OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2010 - December 2010 (4th Quarter)

JURISDICTION:

Consumer §681.102(4)F.S. & Motor Vehicle §681.102(15), F.S.

Cerge v. Land Rover of North America, 2010-0233/FTL (Fla. NMVAB November 16, 2010)
The vehicle, a 2008 Range Rover Sport HSE, was originally leased new by Dr. George on July 18, 2008, in West Palm Beach, Florida. Mileage at the time of delivery of the vehicle to the original lessee was 148 miles. The lease was for more than one year with the lessee responsible for having the vehicle repaired. On December 1, 2009, the Consumer, Christina Cerge, located an advertisement for the vehicle on the web site LeaseTraders.com. The Consumer paid a fee to Auto Lease Brokers in order to secure a meeting with the original lessee. At that meeting, the Consumer was told by the original lessee that he had leased the vehicle for family use, and now wanted to get a bigger car with a third row. Subsequently, the Consumer decided to assume the vehicle lease and, after she paid an assumption fee in the amount of $1,927.33 to the lessor, Fifth Third Bank, she took possession of the vehicle. Mileage at the time of her assumption of the lease and possession of the vehicle was 17,000 miles. The Consumer was provided with Land Rover of North America's written express, limited warranty. According to the Consumer, the vehicle was used for personal and family purposes. The Manufacturer asserted that Ms. Cerge was not a "Consumer" as defined by the Florida Lemon Law, and the vehicle was not a "motor vehicle" as defined by the law, because it was not a new vehicle when leased by the Consumer. The Board rejected both of the Manufacturer's contentions. The vehicle was leased to the original lessee as new and the Consumer merely assumed the lease directly from the original lessee. LeaseTraders.com and Auto Lease Brokers acted solely as advertising agents, and not as a dealer that leased the vehicle for purposes of resale. The evidence further established that the vehicle was leased by the original lessee for personal and family use, and was later transferred for the same purpose to the Consumer during the Lemon Law rights period.

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

Ruby v. General Motors Company-Buick Division, 2010-0241/WPB (Fla. NMVAB December 7, 2010)
The Consumer's 2010 Buick LaCrosse had an intermittent whining noise in the steering rack when making U-turns or when the vehicle was being moved out of a parking space. The Manufacturer contended that the intermittent whining noise did not substantially impair the use, value or safety of the vehicle, but was more of an "annoyance" or "nuisance." According to the Manufacturer's witness, the vehicle was performing "as designed." The Board concluded that

the intermittent whining noise in the steering rack was a defect or 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 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.

Fletcher and Johnson v. American Suzuki Motor Corporation, 2010-0215/TPA (Fla. NMVAB October 18, 2010)
The Consumers complained of a pull to the right and of a steering wheel grinding or moaning noise in their 2008 Suzuki Reno. The Board found the problems to be nonconformities. The Consumers presented the vehicle for repair of the steering wheel noise and pull to the right on 10 occasions. At the tenth repair attempt (after written notification to the Manufacturer), the power steering rack was replaced and an alignment was performed, which corrected the steering wheel noise and pull to the right. The Board concluded that, even if these nonconformities were finally repaired at the tenth repair attempt, under the circumstances of this case, ten repair attempts was not a reasonable number. The Manufacturer having failed to conform the vehicle to the warranty provided in Chapter 681, Florida Statutes, within a reasonable number of attempts, the Consumers were awarded a replacement vehicle.

Wilson v. Mercedes-Benz USA, Inc., 2010-0190/WPB (Fla. NMVAB October 5, 2010)
The Consumer's 2010 Mercedes-Benz ML-350 had a shifting condition that caused the transmission to switch from one gear to another without the driver's input. On at least two occasions, while the Consumer was driving on the road, the vehicle went from drive to neutral and from drive to drive1, without the Consumer shifting the gears. The Consumer testified that on at least one occasion, she parked her car, removed the key and exited the vehicle but the vehicle switched to neutral and began rolling backwards. The Consumer further testified that the vehicle felt like it was surging or lurching when driven at approximately 20 miles per hour and had even surged forward without her input on one occasion when she was driving between 55 to 60 miles per hour. The vehicle was presented to the Manufacturer's authorized service agent for repair of the shifting condition on two occasions. On both occasions, the Consumer was told by the Manufacturer's authorized service agent that they could not find anything wrong with the vehicle and no repairs were performed. The Consumer then sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification and the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was inspected but not repaired and the shifting condition remained. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witnesses testified that they were unable to find any defect or condition with the car that would cause the shifting condition about which the Consumer testified. The Board found that the nonconformity was presented to the Manufacturer and its authorized service agent three times for repair, one of which was after direct notice to the Manufacturer, and on each occasion, no repairs

were undertaken. Under the circumstances, 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. The Consumer was awarded a refund.

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

Thames v. Nissan Motor Corporation USA, 2010-0237/TLH (Fla. NMVAB November 16, 2010) The Manufacturer stipulated that the Consumer's 2010 Nissan Maxima had an excessive vibration between 45-75 miles per hour which substantially impaired its use, value and safety. According to the Consumer, a letter from the Manufacturer dated July 8, 2010, instructed him to take his vehicle to Rahal-Miller Nissan in Marianna, Florida on July 21, 2010, for the final repair attempt. On the afternoon of July 23, 2010, the Consumer met with the Manufacturer's representative, Jimmy Noles, who told him that he could not complete the final repair attempt because he needed access to testing equipment that was not available in Marianna. Mr. Noles asked that the Manufacturer be allowed to finish the final repair attempt in Tallahassee, Florida, and indicated that completion of the repair attempt could not occur until the first week of August, because of Mr. Noles' schedule. It was the Consumer's understanding that Mr. Noles was to have called either that afternoon or the next day, July 24th, to schedule the specific time to complete the repair attempt. However, on July 26, 2010, after not receiving a call from Mr. Noles on either the 23rd or 24th of July, the Consumer contacted Nissan to inform them that he intended to proceed with the Lemon Law.

The Manufacturer contended that it was deprived of a meaningful final repair attempt. Jimmy Noles, the Manufacturer's representative, testified that he was present when the vehicle was presented for the final repair attempt in Marianna, Florida, on July 21, 2010, and that on July 23, 2010, he arranged to have all four tires on the Consumer's vehicle replaced in an attempt to correct the vibration problem. When the new tires did not correct the vibration, his only recourse was to perform further tests, and the equipment needed to perform those tests was not available at the repair facility in Marianna. According to Mr. Noles, the Consumer originally agreed to allow the Manufacturer to continue the final repair attempt at a future date in Tallahassee, Florida, and was incorrect in his understanding of when Mr. Noles had intended to call. Mr. Noles acknowledged that, because of his schedule, he would not have been available to complete the final repair attempt until the week of August 2nd. He asserted, however, that the Consumer's refusal to allow him to finish the final repair attempt deprived the Manufacturer of a meaningful final repair attempt. Once the Consumer delivers the motor vehicle to the designated repair facility for the final repair attempt, the Manufacturer, "... shall have 10 days ... to conform the motor vehicle to the warranty. ... If the manufacturer fails to ... perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply." §681.104(1)(a), Fla. Stat. (2009). Under the facts presented in this case, a majority of the Board found that the Manufacturer was afforded the final repair attempt contemplated by the Lemon Law on July 21-23, 2010. The Consumer presented the vehicle at the time and place designated by the Manufacturer. The Manufacturer's proposal to "complete" the final repair attempt at a later time, and at a different location, would have exceeded the 10 day time limit for the final repair attempt provided by statute, and would have required the Consumer to transport the vehicle to a different repair facility, which is also

not required under the statute. The Manufacturer having failed to conform the vehicle to the warranty within a reasonable number of attempts, the Consumer was awarded a refund.

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.

Bedri v. American Honda Motor Company Inc., 2010-0219/JAX (Fla. NMVAB October 25, 2010)
The Consumer complained of a premature deterioration of the neoprene-type tabs or "fingers" that line the circumference of the front-seat cupholders in his 2009 Honda Pilot. The Consumer testified that he is a heavy coffee drinker, and always has a cup of coffee with him when he is driving. Because he drives a great deal, the Consumer explained, the vehicle cupholders located in the center console between the front seats get a lot of use, and are very important to him. The Consumer explained that the tabs lining those cupholders, which act to stabilize whatever cup is inserted, crack and weaken over a short period of time, which had necessitated their replacement on three occasions. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that, when she observed the vehicle at the final repair attempt, the tabs around the edge of the cupholders in question were "abraided" and "cracked"; functional but not pretty. Another Manufacturer's witness testified, based on the damage he saw, that something "too big" was being forced into the cup holder. He also stated that the only time he had seen similar damage was in an old vehicle where the tabs had melted. The Board concluded that the premature deterioration of the neoprene-type tabs or "fingers" that line the circumference of the front-seat cupholders, as complained of by the Consumer, did not substantially impair the use, value or safety of the vehicle so as to constitute a nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

Prado v. American Honda Motor Company Inc., 2010-0242/ORL (Fla. NMVAB November 18, 2010)
The Consumer complained that the head restraint on the driver's side was uncomfortable in his 2009 Honda Accord. He testified that the head restraint was so uncomfortable that he would lose concentration when he was driving, which gave him concern for his safety and the safety of others. He acknowledged that the head restraint was the same one that was in the vehicle when he purchased it and that it was not broken and had not been repaired. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that all Honda Accord head restraints are identical and that the design complies with federally-mandated safety guidelines. He stated that it was the Consumer's positioning of the driver's seat-back which caused the Consumer to find the head restraint uncomfortable. An inspection of the subject vehicle was performed by the Board in the presence of the Consumer and the Manufacturer's attorney and witnesses. The Consumer demonstrated the position of the head restraint and how he sat in the driver's seat, and he operated various seat controls to move the seat up and down. When the Consumer adjusted his

seat back so that it was not completely straight, the head restraint did not appear to be in an uncomfortable position. The Board concluded that the uncomfortable head restraint complained of by the Consumer did not substantially impair the use, value or safety of the vehicle so as to constitute a nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

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

Pagan v. Toyota Motor Sales, USA, 2010-0231/ORL (Fla. NMVAB November 9, 2010)
The Consumer complained of a sudden acceleration on one occasion in his 2010 Toyota Corolla. The Consumer testified that, while he was "taking off " from a stop light at approximately 20 miles per hour, the vehicle began to accelerate by itself up to approximately 60 miles per hour. He attempted to apply the brakes; however, the brake pedal went all the way to the floor and the vehicle continued to accelerate. He acknowledged that he had two floor mats placed under the accelerator and brake pedals at the time; the original Corolla mat and over that, he had positioned a larger Tacoma all-weather mat, to keep the vehicle clean. He additionally testified that he had not experienced any other occurrence of sudden acceleration, either prior to this date or since he removed the larger Tacoma mat, as instructed by the Manufacturer's authorized service agent. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, it was the Manufacturer's position that, when the sudden acceleration event occurred, the subject vehicle was equipped with two floor mats on the driver's side floor, one of which was unauthorized by the Manufacturer and, as a result of this unauthorized modification, the accelerator pedal stuck, causing the sudden acceleration. In support of that assertion, the Manufacturer's witness testified that, prior to the acceleration event, the subject vehicle had already been presented to the Manufacturer's authorized service agent for the A0A or "sticky pedal" recall, which modified the accelerator pedal by installing a reinforcement bar to increase the clearance between the internal mechanisms of the pedal assembly and eliminate any excess friction which might cause the accelerator pedal to stick.

After the vehicle was driven to the Manufacturer's authorized service agent on the day of the sudden acceleration, Toyota technical assistance advised the service agent to remove any additional floor mats not intended for the subject vehicle, to semi-permanently attach the original mat in the driver's position, and to order parts for the ongoing safety recall 90L. Two days later, the 90L safety recall was performed, wherein a new modified, trimmer pedal was installed, to reduce the risk of pedal entrapment by incorrect or out of place accessory floor mats. The witness additionally referred to the subject Owner's Manual advising consumers to "not place floor mats on top of existing mats." The Board concluded that the sudden acceleration problem complained of by the Consumer was the result of unauthorized modification of the motor vehicle by persons other than the Manufacturer or its authorized service agent, to wit: the Consumer's acknowledged stacking of a second floor mat from another vehicle on top of the Manufacturer's authorized floor mat, resulting in the sudden acceleration. Consequently, the Consumer's complaint of sudden acceleration did not constitute a nonconformity within the meaning of the law and the case was dismissed.

Consumer's claim not timely filed §681.109(4), Fla. Stat.

Cohen v. Volkswagen/Audi of North America Inc., 2010-0165/WPB (Fla. NMVAB October 28, 2010)

The Manufacturer contended that the Consumer failed to file the Request for Arbitration within the time period required by statute. On March 4, 2010, the Consumer filed a claim with the BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Audi. On April 14, 2010, the program rendered a decision awarding a refund to the Consumer. The decision was forwarded to the Consumer, accompanied by a letter dated April 15, 2010, which advised the Consumer that she had 14 days from receipt of the refund calculation that accompanied the letter to either accept or reject the decision. In response to the decision and accompanying refund calculation, the Consumer filed a Correction/Clarification Request with BBB/Autoline. On May 17, 2010, BBB/Autoline issued its response to the Consumer's Correction/Clarification Request. That response was accompanied by a letter dated May 18, 2010, advising the Consumer that she had 14 days from the date of this most recent letter in which to either accept or reject the decision, and that if no response was received in that time, the decision would be considered rejected. The Consumer did not respond within the 14-day time period, thereby rejecting the decision.

On June 16, 2010, the Consumer filed her request for arbitration with the New Motor Vehicle Arbitration Board, seeking a refund. The Manufacturer asserted that the Consumer's case should be dismissed because she failed to file her request for arbitration within 30 days after the final action of the Manufacturer's certified procedure. In support of its position, the Manufacturer first contended that April 14, 2010, the date the certified program issued its first decision, should be considered the "final action" date for purposes of calculating the timeliness of the Consumer's request for arbitration. The Manufacturer objected to considering the certified procedure's response to the Consumer's clarification request as the final action, arguing that the Correction/Clarification Request was actually an attempt to re-argue the Consumer's case, and its filing was not authorized under the BBB/Autoline program rules. In the alternative, the Manufacturer asserted that if the Board were to deem the date of the BBB/Autoline's response to the Consumer's Correction/Clarification Request, as the date of the certified program's final action, the Consumer's request for arbitration would still be untimely. In making this alternative argument, the Manufacturer focused on the language of Section 681.109(4), Florida Statutes, which provides that a consumer's request for arbitration must be filed "**no later than** 60 days after the expiration of the Lemon Law rights period, or **within** 30 days after the final action of a certified procedure, whichever date occurs later." The Manufacturer argued that the contrast in wording used by the legislature ("no later than" as opposed to "within") was intentional and must be given effect by interpreting that language as intending to produce differing results. Therefore, the Manufacturer asserted, in order for the Consumer's request for arbitration to have then been filed "**within**" 30 days of May 17, 2010, the request had to have been filed by June 15, 2010, 29 days after the final action of the certified procedure.

The Board rejected both contentions and concluded that the final action of the certified procedure was May 31, 2010, the 14th day of the accept/reject time given in the response to the Correction/Clarification Request. The Consumer's request for arbitration filed on June 16, 2010, was deemed timely filed within 30 days after the final action of the certified procedure.

REFUND §681.104(2)(a)(b), F.S.:

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

Cohen v. Volkswagen/Audi of North America Inc., 2010-0165/WPB (Fla. NMVAB October 28, 2010)
In order to lease the vehicle, the Consumer traded in a 2000 Lexus RX300 for which she received a trade-in allowance of $8,949.80. She applied $3,902.80 of the trade allowance as a down payment on the vehicle lease, with the remaining $5,047.00 paid directly to her via check from the selling agent. The amount of the trade-in allowance was not acceptable to the Consumer. Accordingly, pursuant to Section 681.102(19), Florida Statutes, the Manufacturer was required to produce the March 2008 NADA Official Used Car Guide (Southeastern Edition), the version of the NADA Guide in effect at the time of the trade-in. The Consumer's trade-in vehicle was not listed in the printed NADA Guide, and the Manufacturer submitted several Board Decisions to support its argument that, in the absence of a listing, the Board should use the trade-in allowance reflected in the lease agreement. The Consumer, however, produced a computer printout from the NADA Official Used Car Guide, Southeastern Edition-March 2008, online version, which reflected a retail price for her trade-in of $15,150.00. The Consumer contended that, in the absence of the vehicle listing in the printed NADA Guide book, the Board could look to the online version of the NADA Guide. The Board rejected the Manufacturer's argument. The statute directs the Board to utilize the NADA Official Used Car Guide (Southeastern Edition) but does not specifically limit the Board to use of the printed version of the NADA Guide. Accordingly, the Board awarded the Consumer $15,150.00 for her trade-in vehicle as reflected in the NADA online printout.

MISCELLANEOUS PROCEDURAL ISSUES:

Thames v. Nissan Motor Corporation USA, 2010-0237/TLH (Fla. NMVAB November 16, 2010)
At the hearing, the Nissan representative requested that the Board consider copies of internal emails sent between himself and Heather Arbuckle, an Arbitration Specialist with Nissan North America. The Nissan representative did not submit the emails to the Board or the Consumer prior to the hearing. Pursuant to paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, all documents the Manufacturer intends to present for consideration by the Board must be received by the Board Administrator and the Consumer no later than five days before the hearing. Failure to do so may result in the Board declining to consider the documents unless good cause is shown for the failure to comply. The Consumer objected to the emails being considered, because he did not receive them ahead of time as required by the rule. Based on the aforementioned rule, the Board did not consider the emails.