OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2013 - March 2013 (1st Quarter)

NONCONFORMITY 681.102(15), F.S. (2012)

Rue v. Toyota Motor Sales USA, Inc., 2012-0352/STP (Fla. NMVAB February 10, 2013)
The Consumer complained of a foul odor of mold or mildew intermittently emanating from the air conditioner vents in her 2011 Toyota Camry when the vehicle was first started or after the car had been sitting for a few hours. The Consumer testified this odor sometimes lasted for two to four minutes before dissipating. During that time, she rode in the vehicle with the windows open, because it was not convenient to employ the procedure suggested by the Manufacturer's authorized service agent, which was to get into the vehicle, open all the windows, turn on the engine and air conditioner, get out of the vehicle and let the air conditioner blow for two minutes, and then get back into the vehicle and drive away. None of the repairs corrected the problem. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer also asserted that any alleged odor in the vehicle was "the direct result of environmental conditions." In support of that assertion, the Manufacturer's witness testified that he experienced a "faint whiff of something" for "one to two seconds" on two of the repair visits; however, he acknowledged he did not know how long the vehicle had been sitting after the Consumer dropped it off and before he performed his test. In his view, "you will smell something for a brief moment in any air conditioner." The Consumer's vehicle was dropped off the night before the final repair attempt in order to try to duplicate the conditions under which the Consumer experienced the intermittent air conditioner odor. According to the Manufacturer's representative, "it is not uncommon to notice a somewhat musty odor" upon initial start-up in any vehicle; however, he stated that he did not notice this odor at all in the Consumer's vehicle. A majority of the Board concluded the evidence established that the intermittent foul odor 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 Consumer was awarded a replacement vehicle.

Browning v. Toyota Motor Sales USA, Inc., 2012-0347/FTL (Fla. NMVAB February 15, 2013)
This Consumer complained of a foul odor emanating from the air conditioner in her 2012 Toyota Venza when the a/c was first turned on, and often times while the vehicle was being driven. The Consumer's husband testified that an "unpleasant, obnoxious smell" started coming from the air conditioner vents about one month after they took delivery of the vehicle. The odor did not go away but started to get worse, and the hotter the ambient temperature, the longer the odor would last. When he entered the vehicle, he turned the air conditioner on, put the windows down, and held his breath while he blasted the air conditioner to blow some of the odor out of the vehicle. Nevertheless, sometimes the foul odor lasted 20 to 30 minutes into the drive. The Consumer testified she was the intended driver of the vehicle, but after the odor problem arose she started

having allergy issues and she began driving her husband's vehicle instead. She testified her allergy issues stopped with the change of vehicles. A service writer at one of the Manufacturer's authorized service agents, told the Consumer nothing could be done and they would not even attempt a repair. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was the direct result of "environmental conditions." The Manufacturer's representative testified he conducted the Manufacturer's final repair attempt. He acknowledged that, when he turned on the air conditioner, he experienced an odor that was "not desirable." When he drove the vehicle the odor began to dissipate. He explained that the evaporator in the air conditioning unit was warm, and when the air conditioner was turned on it blew cold air on the evaporator, causing condensation to build up in the unit. Therefore, when the vehicle was shut off, the air conditioner should be switched to outside air for the air to circulate in the unit and help dry out any water that has accumulated; otherwise, the accumulated water can start to smell. Following that practice will not eliminate any air conditioner odor, but it will lessen it, and, according to him, this problem was more prevalent in South Florida because of its wet environment and high humidity. The Board found that the foul odor emanating from the air conditioner 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 Consumer was awarded a refund.

Karp v. Toyota Motor Sales USA, Inc.-Lexus Division, 2012-0270/FTL (Fla. NMVAB January 30, 2013)

In a third air conditioner odor case, the Consumer complained of a foul odor from the air conditioner in her 2012 Lexus IS 250. According to the Consumer, the smell was "vinegar-y" and offensive, and was worse when the vehicle was first started in the morning, so much so that she would leave the door open when she started the car, and started her drive with the windows down in order to air out the vehicle. She testified that on some days the smell tapers off after approximately 30 minutes, but on other days – particularly very hot days – the smell would last all day. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, because the "concern had been repaired and the customer's vehicle was currently up to the manufacturer's specifications." The Manufacturer's witness testified that the odor complained of by the Consumer had to have been caused by micro-organisms on the air conditioner evaporator, but because neither he nor the authorized service agent had ever been able to recreate the odor, the problem had to have been corrected by the repairs that were performed. The Board found that the foul odor coming from the air conditioner substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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.

Browning v. Toyota Motor Sales USA, Inc., 2012-0347/FTL (Fla. NMVAB February 15, 2013) (*See "Nonconformity" above*)
The Manufacturer stipulated that the vehicle was presented to an authorized service agent for repair of the air conditioner odor nonconformity on September 12, 2012 (no repair order given to Consumer) and September 13, 2012, when water was found around the evaporator core, and an air conditioner mist service was performed. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On October 10, 2012, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the evaporator was cleaned and the Consumer was instructed to set the air conditioner to outside air prior to turning off the vehicle. The Consumer again brought the vehicle in for repair of the foul odor on October 27, 2012, and November 17, 2012. The evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent a total of five times. Under the circumstances, the Manufacturer had a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumer was awarded a refund.

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

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

Gallegos v. American Honda Motor Company., 2012-0365/MIA (Fla. NMVAB March 1, 2013)
The Consumer complained of an oil leak in her 2011 Honda Accord. The Consumer testified when she leased the vehicle she was told she could take the vehicle to any Auto Nation dealership for maintenance service. Therefore, she sometimes took her vehicle to Auto Nation Nissan, and sometimes to Auto Nation Honda. On August 6, 2012, the Consumer took the vehicle to the Auto Nation Nissan dealer for an oil and filter change. Subsequent to that maintenance service, she was parked at her friend's home and her friend saw an oil leak on the ground/pavement under her vehicle. The Consumer took the vehicle back to Auto Nation Nissan on September 27, 2012, where it was confirmed there was a hairline crack near the drain bolt. She was advised to take the vehicle to a Honda dealership for a possible warranty repair. She went to the Honda dealership for service the very next day. On November 7, 2012, the oil was checked by the Nissan dealer. On December 4, 2012, the Consumer took the vehicle to South Motors Honda, a Honda authorized service agent, because the oil light was blinking. It was discovered that the oil pan was cracked near the drain bolt. The Honda service agent attributed the crack to the last oil service which had been performed by the Nissan dealer and, rather than perform a repair under Honda's warranty, the cost of the repair was quoted to the Consumer. The Consumer took the vehicle to the Nissan dealer on December 18, 2012, where the crack in the oil pan near the drain bolt was verified, the oil was topped off and the Consumer was cautioned about driving the vehicle, because the oil level would drop. The Consumer then took the vehicle to the Auto Nation

Honda authorized service agent on December 19, 2012, when the oil pan was replaced. The Consumer did not believe the vehicle was leaking oil after that date.

The Manufacturer asserted the alleged nonconformity was the result of accident, abuse, neglect or modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. The Service Manager at Auto Nation Honda of Miami, testified that, on December 19, 2012, when the vehicle was returned to the Auto Nation Honda authorized service agent, a technician replaced the oil pan. The technician testified the oil pan had a hairline crack coming from near the drain bolt. The crack was attributed to over-torquing of the drain bolt and not to a defect in the oil pan; therefore, it was not treated as a warranty repair. The Service Manager for Auto Nation Nissan of Kendall, testified that the repair was billed out to Auto Nation Nissan of Kendall, because it was concluded by two Honda dealers (Auto Nation and South Motors) that over-torquing caused the crack in the oil pan, and his Nissan dealership had performed the oil changes. The District Parts & Service Manager for American Honda Motor Company, testified that Auto Nation Nissan is not an authorized service agent of American Honda Motor Company.

The Board found the evidence established that the oil leak complained of by the Consumer was caused by the over-torquing of the drain bolt by the Nissan authorized service agent. Since the defect was not the result of accident, abuse, neglect, modification or alteration of the vehicle by American Honda Motor Company or its authorized service agent, it was not a nonconformity as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Lyons v. Ford Motor Company, 2012-0324/WPB (Fla. NMVAB February 7, 2013)
The Consumer's 2011 Ford Explorer was declared a "lemon" by the Board. The Consumer paid $2,000.00 in cash as a down payment. The purchase documents also reflected that a vehicle rebate in the amount of $3,250.00 was provided by the Manufacturer towards the purchase of the vehicle, which the Consumer argued should be included in the refund calculation as cash awarded to him. According to the Consumer, at the time of purchase, he had the option of either accepting the rebate as cash or applying the rebate to the price of the vehicle. He argued that he should not be penalized for applying the rebate toward the purchase price of the vehicle. The Consumer's request to be reimbursed the $3,250.00 manufacturer's rebate was denied by the Board. Instead, the purchase price of the vehicle was reduced by $3,250.00 for the rebate in order to calculate the statutory reasonable offset for use.

Net Trade-in Allowance §681.102(18), F.S.

Weiser v. Chrysler Group LLC, 2012-0378/FTL (Fla. NMVAB March 4, 2013)
At the hearing, the Manufacturer, through its representative, stipulated that the Consumer's 2011 Chrysler 200 was a "lemon." To purchase the vehicle, the Consumer traded in a used 2003 Chevrolet Trailblazer for which a net trade-in allowance of $3,200.00 was received, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. The NADA Official Used Car Guide (Southeastern Edition) (NADA

Guide) in effect at the time of the trade-in did not list a retail price for the 2003 GMC Trailblazer. The Consumer submitted a copy of the May through August 2011 NADA Official Older Used Car Guide (National Edition), which did list the 2003 GMC Trailblazer. The Manufacturer objected to the use of the NADA Older Used Car Guide and argued that either the NADA Guide (Southeastern Edition) in effect at the time of the trade-in should be used for calculating the net trade-in allowance, or the gross trade-in allowance which was reflected in the purchase contract should be used. The Manufacturer's objection to the use of the Official Older Used Car Guide to determine the retail value of the trade-in vehicle was denied by the Board. According to the NADA Official Older Used Car Guide, the trade-in vehicle had a base retail price of $8,225.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a net trade-in allowance of $7,175.00. Accordingly, the Consumer was entitled to a refund of $7,175.00 for the net trade-in allowance.

Wald v. American Honda Motor Company., 2012-0267/FTL (Fla. NMVAB March 18, 2013)
The Consumer's 2011 Honda Ridgeline was declared a "lemon" by the Board. To purchase the vehicle, the Consumer traded in a used 2001 Acura MDX for which a net trade-in allowance of $3,898.00 was received, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. The NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in did not list a retail price for the 2001 Acura MDX. The Consumer submitted a copy of the May through August 2010 NADA Official Older Used Car Guide, which did list the 2001 Acura MDX. The Manufacturer objected to the use of the NADA Older Used Car Guide and argued that either the NADA Guide (Southeastern Edition) in effect at the time of the trade-in should be used for calculating the net trade-in allowance, or the gross trade-in allowance which was reflected in the purchase contract should be used. The Board rejected the Manufacturer's argument. According to the NADA Official Older Used Car Guide, the trade-in vehicle had a base retail price of $12,550.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a net trade-in allowance of $11,400.00. Accordingly, the Consumer was entitled to a refund of $11,400.00 for the net trade-in allowance.

MISCELLANEOUS PROCEDURAL ISSUES:

Damato v. Ford Motor Company, 2012-0246/TPA (Fla. NMVAB January 23, 2013)
During the hearing, the Manufacturer sought to introduce BBB/Autoline documents not timely received by the Board as attachments to its Manufacturer's Prehearing Information Sheet or any amended Prehearing Information Sheet. Paragraph (6), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, requires that the originals be received by the Board Administrator with copies to the opposing party or attorney "…no later than five days before the scheduled hearing" or the Board may decline to consider any attachments unless good cause is shown for the failure to comply with the rule. No reason was given by the Manufacturer's representative for the failure to timely supply the documents. The Consumers objected to the Manufacturer's request. Upon consideration, the documents were not considered by the Board.