OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2011 - June 2011 (2nd Quarter)

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

Lichtenstein v. Toyota Motor Sales USA Inc., 2011-0073/FTL (Fla. NMVAB May 25, 2011)
The Consumer's 2009 Toyota Prius had a bad odor inside which got worse when the air conditioner was running. It was a "moldy" or "musty" smell. Although several replacement cabin filters were installed, several chemical sanitizer treatments were performed and the evaporator was replaced, all by the Manufacturer's authorized service agent, the odor was always present after the chemical/sanitizer odor went away. The Manufacturer raised the defense that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that the Consumer's vehicle was built with an updated evaporator core, which has an improved coating that helps it shed odor particles. He further explained that the Manufacturer does not recommend that sanitizer treatments be used because they can compromise the coating on the evaporator. The Manufacturer contended that the dealer took it upon themselves to perform those treatments. The Board concluded that the bad odor in the vehicle, which got worse when the air conditioner was running, substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Mansukhani v. American Honda Motor Company , 2011-0071/FTL (Fla. NMVAB June 17, 2011)
The Consumers complained that intermittently, the moonroof malfunctioned in auto mode in their 2009 Honda Acura TL. When the Consumer opened the moonroof and he pushed the auto touch button to close it, it would not close all the way. That is, it closed half way then opened back up; he then had to press the manual button in order for the moonroof to close completely. The Manufacturer argued that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that it should not matter whether the moonroof is opened all the way or part way, as the auto mode should always close the moonroof completely. According to the witness, all the moonroof parts had been replaced except the glass, and no code indicated there was a problem with any of the parts. He further testified the moonroof has a safety feature and will not close in the event someone's hand is in the way. The evidence established that the intermittent failure of the moonroof to operate properly in auto mode substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were 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.

Leigh v. Nissan Motor Corporation USA, 2011-0016/PEN (Fla. NMVAB April 15, 2011) The Consumer asserted that the driver's side seat rubs against the door in her 2009 Nissan Versa. Ms. Leigh added that, as a result, a little bit of fabric had started to come off of the seat. The Manufacturer asserted the problem did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative inspected the vehicle at the final repair attempt and only noticed normal wear and tear on the seat. At the hearing, the representative opined that the seat may be wearing a little faster based on the way the Consumer turns in the seat while she is exiting the vehicle. The Board concluded that the evidence failed to establish that the seat problem complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

Abella v. Volkswagen/Audi of America, Inc., 2011-0051/FTL (Fla. NMVAB May 20, 2011) The Consumer asserted that his 2009 Volkswagen Jetta had a defective transmission. The Consumer testified that the gears of the manual transmission would grind and it was hard to shift from one gear to another, and after each repair the hard shifting recurred. The Consumer testified his son, who was not present at the hearing, was the primary driver of the vehicle. His son drove the vehicle about 80 percent of the time, and he drove the vehicle the other 20 percent. In support of the statutory affirmative defense that the alleged nonconformity was the result of abuse of the motor vehicle by persons other than the manufacturer or its authorized service agent, the Manufacturer's witness testified he first saw the vehicle on February 4, 2010. The first, third and fifth gears were not working and the shaft was bent. His opinion was that the damage was due to "speed shifting." He explained that speed shifting is when a driver aggressively shifts from one gear to another without using the clutch, which is a common practice when racing a vehicle. Notwithstanding his belief, the gear shift shaft was replaced at the February 4, 2010, repair. The next time he saw the vehicle the synchronizer hub was missing teeth and there were no synchronizer gears. According to the witness, this was not normal and was due to abusive driving habits as metal shaving debris could be seen throughout the transmission. The Board concluded that the greater weight of the evidence established that the hard shifting and stripped transmission gears were the result of abuse by persons other than the manufacturer or its authorized service agent. Therefore, the complained of defect did not constitute a "nonconformity" as defined by the statute and the case was dismissed.

REMEDIES §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Carey-Donlevy v. General Motors Company, 2011-0036/ORL (Fla. NMVAB April 7, 2011)
The Consumer's 2009 Saturn Vue had the following defect or condition that substantially impaired its use, value or safety: a transmission condition, which had manifested itself in several different ways: (a) the transmission hesitated before shifting gears and then "jumped" or "slammed" into gear, (b) the key got stuck and could not be removed from the ignition, and (c) there was a leak in the axle seal. The Consumer requested reimbursement of $308.06 for replacement tires that were purchased for the subject vehicle as an incidental charge. The Manufacturer objected to reimbursement for the tires, and argued that this charge was for a normal wear item associated with vehicle ownership. The Consumer's request for reimbursement of $308.06 for replacement tires was denied by the Board, because such cost was not directly caused by the nonconformity.

Marsh v. Ford Motor Company, 2011-0042/ORL (Fla. NMVAB May 16, 2011)
The Consumers' 2010 Ford Fusion was declared a "lemon" by the Board due to a transmission failure condition which caused three transmission replacements. The Consumers requested reimbursement of the following as incidental charges: $154.00 for towing fees to Crestview, Florida, on September 14, 2010, and $176.26 for alternative transportation from Alabama back to Crestview, and one night campground stay September 21, 2010, caused by the first transmission replacement; $118.19 for car rental on November 16, 2010, in New Mexico, caused by the second transmission replacement; $253.16 for car rental on November 18, 2010, caused by transmission failure while on a planned trip to Texas; $375.33 for U-Haul and towing package on November 22, 2010, to transport the vehicle back to Florida for transmission repair; and $25.67 for postage. The Manufacturer objected to all towing charges as unreasonable; specifically, the Texas charges, on the basis that the Consumers did not give Ford the opportunity to have the vehicle repaired in Texas. The Board awarded the Consumer all incidental charges requested.

Collateral Charges §681.102(3), F.S.

Marsh v. Ford Motor Company, 2011-0042/ORL (Fla. NMVAB May 16, 2011)
(See: **Incidental Charges** above)
The Consumers additionally requested reimbursement of $367.01 for base plate and electrical removal and $372.36 for auxiliary brake removal and installation in a new vehicle to be purchased in the future. The Manufacturer objected on the basis that the removal charges were not wholly incurred as a result of the acquisition of the lemon vehicle. The Consumers' request for $367.01 for base plate and electrical removal and $372.36 for auxiliary brake removal and installation in the future vehicle were denied by the Board.

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

Sepe v. BMW of North America, LLC, 2010-0315/MIA (Fla. NMVAB May 9, 2011)
The Consumers' 2008 BMW 325i was declared a "lemon" by the Board. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $59,320.00. Mileage attributable to the Consumers up to the date of the first scheduled New Motor Vehicle Arbitration Board hearing on February 22, 2011, was 42,455. Application of the statutory formula resulted in a reasonable offset for use of $20,986.92. At the hearing, the Manufacturer asserted the mileage up to the date of the later hearing should be used, rather than the mileage up to the date of the first scheduled arbitration hearing, which was cancelled as a condition of settlement with the Manufacturer. The Manufacturer's attorney argued that BMW did not reach a settlement agreement with the Consumers, and further argued it was the Consumers who postponed the hearing, not the Manufacturer. The Consumers produced a letter from the Manufacturer dated February 21, 2011, which stated, in pertinent part:

> This will confirm our telephone conversation of this date, wherein it was agreed that BMWNA will provide you with a replacement motor vehicle in exchange for the subject vehicle pursuant to the Florida Lemon Law Statute. This will also confirm that you have agreed to postpone tomorrow's arbitration hearing for 90 days pending final resolution of our settlement.

The Manufacturer's assertion that mileage up to the day of the later hearing be used to calculate the offset was rejected. Calculation of the reasonable offset for use is based in part upon, "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first." §681.102(20), Fla. Stat. In this case, there was a settlement agreement between the parties as evidenced by the letter prepared by the Manufacturer, which conditioned the settlement upon the Consumers cancelling the arbitration hearing which was scheduled for February 22nd. The Board concluded that, since both the settlement agreement and the first arbitration hearing date pre-dated the date of the actual hearing, calculation of the offset utilizing miles attributable to the Consumers up to February 22, 2011, was well within the statutory definition.

Ruggiero v. Volkswagen/Audi of America Inc., 2011-0028/FTL (Fla. NMVAB April 1, 2011)
The Consumer's 2010 Volkswagen Tiguan was declared a "lemon" by the Board. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $27,526.00. The Manufacturer argued the mileage used to calculate the offset should be the miles on the odometer at the time of the hearing on March 30, 2011. The Consumer argued that the offset amount should be $3,500.00, the amount designated in the Manufacturer's offer of settlement letter of November 2, 2010. Mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing was 18,330 miles, the number the Board used for calculating the offset for use. Application of the statutory formula resulted in a reasonable offset for use of $4,204.60. The Consumer's request that the offset be the amount quoted in the Manufacturer's November 2, 2010, offer letter was denied. The Manufacturer's request that the Board utilize the mileage on the vehicle's odometer as of the date of the Board's hearing was also denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Hansen v. BMW of North America, LLC, 2011-0068/TLH (Fla. NMVAB May 24, 2011)
At the beginning of the hearing, the Consumer made a motion to exclude all evidence submitted by the Manufacturer that was gathered at the prehearing inspection. Paragraph (15), *Hearings Before the Florida New Motor Vehicle Arbitration Board,* states that "***the consumer must be present during the vehicle inspection, unless he or she expressly waives the right to be present in writing***," and Paragraph (16) states:

> All information gathered as a result of the prehearing inspection will be provided to the consumer in writing as soon as it is available, but no later than ***7 business days*** before the date of the hearing. If the manufacturer fails to provide the information to the consumer as required, evidence or testimony related to the vehicle inspection may not be considered by the board at the hearing.

The Consumer testified that she was not present during the inspection and did not waive in writing her right to be present. Furthermore, she did not receive the results of the inspection until four business days before the hearing. The Manufacturer, through counsel, argued that, since the vehicle was already at the Manufacturer's authorized service agent, the Consumer did not have to be present during the inspection, and that, since no repairs were made or a test drive taken, there was "no harm" in the Consumer not being present. Based upon the plain meaning of the prehearing inspection rules described above, the evidence relating to the prehearing inspection was not considered by the Board.