

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

QUARTERLY CASE SUMMARIES

April 2009 - June 2009 (2nd Quarter)

NONCONFORMITY 681.102(16), F.S. (2008)

Pantera v. Toyota Motor Sales USA, 2009-0026/FTM (Fla. NMVAB April 1, 2009)

The Consumer complained of a defective driver's seat that manifested itself through "squeaking" noises in his 2008 Toyota Solara. When the Consumer took the vehicle in for repair of the noise, instead of eliminating it, the repair made the driver's seat noticeably higher and gave it a decidedly unstable feel. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative, who had no personal involvement in the repairs, presented a review of the written repair orders prepared by the authorized service agent. The Board found the problem complained of by the Consumer substantially impaired the safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Batalla and Holcombe v. Mercedes-Benz USA Inc, 2009-0063/FTL (Fla. NMVAB April 29, 2009)

The airbag warning light on the instrument cluster of the 2008 Mercedes-Benz ML350 illuminated, warning that the front passenger airbag was disabled whenever the passenger got out of the front seat. The warning light stayed on until the engine was turned off. This caused the Consumers to be concerned that the front passenger airbag might not deploy when it is supposed to, or might deploy when it is not supposed to. The Manufacturer contended that the front passenger airbag and the related warning light were working properly. The Manufacturer's witness explained the passenger seat has an Occupant Class Recognition (OCR) sensor. That is, the sensor can detect if a small child, adult, or someone in between in weight is occupying the passenger seat. If an airbag needs to deploy, it will deploy in stages, depending upon the weight of the passenger. The Board duplicated the condition during its in-hearing inspection of the vehicle and concluded that the malfunctioning warning light, and possibly malfunctioning passenger airbag, was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumers were awarded a refund.

All Star Mirror Inc v. Nissan Motor Corporation USA, 2009-0135/WPB (Fla. NMVAB June 5, 2009)

The Consumer complained that something about or in her 2009 Nissan Rogue made whoever drove it or ride in it feel ill. When the Consumer testified first test drove the vehicle she did not feel well afterwards, but she thought perhaps the air conditioning in the dealership showroom was not cool enough. She leased the vehicle and after she drove home she felt like she was going to vomit. The windshield had a distortion and was replaced, but she continued to feel the same

whenever she was in the vehicle. She tried operating the vehicle with and without the air conditioner running, but it made no difference; she started to feel ill after being in the vehicle for 15 to 30 minutes. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety, and that all repairs were made for “customer satisfaction” only. In addition, the Manufacturer contended that it was not obligated to repair the vehicle because it believed the Consumer had “abandoned” it; however, at one point the vehicle was flat-bedded to the Consumer. Other than the repairs that were made to the windshield, none of the repair orders addressed the issue of what was or may have been making the occupants of the vehicle feel ill and the Manufacturer’s representative testified the Manufacturer was aware something other than a distortion in the windshield could be causing the ill feeling. The Board concluded that the condition in the vehicle that was making its occupants feel ill was a defect that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity that required the vehicle to be out of service by reason of repair for more than 30 cumulative days. Accordingly, the Consumer was awarded a refund.

Peña v. Mercedes-Benz USA Inc., 2009-0111/TLH (Fla. NMVAB May 19, 2009)

The Consumer complained of an intermittent transmission condition manifesting itself in harsh shifting and faulty acceleration, and a hole in the carpet, in her leased 2007 Mercedes-Benz SLK 280. When she reported the transmission defect, she was assured by the Manufacturer’s authorized service agent, with no examination of the vehicle, that the problem she described “happens all the time” and there was nothing to worry about because she probably put [the vehicle] in “sport mode” and caused the problem herself. The Manufacturer made the same assertion at the hearing and additionally asserted that the hole in the carpet was the result of the Consumer driving while wearing high-heeled shoes. The vehicle underwent a total of nine repair attempts and was out of service for repair a total of 37 days. The Board rejected the Manufacturer’s assertions and concluded that both defects substantially impaired the use, value or safety of the vehicle, thereby constituting nonconformities. 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.

Estling and Bastani v. General Motors Company-Chevrolet Motor Division, 2009-0002/FTM (Fla. NMVAB April 10, 2009)

The Board found the defective paint on the tonneau cover of the Consumers’ 2008 Chevrolet Corvette to be a nonconformity. The evidence established that the Manufacturer was given two opportunities to correct the defective paint nonconformity, including one opportunity after the Manufacturer’s receipt of written notification of the defect from the Consumers. There was no dispute that the nonconformity continued to exist. The Manufacturer acknowledged that the local repainting procedure was not the same as that used at the factory, and at least one of its witnesses confirmed the Consumers’ assertion that such repainting would adversely impact the vehicle’s value. Under the circumstances presented in this case, the Board found that two repair attempts were sufficient to afford the Manufacturer a reasonable number of attempts to conform the

vehicle to the warranty provided by the Lemon Law. Accordingly, the Consumers were awarded a refund.

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

Gomez v. Porsche Cars North America Inc., 2009-0059/MIA (Fla. NMVAB April 20, 2009)
The Consumer's 2009 Porsche 911 Turbo had the following nonconformities: the air conditioner did not blow cold air and the driver's side rear view mirror was not secure and would shift when the car was driven at high speeds. After purchasing the vehicle, the Consumer took delivery in Germany under the Manufacturer-sponsored European Delivery Program. After driving it for a few days and discovering the defective conditions, he dropped the vehicle for shipment and repair at the Manufacturer-sponsored shipping facility in Spain on October 24, 2008. On November 20, 2008, the vehicle was shipped from Spain to the Porsche factory in Germany, for repair of the defects. The Manufacturer's witness testified that the vehicle underwent repair for the air conditioner and rear view mirror complaints from December 3, 2008, through December 11, 2008. Once the repairs were completed, the vehicle was shipped from Germany on January 5, 2009, and was received by the Manufacturer's authorized Florida dealer on January 27, 2009. The Consumer contended that he was never advised by the Manufacturer's authorized service agent in Pompano Beach, Florida, to pick up the vehicle once it was delivered from Europe. The Manufacturer's representative contended that the Consumer had communicated to Porsche via letter that, as a result of the abovementioned conditions and the delay in repair, he was no longer interested in the vehicle and would only like to get a full refund, and he made no attempt to pick up the vehicle from the Florida dealer. The Manufacturer further contended that the delay in getting the vehicle to the Consumer was caused by a shipping problem that resulted when the Consumer dropped the vehicle in Spain, with instructions to ship it back to the factory in Germany for repair, instead of shipping it to the dealer in the U.S., a claim disputed by the Consumer. A majority of the Board concluded that the vehicle was delivered to the Porsche factory in Germany for repair of the nonconformities on November 20, 2008, and the work was completed on December 11, 2008, for a total of 22 cumulative out-of-service days. The remainder of the days the motor vehicle was unavailable to the Consumer was not by reason of repair of the nonconformities; rather, it was the result of a shipping dispute between the Consumer and the Manufacturer. A majority of the Board further concluded that 22 days out of service by reason of repair of the nonconformities did not, under the circumstances of this case, constitute a reasonable number of attempts. Therefore, the Consumer's case 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.

Pajkuric v. Ford Motor Company, 2009-0056/WPB (Fla. NMVAB May 6, 2009)
The Consumer complained that the SYNC system did not operate properly in her 2008 Lincoln MKX. The Consumer testified that shortly after taking possession of the vehicle the SYNC

system did not respond to or with a voice command, and sometimes did not pick up on the phone or Ipod. In addition, the SYNC system did not recognize by voice command 126 of the 756 songs the Consumer had loaded on the Ipod. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified the SYNC system is a Microsoft product that has limitations, as certain songs on the Consumer's Ipod are not compatible with the SYNC system and therefore are not recognized by the system. The Manufacturer asserted, with regard to the phone sometimes not working, that this occasionally occurs with phones that are used in vehicles; therefore, it is neither unique to this vehicle, nor a defect in vehicle materials or workmanship. The Board concluded that the SYNC system not working properly as complained of by the Consumer did not substantially impair the use, value or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Turner v. Subaru of America Inc., 2009-0168/TPA (Fla. NMVAB June 26, 2009)

The Consumer complained of engine failure in his 2008 Subaru Impreza. The Consumer testified that on two occasions, the engine stalled while he was stopped at a red light. The Manufacturer contended that any vehicle defects were the result of "abuse, neglect and unauthorized modifications or alterations by persons other than the manufacturer or its authorized service agent." Specifically, the Manufacturer asserted that the vehicle had been altered to enhance performance, had been used for street racing and had exhibited oil "starvation" due to the Consumer's failure to monitor oil levels. The Manufacturer's witness explained that he found two major failures after the engine was disassembled: the rod bearings and the number four piston were damaged. The witness opined "over-boosting" the turbo engine beyond Manufacturer specifications through the access port software caused the piston to break and the lack of lubrication caused further damage to the engine. He submitted photographs evidencing a discolored clutch pressure plate and flywheel which was indicative of hot spots caused by over-boosting the engine and abusive driving. The Manufacturer's witness further testified that the Consumer's lack of frequent oil changes and failure to regularly monitor the oil level added to the untimely engine damage. A nonconformity is defined as 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." §681.102(16), Fla. Stat. (2008). The Board concluded that the engine failure complained of by the Consumer was the result of abuse, neglect and modification by persons other than the Manufacturer or its authorized service agent. Consequently, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Estling and Bastani v. General Motors Company-Chevrolet Motor Division, 2009-0002/FTM (Fla. NMVAB April 10, 2009) *See*, “Reasonable Number of Attempts” above.

The Consumers requested reimbursement of \$2,438.00 for a K40 Bluetooth Radar Detector that was permanently installed in the vehicle, as a collateral charge. The Manufacturer objected, asserting it was possible to remove the detector from the vehicle. The Board denied the objection and awarded the Consumers \$2,438.00 as a collateral charge.

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

Batalla and Holcombe v. Mercedes-Benz USA Inc, 2009-0063/FTL (Fla. NMVAB April 29, 2009) *See*, “Nonconformity” above.

The lease agreement showed, on one page, that the Consumers received a net trade-in allowance of \$25,000.00; however, on another page a trade-in was shown as “N/A.” Further documentation clarified the Consumers had contributed a trade-in vehicle which was encumbered by a debt of \$21,053.85, for which they received a gross trade-in allowance of \$25,000.00, leaving a net trade-in allowance of \$3,946.15. The Consumers were given a check for \$2,323.59, and the remaining \$1,622.56 was credited as the down payment. The Consumers were not satisfied with the amount of the trade-in allowance reflected in the lease agreement. Accordingly, pursuant to Section 681.102(19), Florida Statutes (2008), the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade in. The November 2007, NADA Guide did not reflect a retail price for the trade-in vehicle. The Consumers produced NADA Guides for December 2007, February 2008, and March 2008. The Manufacturer objected to the use of NADA Guides that were not in effect at the time of the trade-in to calculate the net trade-in allowance. The Board denied the Consumers’ request that the net trade-in allowance be calculated using a NADA Guide other than the one in effect at the time of the trade-in, and the net trade-in allowance reflected in the lease documentation was awarded.

Incidental Charges §681.102(8), F.S.

Peña v. Mercedes-Benz USA Inc., 2009-0111/TLH (Fla. NMVAB May 19, 2009) *See*, “Nonconformity” above.

After leasing the vehicle, the Consumer moved from Florida to California and had to return to Florida for her hearing. The Consumer sought reimbursement of \$340.39 for the airline ticket to attend the hearing; \$45.00 for one night’s hotel stay; \$42.00 for cab fare; and \$116.49 for mailing and copying charges as incidental charges. The Consumer also requested reimbursement for the cost of transporting the vehicle when she moved from Florida to California, and for the cost of office supplies to organize her paperwork for the hearing. The Board awarded the Consumer reimbursement of the air fare, hotel, cab fare, postage and copying costs; however, reimbursement of the cost of transporting the vehicle from Florida to California and for office supplies to organize paperwork for the hearing was denied.

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

Henagen v. Ford Motor Company, 2008-0604/TLH (Fla. NMVAB April 6, 2009)

The Board awarded the Consumer a refund. The Manufacturer objected to using mileage attributable to the Consumer up to the date of the BBB/Autoline arbitration hearing for calculation of the offset, arguing that the proceeding conducted by its sponsored dispute resolution procedure was not an “arbitration hearing” under Chapter 681, Florida Statutes, and that the length of time between the BBB hearing and the Board’s hearing, and the resulting additional mileage placed on the vehicle, resulted in an offset calculation that was “unfair” to the Manufacturer. The Board rejected the Manufacturer’s argument and calculated the offset based on the miles attributable to the Consumer up to the date of the BBB arbitration hearing.

MISCELLANEOUS PROCEDURAL ISSUES:

Myers v. General Motors Company-Chevrolet Motor Division, 2009-0069/JAX (Fla. NMVAB April 23, 2009)

At the start of the hearing, the Manufacturer’s representative asserted that the case should be dismissed because the Consumer did not “complete” the state-certified, manufacturer-sponsored procedure, specifically, the BBB/Autoline program. The representative stipulated that the Consumer filed a claim and that the claim was accepted by the BBB/Autoline program. The program's paperwork indicated that, after the claim was accepted, there was a settlement agreement between the Consumer and the Manufacturer which entailed the Consumer sending the Manufacturer a Motor Vehicle Defect Notification form followed by a final repair attempt undertaken by the Manufacturer. The Consumer complied with the settlement agreement and a final repair attempt was undertaken on January 22, 2009. At this hearing, the representative asserted that the Consumer was “required” to proceed with an arbitration hearing through the BBB/Autoline program after the final repair attempt. The Consumer testified that he was told by the BBB/Autoline program administrator that, after the final repair attempt, the Manufacturer was willing to offer him an extended warranty and if he did not want to accept the offer, then he needed to file a request for arbitration with the state-run program. Section 681.108(1), Florida Statutes (2008), provides, “If a manufacturer has established a procedure, which the division has certified . . .the provisions of s. 681.104(2) apply to the consumer only if the consumer has first resorted to such procedure.” Section 681.109(2), Florida Statutes (2008), provides, “If a consumer is not satisfied with the decision [of the manufacturer's certified procedure] or the manufacturer’s compliance therewith, the consumer may apply to the division to have the dispute submitted to the board for arbitration.”

The Board found the Consumer met the statutory prior resort requirement and was not satisfied with the Manufacturer's compliance with the agreement; therefore, he was not required to return to the procedure, but properly filed a request for arbitration with the Board. The Board denied the Manufacturer's request for dismissal of the claim on prior resort grounds.

Derosa v. Ford Motor Company, 2008-0641/FTM (Fla. NMVAB April 16, 2009)

This case initially came before the Florida New Motor Vehicle Arbitration Board upon approval of the Consumer's request for arbitration on March 13, 2008. The Board dismissed the Consumer's claim of a consistent vibration at speeds of 50 through 55 miles per hour, because the Board found the nonconformity was cured. Subsequent to that hearing, the Consumer filed a request for an additional arbitration for the same vehicle. The Board held a hearing to determine whether the Consumer's second request for arbitration would be allowed to be heard pursuant to paragraph 71, *Hearings Before the Florida New Motor Vehicle Arbitration Board*, which provides as follows: "Generally, consumers are entitled to only one arbitration per vehicle before the Board. However, it is within the discretion of the Attorney General's Office or the Board whether to allow a consumer to arbitrate after the consumer has lost a previous arbitration involving the same vehicle. The consumer must show a significant change in circumstances that would now qualify the vehicle for refund or replacement." The Consumer contended that the tires placed on his vehicle did not cure the vibration nonconformity, and he continued to experience the same vibration about which he complained at the previous arbitration hearing. The Consumer testified that the vibration was particularly bad when he towed his boats and drove in excess of 70 miles per hour. The Manufacturer argued that the Consumer's testimony about the vibration when towing his boats was considered by the Board at the previous hearing; therefore, the Consumer failed to show a significant change in circumstances that would allow a second hearing. The Board agreed and denied the Consumer's request for an additional arbitration.