle's steering wheel was found to be a nonconformity. The Consumer brought the vehicle in for repair on two separate occasions. The nonconformity was the subject of a Manufacturer's technical service

bulletin; however, the Manufacturer's representative could not explain why part numbers required by the TSB were not listed on the Consumer's repair orders. The Manufacturer contended that the Consumer had not "met the requirements" of the Lemon Law, because there had not been a "sufficient number"of repair attempts. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes (2005), creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent on at least two occasions. The nonconformity was known to the Manufacturer and involved a major safety component. Under the circumstances, the Board concluded that two repair attempts were 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.

Delaney v. Ford Motor Company, 2005-0794/ORL, (Fla. NMVAB December 2, 2005)

The Consumer complained of a vibration in the vehicle's rear end during turns, poor engine performance and the engine was hard to start. The vehicle was presented to the Manufacturer's authorized service agent for repair of these defects a total of seven times (4 times for the rear-end vibration, and 3 times for the engine problems) and was out of service for repair a total of 24 cumulative days. Nevertheless, the total number of days out of service and the number of repair attempts in this case were not sufficient to support a conclusion that a reasonable number of attempts were undertaken. Consequently, the Consumer was not entitled to repurchase relief under the Lemon Law.

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

Ippolito v. DC Concepts and DaimlerChrysler Motors Corporation, 2005-0892/ORL
(Fla. NMVAB December 20, 2005)

The Consumer sent written notification to DC Concepts to provide a final opportunity to repair the vehicle. DC Concepts received the notification on September 21, 2005. On that date DC Concepts' representative telephoned the Consumer to arrange the final repair attempt. The Consumer was scheduled to be out of town for approximately one month beginning Sunday, September 25, 2005. DC Concepts offered to send technicians on Saturday, September 24, 2005, to perform the final repair attempt. The Consumer declined, and DC Concepts offered to perform the final repair attempt upon the Consumer's return. On September 27, 2005, the Consumer filed his Request for Arbitration with this Board seeking a refund, and the final repair attempt did not take place. Manufacturer DC Concepts contended that the Consumer failed to afford a final repair opportunity to DC Concepts after it received the written notification. The Board found that DC Concepts was not afforded its final opportunity to correct that

nonconformity. The Consumer's claim was dismissed.

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

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

Garbarino v. Jaguar Cars, 2005-0446/FTL (Fla. NMVAB October 5, 2005)

The Consumer complained that the vehicle stalled and would not start again. The Manufacturer contended that the alleged defect was the result of abuse on the part of the Consumer. A Manufacturer's witness testified that the Consumer put diesel fuel in the vehicle's gas tank instead of the required gasoline. A different Manufacturer's representative testified that approximately one-half liter of fuel was taken from the vehicle's fuel tank and placed into an empty plastic quart size water bottle. The sample fuel was placed on a work bench from February to when it was sent for testing some time in August. The results of the fuel testing were not available at the hearing. The Board found that the Manufacturer failed to prove its defense of abuse by the greater weight of the evidence. Accordingly, the Consumer was awarded a refund.

Breslin v. General Motors Corporation - Chevrolet Division, 2005-0707/STP (Fla. NMVAB November 16, 2005)

The Consumer complained that the gear shifter assembly was "binding," preventing the key from turning in the ignition. The Consumer testified that the "shifter cable" had broken off three to four times with the key in the ignition. The Manufacturer argued that the alleged conformity was the result of abuse or neglect. The Manufacturer's witness testified that the first encounter with the Consumer ' s vehicle was on November 4, 2005, when he found four lug nuts missing from the right rear tire, and, on February 17, 2005, he found an unknown sticky substance spilled on the key release cable. Ultimately, on March 1, 2005, the vehicle was towed in with the gear shift lever completely broken from the base assembly, and the Manufacturer determined that there was no Manufacturer defect within the shift lever cable and that "some outside force had caused the shifter to break off." The Board rejected the argument of the Manufacturer and awarded the Consumer a refund.

REFUND §681.104(2)(a)(b), F.S.:

Wallace v. Ford Motor Company, 2005-0823/TPA (Fla. NMVAB December 2, 2005)

The purchase of the vehicle was financed with a loan from Ford Credit. Prior to making any payments to Ford Credit the Consumer used the vehicle as collateral for a new loan from the lienholder, Suncoast Schools Federal Credit Union, in the amount of $38,280.00. The lienholder disbursed $20,126.94 to Ford Credit and $18,153.06 to the Consumer; in other words, 52 percent of the new loan was for the purchase of the subject vehicle and the remaining 48 percent of the

new loan was disbursed to the Consumer. The Consumer made eight monthly payments to the lienholder for a total of $4,966.16. Fifty-two percent of that amount was $2,582.40. Accordingly, the Consumer was entitled to a refund of $2,582.40 for 52 percent of the monthly loan payments made as of the date of the hearing, plus 52 percent of any subsequent monthly payments the Consumer would make prior to the date of repurchase by the Manufacturer.

Incidental Charges §681.102(8), F.S.

Fletcher v. Jaguar Cars, 2005-0860/FTL (Fla. NMVAB December 2, 2005)

The Consumer incurred the following incidental charges as a result of the nonconformities: $9.62 for postage, $25.00 for a car she rented from a friend for one day when the vehicle was out of service for repair and the Consumer was not able to get to a rental car facility and she needed to be at work, and $40.00 for parking at the hearing. The Manufacturer objected to the Consumer being reimbursed for the amount of the rental car, and the amount of postage in excess of $4.42. The Board rejected the Manufacturer's argument and awarded all the incidental charges that the Consumer incurred.

Levy v. American Honda Motor Company (Acura), 2005-0609/MIA (Fla. NMVAB October 6, 2005)

The Consumers sought to recover incidental charges for lost wages and faxing costs. The Manufacturer objected to these charges. The Board denied the Consumer's request for reimbursement of unspecified lost wages and faxing costs.

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

Brown v. Ford Motor Company, 2005-0594/JAX (Fla. NMVAB October 28, 2005)

In order to purchase the vehicle, the Consumer paid $23,001.89 in cash and traded in a 1998 Volvo S70 and a 1996 Nissan. The purchase contract reflected a net trade-in allowance of $6,000.00 designated for both vehicles, without any indication as to how much was attributable to each. This was not acceptable to the Consumer. In accordance with Section 681.102(19), Florida Statutes (2004), the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in (hereinafter NADA Guide). The 1996 Nissan was not listed in the NADA Guide. Taking into account the 1998 Volvo ' s equipment and mileage, the retail price reflected in the NADA Guide for that vehicle was $8,625.00. The Consumer chose to accept $8,625.00 as the net trade-in allowance for both vehicles.

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

Liwosz v. DaimlerChrysler Motors Corporation, 2005-0716/TPA (Fla. NMVAB October 24, 2005)

The purchase contract reflected a "total including accessories" for the vehicle of $34,748.24, which did not include taxes, dealer service fees, or license or registration fees. The Consumer received $4,250.00 in rebates. The Manufacturer's dealer invoice listed the "MSRP Retail Total" for the vehicle as $25,970.00. The Consumer testified that the purchase price was increased because of the debt on the trade-in vehicle, and that without the trade-in vehicle the purchase price would have been less than the "MSRP" for the vehicle. The Manufacturer's representative argued that a "logical reading" of the definition of "purchase price" found in Section 681.102(19), Florida Statutes (2005), required the Board to utilize the purchase price reflected in the buyer's order and finance agreement to calculate the offset for use, because the Consumer agreed to this amount at the time of purchase. The Manufacturer further argued, as stated in Section 520.31(2), Florida Statutes (2005), the purchase price reflected in the purchase documents was negotiated "in the ordinary course of business," and that historically the Board had interpreted the phrase "excludes debt from any other transaction" to mean loans for items such as home improvements or vacations when combined with a new vehicle loan by using a home equity loan or line of credit. The Board recognized that a typical new car purchaser does not pay "MSRP" when purchasing a new vehicle; however, the "MSRP Retail Total" of $25,970.00 as reflected on the Manufacturer's dealer invoice more accurately met the definition of "purchase price," because it represented the price not inflated to account for any debt from the transaction associated with the trade-in vehicle. Accordingly, the Board used $25,970.00 as the purchase price for purposes of calculating the reasonable offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Brown v. Ford Motor Company, 2005-0852/FTM (Fla. NMVAB December 15, 2005)

The Manufacturer's prehearing inspection originally was scheduled to take place on November 4, 2005. On the evening prior to the inspection, a Manufacturer's Representative called the Consumer to cancel the appointment because of the unavailability of the Manufacturer to attend on that date. The Manufacturer and Consumer rescheduled the prehearing inspection for November 22, 2005, and then December 2, 2005, but the Consumer had to cancel both scheduled inspections. The prehearing inspection occurred on December 5, 2005, two days prior to the hearing. During the pendency of this claim the Manufacturer never requested the assistance of the Board to schedule the prehearing inspection so that the written inspection information could be supplied to the Consumer in a timely manner. The Manufacturer's request to admit the prehearing inspection report was denied; furthermore, the Manufacturer was not permitted to present testimony about the prehearing inspection during the hearing.