OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2010 - September 2010 (3rd Quarter)

NONCONFORMITY 681.102(16), F.S. (2009)

Hall v. Nissan Motor Corporation USA, 2010-0158/STP (Fla. NMVAB August 9, 2010)
The Consumers complained that the front passenger "airbag off" light in their 2009 Nissan Rogue intermittently illuminated regardless of the size or weight of the passenger. When the light was illuminated, the air bag would not deploy. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. In support of that assertion, the Manufacturer's witness testified that the vehicle was operating "as designed" by distinguishing between a red airbag off warning light which warns of malfunctions and an amber airbag off light which displays for informational purposes only. According to the witness, if there was a malfunction in the system, a red diagnostic trouble alert code would have been set. The Consumers complained of an amber light illumination; therefore, no repairs were performed on the vehicle. The Board concluded that the intermittent front passenger airbag off light illumination was a defect or condition that substantially impaired the safety of the vehicle. The intermittent nature of the light illumination, even when the passenger's size and weight were not within the parameters set to turn off the airbag, and the fact that the illumination indicated the air bag would not deploy, reasonably caused the Consumers to be concerned for passenger safety. The Manufacturer's assertion that the light was functioning normally was not born out by the evidence and, in any event, did not prove the statutory affirmative defense that the vehicle did not have a nonconformity. Accordingly, the Consumers were awarded a refund.

Schifano v. BMW of North America, LLC, 2010-0168/ORL (Fla. NMVAB September 10, 2010)
The Consumer complained that the computer in his 2008 BMW 528i intermittently advised that there was a malfunction in the passenger safety restraint system (SRS). This was sometimes accompanied by illumination of the passenger airbag light. The Manufacturer contended that the Consumer, or someone on his behalf, had tampered with an electrical connector which caused the recurring illumination of the airbag light. The Manufacturer's witness explained that there was a wire that ran along the passenger SRS cable which monitored the cable. There were connectors at each end of the monitoring wire, one in the trunk, and one under the hood. The recurring faults found in the Consumer's vehicle indicated there was an open circuit for a connector at the end of the monitoring wire. The Consumer denied having any knowledge of mechanics or how the SRS worked and he also denied tampering with the tape or connector. A majority of the Board concluded that the intermittent warning of a malfunction in the SRS was a defect or condition that substantially impaired the use, value and safety of the vehicle. The Manufacturer's evidence in support of its defense that the Consumer or someone on his behalf tampered with the connector was not sufficient to overcome the credible evidence and testimony presented by the Consumer; therefore, the Board rejected the defense. Accordingly, the Consumer was rewarded 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.

Darsey v. Ford Motor Company, 2010-0146/TPA (Fla. NMVAB August 11, 2010)
The Consumer purchased a new 2009 Ford F-150 pickup truck, and complained that, intermittently, when braking, the RPMs decreased and it felt like the vehicle kept pulling and would not stop. The Consumer described one incident in which someone cut him off in traffic on a very busy local road, so he slammed on the brakes, but the vehicle would not stop. At that time, the engine lost power, all of the warning lights on the dashboard illuminated and black smoke poured out of the tailpipe. After this incident, he got a Vehicle Health Report through Ford's Sync system, which advised he should seek repair for an "urgent brake warning." The Consumer subsequently received two more "urgent brake warning" Vehicle Health Reports, but the service agent was "unable to verify the concern," and no repairs were made. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent braking defect on three occasions, twice after the Manufacturer's receipt of written notification of the defect from the Consumer. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle and that there "have not yet been an unreasonable number of repairs." The Manufacturer's authorized service agent had not inspected the truck for a brake problem; rather, they treated the complaint that "the vehicle feels like it does not want stop when braking" as a transmission complaint. A majority of the Board concluded that the intermittent braking defect substantially impaired the use, value or safety of the vehicle, thereby constituting a nonconformity. The Manufacturer was given a total of three opportunities to repair the intermittent braking nonconformity, two such attempts occurring after the Manufacturer's receipt of written notification from the Consumer, and the nonconformity was not repaired. The Consumers were awarded a refund.

Alpizar v. Toyota Motor Sales USA, 2010-0164/MIA (Fla. NMVAB August 12, 2010)
The Consumer's 2008 Toyota Sienna had an intermittent no start/hard start nonconformity which was accompanied by the illumination of the "check engine" warning light and which may have been triggered by the sliding doors, radio and DVD malfunctioning or being inoperable, and the transmission shifting harshly. The vehicle was presented to the Manufacturer's authorized service agent for repair of the nonconformity three times, once after written notification to the Manufacturer. During that repair, no work was performed; however, as credibly testified to by the Consumer, the no start/hard start and related electrical malfunctions continued to exist after the final repair attempt, as evidenced by three failures to start after the last repair attempt. Under the circumstances, the Board found that three 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. Consequently, the Consumer was awarded a refund.

Thompson and Black v. Toyota Motor Sales USA, 2010-0115/FTL (Fla. NMVAB July 23, 2010)
The Consumer purchased a new 2009 Toyota Camry that intermittently, when she would take her foot off the accelerator, would not slow down, but would continue to accelerate and she would have to depress the brake pedal several times to slow down the vehicle. She described the problem as occurring "sporadically" and almost resulting in an accident. The Board concluded that the intermittent continuing acceleration was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity. The first time the vehicle was presented to the Manufacturer's authorized service agent for repair, the Consumer was told they were not making repairs to accelerator pedals as yet. A month later, she brought the vehicle to a different Manufacturer 's authorized service agent and was given a business card with the notation that she would be on a waiting list for a repair; however, she was never subsequently contacted. Neither service agent prepared a written repair order for these attempts contrary to the requirement of Section 681.103(4), Florida Statutes. Under the circumstances, it would have been fruitless for the Consumer to go to yet another service agent; instead, she sent written notification directly to the Manufacturer, to give the Manufacturer a final opportunity to repair the vehicle. The Consumer's address was on the written notification, which the Manufacturer received; however, the response was sent to the wrong address and the Consumer did not receive it within the statutory 10 days. The Manufacturer having failed to timely respond, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Board looked to the two repair attempts prior to the written notification to determine whether a reasonable number of attempts was undertaken. Nothing was done by the Manufacturer's authorized service agents to repair the nonconformity during those two attempts and if it was, there was no documentation of it; consequently, the Board concluded that the Manufacturer failed to correct the nonconformity within a reasonable number of attempts and 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.

Milgrim v. Toyota Motor Sales USA, 2010-0135/WPB (Fla. NMVAB July 23, 2010)
The Consumer's 2009 Toyota Camry had a sticky gas pedal, a sticking gear shift, and the brakes did not feel "right," all of which were found to be nonconformities. The vehicle was out of service by reason of repair of the nonconformities for a total of 47 cumulative days. After 15 or more days out of service, the Consumer sent written notification to the Manufacturer to so notify the Manufacturer. The Manufacturer received the notification and thereafter, the vehicle was subjected to inspection by the Manufacturer's authorized service agent. At the hearing, the Manufacturer contended that there were not three repair attempts or 15 days out of service before the Consumer sent in the written notification. The Board rejected the Manufacturer's contention as to the days out of service and presumed that a reasonable number of attempts had been undertaken to conform the vehicle to the warranty. The vehicle having been out of service for repair of nonconformities for 47 days, the Consumer was awarded a refund.

Cohen v. BMW of North America, LLC, 2010-0144/MIA (Fla. NMVAB August 9, 2010)
The Consumer complained of an electrical condition in his 2008 BMW 528i, which the Board found to be a nonconformity. The vehicle was out of service by reason of repair of the nonconformity for a total of 28 cumulative out-of-service days. The Consumer sent written

notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification. Following receipt of the notification, the Manufacturer or its authorized service agent had more than one opportunity to inspect or repair the vehicle, as evidenced by the repair orders in the file. At the hearing, the Manufacturer asserted that this matter should be dismissed, because the Consumer did not accord it a "final repair attempt." The Board rejected the contention, concluding that the Consumer had met the requirements of Section 681.104(1)(b), Florida Statutes. The Consumer was awarded a refund.

What Constitutes Written Notification Under §681.104(1)(a), & Final Repair Attempt §681.104(1)(a),

Chassin v. Volkswagen/Audi of America Inc., 2010-0201/STP (Fla. NMVAB September 27, 2010)
The Consumer complained that the electric convertible top was inoperable in his 2009 Audi TT Roadster. After three unsuccessful repair attempts, the Consumer mailed a Motor Vehicle Defect Notification form to the following address: "Audi of America, P.O. Box 17497, Baltimore, MD 21297." This was not the address given in the Manufacturer's written warranty as the address to which written notice under Florida's Lemon Law should be sent. Nevertheless, the Manufacturer eventually received the notification and within 10 days thereafter, contacted the Consumer to arrange for a final repair attempt. The Consumer advised the Manufacturer that "Audi was out of compliance[,]" and that he had "retained an attorney[,]" and then he disconnected the call. The vehicle was not presented for a final repair attempt. Concluding that the Manufacturer had complied with the statute and was entitled to an opportunity for a final repair attempt, the Board dismissed the claim.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Vazquez v. Toyota Motor Sales USA, 2010-0150/JAX (Fla. NMVAB July 22, 2010)
The Board found the steering condition in the power assist system that resulted in the vehicle unexpectedly drifting right or left in the Consumer's 2010 Toyota Corolla to be a nonconformity and awarded the Consumer a refund. The Consumer sought reimbursement of $160.00 ($10.00 per hour) for two days of lost wages to attend the hearing and the NCDS hearing. The Consumer did not provide any documentation to verify the lost wages and the Manufacturer objected to the request for reimbursement as being speculative. The Consumer's unsubstantiated request for reimbursement of lost wages was denied by the Board as unreasonable.

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

Kruger v. Toyota Motor Sales USA, 2010-0147/WPB (Fla. NMVAB September 23, 2010)
At the time of purchasing their 2009 Toyota RAV4, which was declared a lemon by the Board, the Consumers traded in a 1995 Mercury Villager vehicle for which they received a "net trade-in allowance" of $4,500.00, as reflected in the purchase contract. The Manufacturer was not satisfied with the "net trade-in allowance" reflected in the purchase contract, and requested that the NADA Official Used Car Guide in effect at the time of the "trade in" be used to calculate the trade-in allowance. The Consumers objected, asserting that the NADA Guide was not applicable because the $4,500.00 allowance credited to them was money received pursuant to the United States government's "cash for clunkers" program. The Manufacturer's request that the NADA value be substituted for the "cash for clunkers" "incentive" payment for the Consumers' trade in was denied by the Board.

MISCELLANEOUS PROCEDURAL ISSUES:

Snow v. Ford Motor Company, 2010-0119/TLH (Fla. NMVAB August 17, 2010)
The Manufacturer sought to introduce into evidence the results of the Manufacturer's prehearing inspection. Pursuant to Paragraph (15) of *Hearings Before the Florida New Motor Vehicle Arbitration Board*, "the Consumer must be present during the vehicle inspection, unless he or she expressly waives the right to be present in writing." The Consumers were not present for the inspection and did not waive in writing their right to be present. The Consumers' counsel objected to the documents being submitted into evidence based on the aforementioned rule. Accordingly, the prehearing inspection documents were not considered by the Board and the Manufacturer's witness was not permitted to testify regarding the prehearing inspection.