OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2009 - September 2009 (3rd Quarter)

NONCONFORMITY 681.102(16), F.S.

Pou v. Toyota Motor Sales USA, 2009-0177/MIA (Fla. NMVAB July 30, 2009)
The Consumer complained that the GPS system in her 2007 Toyota Sequoia did not locate all directions, and sometimes indicated that the vehicle was being driven in the ocean. The Consumer testified there were problems with the GPS since she took delivery of the vehicle. The Manufacturer's representative was involved with the vehicle at the final repair attempt and again at the Manufacturer's prehearing inspection. According to the representative, she was not aware the vehicle was having any problems with the GPS system so she did not inspect it. The Board concluded that the GPS failing to work properly was a defect or condition that substantially impaired the use and value of the vehicle. Accordingly, the Consumer was awarded a refund.

Hanna v. BMW of North America LLC, 2009-0242/WPB (Fla. NMVAB September 17, 2009)
The Consumer complained that intermittently, in his 2008 BMW 328i, the yellow "airbag off " warning light illuminated to signify that the passenger side airbag was off, even when a passenger was sitting in the seat. The Consumer testified he was told by one of the Manufacturer's service agents that the passenger must sit "squarely" in the seat and weigh at least 120 pounds. According to the Consumer, his fiancée weighed 130 pounds and she sat squarely in the seat, but the warning light still illuminated. At the hearing, the Consumer played a videotape which showed his fiancée sitting squarely in the seat with her feet flat on the floor, and the warning light coming on. The indicator light shows whether the passenger side airbag is activated or deactivated. According to the Owner's Manual, the airbag will be activated as long as a person of "sufficient size" is sitting "correctly" in the seat. The Manual does not further describe what is meant by "sufficient size" or how one sits "correctly." The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. The Manufacturer's representative explained that someone who weighs at least 120 pounds must be sitting in the passenger seat in order for the airbag to activate. If someone who weighs less than 120 pounds sits in the seat, the airbag automatically turns itself off. There is a sensor in the seat and if the person leans back, more weight will be shifted to the back of the seat rather than the seat itself, and the yellow warning light will illuminate. The airbag will not deploy if the yellow light is on. The Board concluded that the intermittent illumination of the passenger-side "airbag off" warning light, indicating that the airbag would not deploy, when there was a passenger weighing more than 120 pounds sitting squarely in the seat, 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. The Manufacturer's assertions to the contrary were rejected. Accordingly, the Consumer was awarded a refund.

Navas v. General Motors Company-Cadillac Division, 2009-0199/PEN (Fla. NMVAB July 31, 2009)

The Consumers complained of a broken control arm causing their 2008 Cadillac SRX to become inoperable. While the vehicle was being driven at a very slow speed, the right front suddenly dropped down, causing the vehicle to abruptly decelerate and swerve to the right, hitting a nearby wooden fence. When the vehicle contacted the fence, it was traveling approximately 13 miles per hour. Shortly after the accident, the vehicle was towed to the Manufacturer's authorized service agent where it remained for approximately the three months prior to the hearing. The Consumers also produced an affidavit of a witness to the accident which corroborated their testimony of what happened. The Manufacturer asserted the affirmative defense that the alleged nonconformity was the result of an accident of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer argued the alleged defects in the vehicle were caused by the accident. After the accident, the Manufacturer's representative inspected the vehicle at the Manufacturer's authorized service agent. He expressed the opinion that the damage to the control arm happened after the vehicle hit the fence. He testified that, if the control arm was broken before the accident, then it would have just hung down and would not have moved inward to the location it was in when he did his inspection. The Board concluded that the broken control arm causing the vehicle to become inoperable was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it was a nonconformity within the meaning of the statute. The Manufacturer failed to prove, by a preponderance of the evidence, that the defect was the result of the accident. Therefore, the Consumers were awarded a refund.

Peters v. American Honda Motor Company-Acura Division, 2009-0202/FTL (Fla. NMVAB August 3, 2009)

The Consumer's 2007 Acura RDX had a white crystalline or powdery substance growing out of the armrests, under the hood, on the stitching on the seats, the stitching on the door panels, the rubber on the door panels, and on the headrests. The substance did not have an odor, but was very visible. The Consumer testified she felt ill when she drove the vehicle, and when her son was in the vehicle he also felt ill. She never cleaned the interior of the vehicle with any chemicals, and she never carried any chemicals or fertilizer in the vehicle. None of the other vehicles owned by the Consumer and her husband had ever displayed this substance. The Manufacturer asserted the statutory affirmative defense that the alleged defect was the result of an accident, abuse, neglect, unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. An investigator with the Defense Litigation Group, Inc., looked at the vehicle and in May 2009, and obtained a sample of a "white crystalline substance" from the left rear door panel armrest. He used a razor blade to scrape the substance into a test tube, and then shipped the test tube to the ECA lab in San Diego, California. ECA analyzed the sample and reported that it "appeared" to be "ammonium phosphate monobasic, a fertilizer." The Manufacturer's representative testified that Honda does not use ammonium phosphate monobasic in its assembly of vehicles. The Board concluded that the white substance growing or appearing under the hood and on various parts of the interior of the vehicle was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity as defined by the statute. The Manufacturer's affirmative defense that the nonconformity was the result of an accident, abuse, neglect or unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent

was rejected as not proven by a preponderance of the evidence. Therefore, the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

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

Mir v. Toyota Motor Sales USA, 2009-0178/FTL (Fla. NMVAB July 1, 2009)
The Consumer complained that intermittently, the keyless remote was inoperable in his 2009 Toyota Corolla. The Board found the problem substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of 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, timely responded, and attempted to set up a final repair attempt; however, the Consumer declined to present the vehicle. The Consumer testified that he was told by an individual at the National Center for Dispute Settlement, the Manufacturer's informal dispute resolution mechanism, that he did not need to present the vehicle to the Manufacturer's designated repair facility for the final repair attempt, if he did not want to, so he did not present the vehicle on the date established by the Manufacturer. The Consumer further testified, however, that when he left the NCDS hearing he told the Service Manager at Maroone Toyota, who also was at the NCDS hearing, that as soon as he got the NCDS decision, he would bring the vehicle in for the final repair attempt. The Consumer believed that a repair performed on April 20, 2009, was the final repair attempt. The Manufacturer's representative testified that the Manufacturer was not directly involved in the April 20, 2009, repair attempt and that no final repair attempt was conducted by the Manufacturer. The Board found that the Manufacturer responded to the Consumer's written notification in a timely manner and attempted to schedule a final repair attempt. The Consumer chose not to present the vehicle; consequently, the Manufacturer had not yet had a reasonable number of attempts to correct the keyless remote nonconformity and the Consumer was not qualified for repurchase relief under the Lemon Law. Therefore, the case was dismissed.

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

Morgan v. Chrysler Group LLC, 2009-0210/FTL (Fla. NMVAB September 22, 2009)
The Consumer's 2007 Chrysler 300 had the following nonconformities: dings and dents in the body of the vehicle, the "FOB" key intermittently not opening the vehicle or trunk, a rough idle, and noise from the air conditioner. The vehicle was at the Manufacturer's authorized service agent for a total of 30 cumulative out-of-service days for repair of the nonconformities. The Manufacturer contended that it should not be "penalized" for the days the vehicle was in the body shop for repair of the dents and dings as they were not "manufacturing defects." The Manufacturer's witness attributed the body damage to either the transport of the vehicle to the selling dealer or damage sustained while the vehicle sat on the dealer's lot prior to its purchase by the Consumer. The Board rejected the Manufacturer's argument and counted the days out of service for the dings and dents. Accordingly, the Consumer was awarded a refund.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Navas v. General Motors Company-Cadillac Division, 2009-0199/PEN (Fla. NMVAB July 31, 2009) (*See*, "Reasonable Number of Attempts" above.) The Consumers requested reimbursement of car insurance paid during the approximately three months the vehicle was just sitting at the Manufacturer's authorized service agent. The Manufacturer objected to reimbursement for the insurance due to the fact that the insurance expense was incurred as a result of state law and not wholly incurred as a result of acquisition of the vehicle. The Board denied reimbursement for the car insurance as not being under the definition of "collateral charges" in the statute.

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

Johnson v. Ford Motor Company, 2009-0035/WPB (Fla. NMVAB August 25, 2009)
The Consumer originally purchased a new 2006 Lincoln Town Car, which was returned to the Manufacturer's authorized service agent, due to vehicle defects. The service agent delivered to the Consumer in substitution the new 2007 Lincoln Town Car, which was the subject of the arbitration hearing. The service agent prepared a "Purchase Agreement" that reflected a "Total List Price" for the 2007 Town Car and a "Trade-in Allowance/Discount" for the 2006 Town Car of the same amount. Since the 2007 Town Car was delivered to the Consumer as a substitute for the 2006 Town Car, the documents related to the sale of the 2006 Town Car were utilized to calculate the amounts due the Consumer. The Consumer originally traded in a 1998 Lincoln Mark VIII for which she received a net trade-in allowance of $3,000.00, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer and she produced a NADA Official Used Car Guide, seeking the retail price as the net trade-in allowance pursuant to Section 681.102(19), Florida Statutes. However, the NADA Guide did not reflect a retail price for the 1998 Lincoln. Therefore, the Board awarded the Consumer the $3,000.00 net trade-in allowance reflected in the purchase agreement as part of her refund.

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

Johnson v. Ford Motor Company, supra.
For the purpose of calculating the statutory reasonable offset for use, the Consumer asserted the purchase price was $31,536.00 ($43,686.00 reduced by a $12,150.00 Ford rebate). The Manufacturer objected to reduction of the purchase price to take into account the rebate, arguing that the $12,150.00 identified as a "Ford rebate" in the purchase document represented an "employee discount" because the Consumer's father was a Ford dealer. The Board rejected the Manufacturer's objection and used $31,536.00 as the purchase price for calculating the offset for use.

Buchanan v. Chrysler Group LLC, 2009-0272/JAX (Fla. NMVAB September 18, 2009)
The Manufacturer stipulated that the Consumer's 2008 Dodge Avenger was a lemon; therefore, the Consumer was awarded a refund. In May 2008, the Consumer had filed a civil lawsuit against the Manufacturer for various breach of warranty claims regarding her defective vehicle. In August 2008, as part of that lawsuit, the Consumer made her vehicle available to the Manufacturer for an inspection and a chance to make a settlement offer to her. At that time the Manufacturer elected not to inspect the vehicle. The Consumer argued that the additional mileage put on the vehicle after that date should not be attributable to her in calculating the statutory reasonable offset for use, because the Manufacturer should have inspected the vehicle and subsequently, repurchased it from her. The Manufacturer objected to using the mileage as of August 2008, arguing that the lawsuit was "completely separate" from the Lemon Law claim and should not have any effect on the mileage attributable to the Consumer for calculation of the offset. Section 681.102(20), Florida Statutes (2009), establishes the formula for its calculation, in pertinent part as: "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first, multiplied by the purchase price of the vehicle and divided by 120,000." The Board found the Consumer's argument on the issue to be compelling and not outside the scope of the statutory formula. The Manufacturer's objection was denied and the reasonable offset for use was calculated based on the mileage attributable to the Consumer up to August 2008.

MISCELLANEOUS PROCEDURAL ISSUES:

Urie v. Toyota Motor Sales USA, 2009-0245/TPA (Fla. NMVAB September 28, 2009)
Pursuant to Paragraph (8), *Hearings before the Florida New Motor Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration" and "affirmative defenses not timely raised in the required form, or in a timely filed amendment to the original timely filed Answer cannot be raised at the hearing, unless permitted by the Board." In this case, the Manufacturer's Answer was never filed with the Board, nor provided to the Consumer. At the hearing, the Manufacturer's Representative did not appear to have a copy of the Answer and could not provide any explanation of why the Answer had not been filed. Upon consideration by the Board, the Manufacturer was not allowed to raise any affirmative defenses at the hearing. The Manufacturer's representative was allowed to cross-examine the Consumer and to give a closing statement.