OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2010 - June 2010 (2nd Quarter)

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

Salvat v. American Honda Motor Company, 2010-0062/FTL (Fla. NMVAB June 10, 2010)
The Consumer complained of a pull to the right that was very severe at first but, after repair, was moderate in his 2009 Acura MDX. The Consumer testified he must keep his hands on the steering wheel in order to keep the vehicle in whichever lane the vehicle is traveling. He test drove the vehicle with someone from the dealership, and even though the vehicle was being driven on the wrong side of the road, it still pulled to the right. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety; rather, the vehicle had a minor drift. The Manufacturer's witness testified he was present when the vehicle was test driven at the Manufacturer's final repair attempt. The vehicle's alignment was not checked at the final repair attempt because, according to the witness, just resting one's hands on the steering wheel was all that was necessary to keep the vehicle traveling straight. The Board concluded that the pull to the right was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity. Accordingly, the Consumer was awarded a refund.

Mostow v. Maserati North America, Inc., 2010-0039/FTL (Fla. NMVAB April 14, 2010)
The Consumer complained that the leather was peeling on various interior parts of his 2009 Maserati Quattroporte. After having the vehicle for a short time, the Consumer noticed the leather peeling off the door panels, the console and the rear deck/hatshelf in the back seat. Little by little, the leather started peeling off every place where there was leather. The Consumer talked with someone at the dealership and was told that a different glue used in the manufacturing process was causing the peeling. The leather was reattached but started peeling again. Thereafter, new door panels, dash and hatshelf were shipped from Italy and installed. The Consumer was extremely unhappy with the workmanship of the installation of the new parts. The gear shift handle in the center console came off in his hand, the door handle on the passenger door did not match the door handle on the driver's side door, the trim around the doors and windows was crimped, not smooth, as before; velcro stuck out where there was none before, and the leather was peeling once again. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. Rather, the Manufacturer maintained the Consumer's complaint was a "cosmetic" issue. The Manufacturer acknowledged other vehicles were having the same problem with the leather peeling. Maserati only had one individual who was qualified to do leather work, so spray contact cement was used to make temporary repairs until the new parts came from Italy. Those pieces, which were manufactured for this vehicle's VIN, were factory assembled and came with the leather already attached. Maserati's witness agreed "some mistakes" were made in the installation of the new parts, but he did not believe the "mistakes" were substantial. The Board concluded that the leather peeling

was a defect or condition that substantially impaired the use and value of the vehicle, thereby constituting a nonconformity. Accordingly, the Consumer was awarded a refund.

McClain v. Chrysler Group LLC , 2010-0063/TLH (Fla. NMVAB May 7, 2010)
The Consumer testified that while he was driving his 2008 Chrysler 300 on a local street, he heard a noise coming from the engine, followed by the oil warning light illuminating, the engine seizing and the car breaking down. The vehicle was towed to the Manufacturer's authorized service agent on that day. The Manufacturer asserted the statutory affirmative defense that the nonconformity was the result of abuse or neglect of the vehicle by persons other than the Manufacturer or its authorized service agent. In support of this defense, Chrysler's witness testified that the damage to the vehicle's engine was a result of the oil not being changed at intervals recommended by the Manufacturer in the vehicle's Owner's Manual, which advised that the oil be changed every 6,000 miles. The Manufacturer produced photographs of oil sludge from the engine of the Consumer's vehicle. In rebuttal, the Consumer testified that he always had the oil changed at least every 6,000 miles, often every 3,000 miles, and produced the receipts from all but one of his oil change services. The Board resolved the evidentiary conflict in favor of the Consumer, concluding that the Manufacturer's evidence was not sufficient to prove that the engine failure was the result of a failure by the Consumer to maintain the vehicle via regular oil changes inasmuch as the Consumer's evidence established that regular oil changes were performed at the intervals recommended by the Manufacturer. The engine failure caused by the engine seizing was a defect that substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity; consequently, a refund was awarded.

Marsal v. BMW of North America LLC , 2009-0394/WPB (Fla. NMVAB April 23, 2010)
The Consumers' 2008 BMW M3 intermittently went into "limp" or "failsafe" mode; that is, the RPM's would not go over 2,500 or 3,000 and the vehicle accelerated "extremely" slow. In November 2009, when the Consumer was driving the vehicle, he was merging into traffic when all the lights on the dash lit up and the vehicle accelerated so slowly that it was almost rear ended by the car behind him. According to the Consumer, the vehicle went into failsafe mode on two other occasions after November 2009. The Manufacturer asserted the statutory affirmative defense that the alleged intermittent poor acceleration was the result of unauthorized modification of the vehicle by persons other than the Manufacturer or its authorized service agent. The Manufacturer's witness testified that, when the vehicle came in for servicing on October 17, 2008, fault code 2B14 had recorded, notifying that the idle speed actuator was defective. The idle speed actuator was replaced on October 20, 2008, and the fault code was not present in the vehicle's on-board computer at either the final repair attempt, or the Manufacturer's prehearing inspection. A second Manufacturer's witness testified that when the vehicle came in for servicing on September 7, 2009, the dash was "lit up like a Christmas tree" and the engine was in limp mode. They found a "pinched" wire so they insulated the wire and reprogrammed the connecting module. The witness believed the wire got pinched when someone other than the Manufacturer or the Manufacturer's authorized service agent, installed aftermarket lights on the vehicle; however, the witness did not see any aftermarket lights on the vehicle. The Board concluded that the intermittent poor acceleration was a defect or condition that substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity. The Manufacturer's assertion was rejected as unsupported by the evidence.

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

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

Feltenberger v. Ford Motor Company, 2010-0003/PEN (Fla. NMVAB April 13, 2010)
A defective pre-paint preparation or fabrication process at the factory left foreign bodies or particles trapped under the paint on the Consumer's 2008 Ford Expedition, which the Board found to be a nonconformity. The vehicle was presented to the Manufacturer 's authorized service agent for repair of the defective paint job on March 17-25, 2009, July 23-28, 2009, and September 30, 2009, when the vehicle was inspected and the Consumer was told to bring vehicle back at a more convenient time. The Manufacturer asserted that it "was not given three repair attempts plus a final repair attempt," because when the Consumer took the vehicle to the authorized service agent on September 30, 2009, "[n]o repairs were made ... [and] no repair order was generated for the visit." The applicable rule defines a "repair attempt" to include "[a]n examination of a reported nonconformity, without a subsequent adjustment or component replacement…if it is later shown that repair work was justified. " Rule 2-30.001(2)(b), F.A.C. The Manufacturer's assertion was rejected by the Board; the September 30, 2009, examination by the authorized service agent was a repair attempt. The Manufacturer having failed to correct the nonconformity within a reasonable number of attempts, the Consumer was awarded a refund.

Appleton v. Toyota Motor Sales USA, Inc., Lexus Division, 2010-0075/JAX (Fla. NMVAB June 17, 2010)
The erratic shifting of the transmission in the Consumer's 2009 Lexus RX350 was found to be a nonconformity. The evidence established that the nonconformity was initially taken to the Manufacturer's service agent for repair on one occasion, at which time no repair was made. When the Consumer again contacted the Manufacturer seeking repair, he was told there had been no problem previously found and that Lexus would take no further action. Following this contact, and after written notice from the Consumer, the Manufacturer undertook the statutory final repair attempt, at which time no repair was performed. The erratic shifting of the transmission continued to exist after the final repair attempt. Under these circumstances, the Board found that a reasonable number of attempts was undertaken. The Manufacturer having failed to correct the nonconformity within a reasonable number of attempts, the Consumer was awarded a refund.

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

Kay v. BMW of North America LLC, 2010-0022/WPB (Fla. NMVAB May 4, 2010)
The Manufacturer stipulated that the Consumer's 2008 BMW 535i had an engine condition which manifested itself in the vehicle lurching forward upon acceleration, reduced power on acceleration, a hard start, defective fuel injectors and insufficient fuel pressure, and that the engine condition was a nonconformity. On December 18, 2009, 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 on December 22, 2009, but did not respond to the notification until January 4, 2010, beyond the statutorily required 10-day response

time. No final repair attempt was conducted. At the hearing, the Manufacturer, through counsel, initially asserted that the Consumer's claim should be dismissed, arguing the Consumer "denied" the Manufacturer the opportunity for a final repair attempt. The Manufacturer asserted its response to the Consumer's written notification was "timely," given the intervening holiday and weekend. The evidence established that the Consumer sent the required written notification to the Manufacturer after at least three unsuccessful attempts to repair the nonconformity. The Manufacturer received the notification, but did not respond until 14 days after its receipt. The Manufacturer having failed to respond and give the Consumer the opportunity to have the vehicle repaired within the time required by the statute, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Accordingly, the Manufacturer's request that the Consumer's case be dismissed was denied and the Consumer was awarded a refund.

Wirt v. Hyundai Motor America, 2010-0074/TPA (Fla. NMVAB May 26, 2010)
The Consumer's 2007 Hyundai Sonata had an intermittent electrical and transmission lock-up condition, which the Board found to be a nonconformity. On September 18, 2009, the Manufacturer received written notification from the Consumer giving the Manufacturer a final opportunity to repair the vehicle. On September 28, 2009, at 7:00 PM, a Manufacturer letter was delivered to the Consumer, directing her to bring the vehicle to a designated repair facility on October 1, 2009 at 9:00 AM, for the Manufacturer's final repair attempt. The Consumer had a previously scheduled doctor's appointment for that date and she called the Manufacturer to so advise. She was told that the Manufacturer would send her another letter; however, she never received a letter and she was never re-contacted by the Manufacturer or its authorized service agent. When she attempted to bring the vehicle in for service on several subsequent occasions, she was told by the Manufacturer's authorized service agent that they would not be dealing with her anymore. At the hearing, the Manufacturer's representative testified that he had no personal knowledge of the subject vehicle except for some notes relayed to him from the Hyundai Consumer Call Center. Those notes indicated that someone tried to call the Consumer's home to try to reschedule the Manufacturer's final repair attempt for October 22, and spoke to the Consumer's husband. However, the representative admitted that he had no personal knowledge of whether the Consumer ever received a call. The Board found that the evidence established that the Consumer sent the required written notification to the Manufacturer after at least three attempts to repair the nonconformity, that the Manufacturer received the notification, and that the Manufacturer timely responded to the notification. However, the greater weight of the evidence established that the Manufacturer failed to give the Consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the Consumer's receipt of the Manufacturer's response. Accordingly, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply and a refund was awarded to the Consumer.

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

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

Tendler v. BMW of North America LLC , 2010-0082/WPB (Fla. NMVAB May 19, 2010)
The Consumer complained of engine, acceleration and electrical problems in his 2008 BMW X5. The Consumer admitted that, on September 5, 2009, he drove his vehicle through a water puddle and although much smaller cars were able to drive through the puddle, his vehicle's engine malfunction light came on and the engine stalled while he was driving through the puddle. He was advised by the Manufacturer's authorized service agent that water had gotten into his engine and the engine had to be replaced. The Consumer filed a claim with his insurance company, which paid approximately $24,486.80 for the engine replacement. The Consumer further testified that, since the engine replacement, he has experienced acceleration, engine and electrical problems, all of which were repaired by the Manufacturer's authorized service agent at no cost to him and under the Manufacturer's warranty. The Manufacturer asserted the statutory affirmative defense that the alleged engine, acceleration and electrical defects were 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; specifically, that on September 5, 2009, the subject vehicle was driven through deep water causing hydro-lockup. As a result of this incident, the engine stalled and was replaced. The vehicle's repair history revealed no engine condition or defect prior to water getting into the engine. The Owner's Manual for the subject vehicle stated the following with respect to driving through water, "Do not drive through water on the road if it is deeper than 20 in/50cm, and then only at walking speed at the most. Otherwise, the vehicle's engine, the electrical system and the transmission may be damaged." The Board concluded the engine, acceleration and electrical problems complained by the Consumer were the result of an accident; specifically, the Consumer driving through a water puddle causing water damage to the engine, and as such the resulting problems did not constitute one or more nonconformities within the meaning of the law. The case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Cameron v. BMW of North America LLC , 2010-0079/WPB (Fla. NMVAB May 20, 2010)
The Consumer sought reimbursement as a collateral charge of $999.99 for "Liquid Glass Treatment" (the receipt described the treatment in relevant parts as "hand wash & dry, clean windows in & out and hand wax, buff and detail paint finish.") to which the Manufacturer objected. The Consumer's request was denied by the Board as not constituting a collateral charge as defined by the statute.

Incidental Charges §681.102(8), F.S.

Mendez v. General Motors Company, Chevrolet Motor Division, 2010-0070/ORL (Fla. NMVAB May 7, 2010)
The Board found the musty or mildew odor emitted by the air conditioner in the Consumer's 2008 Chevrolet Malibu to be a nonconformity and awarded the Consumer a refund. The Consumer sought reimbursement of $35.00 as an incidental charge, which represented a health insurance co-pay amount paid when he sought treatment for nasal irritation caused by the defect. The Board awarded the Consumer the $35.00 as a direct result of the nonconformity.