

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

**QUARTERLY CASE SUMMARIES**

January 2011 - March 2011 (1st Quarter)

**NONCONFORMITY 681.102(16), F.S.. (2010)**

*Linzer v. Land Rover of North America*, 2010-0299/FTL (Fla. NMVAB January 28, 2011)

The Consumer's 2010 Range Rover had a defective passenger air bag system. When the Consumer's wife was in the passenger seat, the passenger air bag warning light came on indicating that the air bag was disabled (meaning it would not deploy in a crash). The problem was intermittent and the Consumer was unable to predict when his wife would have air bag protection. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. Both Manufacturer witnesses testified that the passenger air bag system was not defective and was doing exactly what it was designed to do, which was to disable the air bag when a child or a low weight occupant was seated in order to protect the passenger from the air bag in the event of a crash. Although it is not published by the Manufacturer, the Manufacturer's witness testified that an adult weighing 110 or less pounds might disable the passenger air bag. Since the Consumer's wife weighed 115 pounds, the air bag system would disable depending on how she sat in the passenger seat. The Board concluded that the defective passenger side air bag system 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 Consumer was awarded a replacement vehicle.

*Robins v. Jaguar Cars*, 2010-0252/FTL (Fla. NMVAB March 10, 2011)

Intermittently, even when someone over the threshold weight was sitting in the passenger seat, the passenger "airbag off" warning light illuminated, meaning that the passenger airbag would not deploy, in this 2009 Jaguar XFL. The Consumer testified that when she first purchased the vehicle she weighed 180 pounds and yet sometimes when she rode as a passenger in her vehicle the passenger "airbag off" light illuminated. She later weighed approximately 150 pounds and the light still illuminated intermittently. When she first brought the vehicle to the Manufacturer's authorized service agent complaining about this problem she was repeatedly told there was nothing wrong, but as the warning light continued to illuminate, she eventually became concerned for her safety and that of her passengers. The Manufacturer asserted that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness explained that the passenger airbag system operates on a "bladder" kit that has a sensor in the center of the passenger seat. The sensor measures the amount of weight put on the seat, and "talks" to the module under the seat; the module then "talks" to the center console, to know whether or not to activate the airbag in the event of a triggering occurrence. Jaguar Cars presets the threshold weight for this vehicle between 120 and 125 pounds. However, even if a passenger is over the threshold weight, the way in which they are sitting in the seat can affect the weight distribution in the seat. That is, if they are leaning to one side or have their arm resting on the

console, the weight sensor in the seat could read 10 or 15 pounds less than what the passenger actually weighs. In addition, if the seat is too far forward, regardless of weight, the passenger “airbag off” light will display, and the airbag will not deploy. The Board concluded that the intermittent illumination of the passenger “airbag off” light, warning that the passenger airbag was off even though the passenger met the threshold weight, substantially impaired the safety of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

*Urrutia v. Chrysler Group LLC*, 2011-0002/ORL (Fla. NMVAB March 1, 2011)

The Consumer complained of a loud wind noise emanating from the skyslider roof in his 2010 Jeep Liberty. The Consumer first heard the noise two days after purchasing the vehicle, when he first drove at highway speeds of between 55 through 70 miles per hour. The noise was most prominent on the passenger side of the vehicle and his wife was so annoyed that she was reluctant to ride in the vehicle. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. An air leak was detected on the right front door during a test drive with the aid of “chassis ears.” The Manufacturer contended that the air leak and accompanying noise were corrected at the second repair attempt with the replacement of two moldings around the right front door, and that any noise the Consumer was hearing after that repair was merely the “normal road” noise of driving a soft top vehicle down the highway. The Board concluded that the noise from the skyslider roof 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.**

*Grippi v. BMW of North America LLC*, 2010-0291/JAX (Fla. NMVAB January 31, 2011)

The Consumer complained of a pull to the right in his 2011 BMW 325i. The Manufacturer stipulated that the pull to the right was a nonconformity, and was a “safety issue.” However, the Manufacturer contended that the changes made to the vehicle at the final repair attempt corrected the nonconformity, and that the vehicle was repaired and operating correctly. The vehicle was presented to the Manufacturer’s authorized service agent for repair of the pull to the right on July 15, 2010, at which time there was no work performed. The Manufacturer stipulated that there was no “fix” available for the pull to the right at that time. On August 27, 2010, 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 September 3, 2010. On September 14-15, 2010, the vehicle was presented to the Manufacturer’s designated repair facility for the final repair attempt. At that time, the vehicle’s suspension was tightened and its software updated to change the voltages at which the electronic steering would operate. The Manufacturer indicated that, because there was no “fix” for the Consumer’s problem until the post-notice repair attempt, it agreed that, under the circumstances of this case, two 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 Board concluded that the pull to the right continued to exist; therefore, the vehicle was not conformed to the warranty within a reasonable number of attempts. Accordingly, the Consumer was awarded a replacement vehicle.

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

*Krueger v. Toyota Motor Sales, USA, Inc.*, 2010-0314/WPB (Fla. NMVAB March 1, 2011)

On September 1, 2010, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair his 2010 Toyota Prius. The Manufacturer received the notification on September 7, 2010. By letter dated September 10, 2010, from a representative of Southeast Toyota Distributors on behalf of Toyota Motor Sales, the Manufacturer responded and advised that a Field Technical Specialist would be available to inspect the Consumer's vehicle at Earl Stewart Toyota on September 22, 2010. The Consumer contacted the Southeast Toyota representative and arranged to have the final attempt conducted at Toyota of Stuart on September 27, 2010. On that date, the Consumer delivered the vehicle at the appointed time and was told the Technical Specialist had not arrived and was advised to wait. The Consumer waited 45 minutes to an hour, then left his card with a dealer employee and left the dealership. He called the Southeast Toyota representative, but did not receive a return call until several days later, when he again agreed to bring the vehicle to Toyota of Stuart on October 21, 2010. On that date, the Consumer again arrived at the dealership at the appointed time and was again told the Technical Specialist had not yet arrived. He was again advised to wait, and was informed that a loaner car would be available "if needed." After waiting an hour, he left the dealership when he could not locate the Technical Specialist. He again called the Southeast Toyota representative, who phoned him back and asked why he had not picked up the loaner car and left his vehicle. At the hearing, the Consumer testified that he was not given a loaner vehicle when he arrived at the dealership on October 21st.

The Manufacturer asserted no statutory affirmative defenses to the claim, instead contending that the Consumer was not qualified for relief, because he did not afford the Manufacturer its statutory final repair attempt. In support of its contention, the Manufacturer's representative testified that he was the Field Technical Specialist who was supposed to be at the final repair attempt. According to the representative, typically, Toyota authorizes a loaner vehicle for a Consumer, because he does not meet with Consumers during final repair attempts. He had no firsthand knowledge regarding whether a loaner was authorized for the first scheduled final attempt, and he was not the representative who communicated with the Consumer to schedule the final attempt. The Board found that, after at least three unsuccessful repair attempts by the Manufacturer's authorized service agent, the Consumer sent the required written notification to the Manufacturer, to which the Manufacturer timely responded. Pursuant to instruction by the Manufacturer, the Consumer delivered the motor vehicle to the Manufacturer's designated repair facility for the final repair attempt on September 27, 2010. The Manufacturer failed to complete the repairs within the 10 days required by statute. While not required by statute to do so, the Consumer nevertheless gave the Manufacturer another opportunity and again delivered the vehicle to the designated repair facility pursuant to instruction by the Manufacturer. The Manufacturer again, essentially failed to perform any repair. Therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Manufacturer

failed to correct the nonconformity after a reasonable number of attempts; accordingly, 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.**

*Armada Development Corporation v. BMW of North America LLC*, 2010-0295/FTM (Fla. NMVAB February 21, 2011)

The Consumer asserted that the speedometer in his 2008 BMW X3 was inaccurate, in that it displayed a higher speed than the speed at which the vehicle was actually traveling. The Consumer testified to one incident in which he thought he was driving 70 miles per hour, based on the speedometer display, but when he pulled into the left lane to pass another vehicle, he was forced off the road by a third vehicle, at which time his wife pointed out to him that their GPS displayed a vehicle speed of only 66 miles per hour. The Consumer found the accuracy of the vehicle's speedometer to be off by seven to eight percent. As a result, they parked the vehicle and did not use it unless they absolutely had to do so. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that he tested the Consumer's speedometer at the Manufacturer's final repair attempt using a one-mile course and a stop watch. Over ten tests, he averaged four and one-half percent error in the accuracy of the speedometer, which, according to him, was well within the BMW specifications for the vehicle; therefore, no repair or recalibration was necessary. Although there was no dispute that there was some inaccuracy in the speedometer, the Board found that the evidence failed to establish that this inaccuracy substantially impaired the use, value or safety of the vehicle so as to constitute a nonconformity as defined by the statute. Accordingly, the Consumer's case was dismissed.

#### **REFUND §681.104(2)(a)(b), F.S.:**

#### **Collateral Charges §681.102(3), F.S.**

*Grant v. Volvo Cars of North America*, 2011-0007/JAX (Fla. NMVAB March 1, 2011)

The Consumers' 2010 Volvo XC60 was declared a "lemon" by the Board. The \$687.34 monthly payment the Consumers made to the lienholder included payments made for credit life insurance and credit disability insurance, collateral charges which were financed at vehicle purchase. The Manufacturer's representative objected to the Consumers being reimbursed for the credit life and disability insurance, arguing that, since the insurance was optional, the Consumers should not be reimbursed. The Manufacturer's objection regarding the credit life and disability insurance was rejected by the Board. The financed insurance charges met the definition of collateral charges pursuant to Section 681.102(3), Florida Statutes, and were included in the amount awarded to the Consumers for the monthly loan payments.

*Urrutia v. Chrysler Group LLC*, 2011-0002/ORL (Fla. NMVAB March 1, 2011)  
(See “Nonconformity” above)

The Consumer sought reimbursement of \$80.00 for window tint as a collateral charge. The Consumer did not provide documentation to verify the charge for the window tint and the Manufacturer objected to the request for reimbursement as being “speculative.” An inspection of the subject vehicle was performed by the Board in the presence of the parties where the window tint was observed on the vehicle. The Board awarded the Consumer \$80.00 for window tint as a reasonable collateral charge.

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

*Cates v. JH Global Services, Inc.*, 2010-0292/ORL (Fla. NMVAB February 18, 2011)  
The Board declared the Consumers’ 2010 Star 48-2 Low Speed Vehicle to be a “lemon” and awarded the Consumers a refund. The parties stipulated that there was no mileage on the odometer at the time of delivery or up to the date of the hearing, since the vehicle was not equipped with an odometer. The Manufacturer did not object to a determination of zero miles attributable to the Consumers. Consequently, the reasonable offset use was zero.

*Grant v. Volvo Cars of North America*, 2011-0007/JAX (Fla. NMVAB March 1, 2011)  
(See “Collateral Charges” above)

For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the hearing date was 32,817. The Consumers argued that the mileage should have been calculated up to the first repair attempt for the nonconformity, because they were told to keep driving the car by the Manufacturer’s authorized service agent and because they felt they did not get the full value of the vehicle during those additional miles. The Manufacturer objected and argued that the mileage on the vehicle up to the day of the hearing should be used for purposes of calculating the offset for use pursuant to Section 681.102(20), Florida Statutes. The Consumers’ request that the offset be calculated based upon mileage at an earlier time was denied by the Board.