

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

QUARTERLY CASE SUMMARIES

April 2001 - June 2001 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Rossi v. American Honda Motor Company, 2000-1230/WPB (Fla. NMVAB April 18, 2001).

The Manufacturer argued at the hearing that the vehicle was “used” and the case should be dismissed. This defense was not raised in the Manufacturer’s Answer, nor did the Manufacturer submit an amended Answer prior to the hearing. Manufacturer’s counsel argued that this was a jurisdictional matter and not an affirmative defense, and could be raised at any time prior to, or at, the arbitration hearing. The Board rejected this contention and determined that this was an affirmative defense and that it was not timely raised. The case was dismissed on other grounds.

Pixley v. Ford Motor Company and Mark III Industries, 2001-0244/ORL (Fla. NMVAB April 18, 2001).

Counsel for Ford argued that the Consumer’s claim should be dismissed because the conversion van was not sold in Florida and, therefore, did not meet the definition of “motor vehicle” under Chapter 681, Florida Statutes. In support of this argument, the Manufacturer contended that the Board should look at the “totality of the circumstances” surrounding the sale transaction. The certificate of origin for the motor vehicle indicated that it was sold by Mark III to a Ford dealership in Idaho, and the vehicle was ordered by the Consumer’s son, who was employed by the Idaho dealership at the time of purchase. The purchase contract was prepared by the Idaho dealership, the down payment was remitted to the dealership, and a Ford Credit security agreement listed the seller as the Idaho Ford dealership. This dealership paid Mark III for the conversion package, and paid for the floor plan interest on the motor vehicle while the conversion was being completed at Mark III’s Florida facility. The Consumer took possession of the vehicle at Mark III’s facility when the work was completed as arranged by the Idaho dealership. The Consumer then drove the vehicle to a Ford dealership in Florida where he had made arrangements for the completion of the registration and title documents to register and title the vehicle in Florida. The Consumer did not pay a \$2.00 Lemon Law fee when he purchased the vehicle, and if he had failed to take possession of the vehicle, Mark III would have arranged for the transport of the vehicle to the Idaho Ford dealership. Because of the creation of the buyer’s order in Idaho, the remittance of the down payment to the Idaho dealership, the Manufacturer’s certificate of origin listing the dealer as the Idaho Ford dealership, and Mark III’s agreement with this dealership, the Board concluded that the sale of the vehicle took place in Idaho. Accordingly, since the vehicle was

not sold in Florida, it did not meet the definition of a “motor vehicle” under the Lemon Law; as a result, the Consumer was not eligible for relief and the case was dismissed.

Warranty §681.102(23), F.S.

Zdancewicz v. Toyota Motor Sales, U.S.A., Inc., 2001-0268/ORL (Fla. NMVAB April 19, 2001). The Consumers complained that their vehicle’s horizontal surfaces had spots in the paint, which became apparent approximately six months after purchasing the vehicle. The Manufacturer asserted that the paint damage was not covered under its warranty because it was caused by “environmental contamination.” Because of the passage of time from the date of purchase to the date the spots were first noticed by the Consumers, the Board concluded that the spots in the vehicle’s paint on the horizontal surfaces were caused by airborne particles or environmental conditions, and were not the result of any defect in materials or workmanship subject to coverage under the Manufacturer’s warranty. Accordingly, the Consumers were not entitled to relief, and the case was dismissed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes an Out-of-Service Day, Rule 2-30.001(2)(c), F.A.C.

Taylor v. Ford Motor Company, 2001-0434/TPA (Fla. NMVAB June 13, 2001). The Consumers believed that they were qualified for Lemon Law relief because an engine nonconformity caused their vehicle to be out of service by reason of repair for 51 cumulative days. When the vehicle was presented to the dealership for an engine tapping noise, the problem was diagnosed as “piston slap.” The Consumers were advised that a new engine would be ordered and they were instructed to pick up their vehicle and drive it until the new engine arrived; however, because they lived in a rural area and did not feel safe driving the vehicle, they refused to pick up the vehicle and allowed it to remain at the dealership while the engine was on order, and until the engine replacement was completed. The Manufacturer asserted that the engine nonconformity was cured within a reasonable number of attempts, because the vehicle was not out of service by reason of repair as defined in Rule 2-30.001(2)(c), Florida Administrative Code, for 30 or more cumulative calendar days. In support of that assertion, a Manufacturer witness testified at the Lemon Law hearing that “piston slap” was not a “driveability” problem, and the Consumers could have safely driven the vehicle until the new engine arrived; thus, the vehicle would not have been out of service at the dealership for 51 days. The Board concluded that the period during which the vehicle remained at the service facility, because the replacement engine was not available and the Consumers did not want to drive the vehicle with the nonconformity unrepaired, constituted out-of-service days, as defined in the Florida Administrative Code, because the repair work was not completed. Accordingly, the Consumers were awarded a replacement vehicle.

What Constitutes a Reasonable Number of Attempts §681.104, F.S.; §681.1095(8), F.S.

Mauldin v. Ford Motor Company, 2001-0272/FTM (Fla. NMVAB May 3, 2001).

A nonconformity consisting of an intermittent screaming or groaning noise and accompanying vibration in the steering wheel was subjected to repair by the Manufacturer's authorized service agent on two occasions. Following the second repair attempt, the Consumers were advised that no further work would be performed on the vehicle because of a lack of a Manufacturer's "fix" for the problem. The Board held that, under these circumstances, two repair attempts, plus the Manufacturer's repair attempt after written notification, were sufficient to afford the Manufacturer a reasonable number of attempts to conform the vehicle to the warranty as contemplated by the Lemon Law. The Manufacturer having failed to conform the vehicle to the warranty within a reasonable number of attempts, the Consumers were entitled to a refund under the Lemon Law.

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

Vigliotti v. DaimlerChrysler Motors Corporation, 2001-0288/ORL (Fla. NMVAB May 23, 2001).

When the Manufacturer responded to the Consumer's written notification by calling the home telephone number listed on the notice, a facsimile machine sound was heard. Thereafter, the Manufacturer contacted the selling dealer in an effort to obtain an alternate telephone number. When messages left at the work telephone number provided by the dealer went unanswered, the Manufacturer sent a letter via facsimile to the "home telephone" number asking the Consumer to telephone the Manufacturer's representative to arrange a mutually convenient time for the final repair attempt. When the Manufacturer failed to receive any response from the Consumer, a certified letter was mailed to the Consumer's post office box, which was received at the post office box on the 10th day after receipt of the Consumer's written notification. At the hearing, the Consumer testified that she was out of town and did not retrieve the letter until approximately one week after it was received at the post office box. The Consumer did not respond to the letter because she considered it "too late." A final repair attempt was not performed. The Board concluded that the Manufacturer timely responded to the Consumer's notification, both at the telephone number provided and in writing; moreover, the Consumer's failure to provide a telephone number at which she could be reached and her failure to respond to the Manufacturer's written correspondence deprived the Manufacturer of a final opportunity to conform the vehicle to the warranty; consequently, the case was dismissed.

Reimann v. Ford Motor Company, 2001-0349/STP (Fla. NMVAB May 24, 2001).

The Manufacturer asserted that it was not afforded a final attempt to conform the vehicle to the warranty, because the Consumer's failure to send the written notification to the appropriate address for consumers located inside the United States thwarted the Manufacturer's ability to appropriately respond. The notification was received at the location designated for consumers outside the United States or Canada and was internally redirected to the location designated for consumers inside the United States and Canada. The Board determined that the Manufacturer's subsequent response failed

to direct the Consumer to a repair facility for a final repair attempt and, instead, solicited information already contained on the written notification previously sent. Accordingly, the Board concluded that the Manufacturer had a reasonable number of attempts to conform the vehicle to the warranty. The Manufacturer having failed to conform the vehicle to the warranty after a reasonable number of attempts, the Consumer was awarded a refund for an intermittent hesitation and stalling nonconformity.

NONCONFORMITY §681.102(16), F.S.

Baker v. DaimlerChrysler Motors Corporation, 2001-0072/FTL (Fla. NMVAB May 13, 2001). The Consumers complained of a rust spot the size of a fingernail on the inside of the sliding door of their van. The spot kept returning after numerous attempts by the Manufacturer to remove it. The Manufacturer argued that the spot was so small that it did not constitute a substantial defect. The Board disagreed and awarded a refund to the Consumers.

Martin v. Toyota Motor Sales, U.S.A., Case No. 2000-0988/MIA (Fla. NMVAB May 14, 2001). The Consumers complained of a brake noise when the vehicle turned, which was not experienced during the first 14 months of operation of the vehicle. The Manufacturer's representative opined that the brake noise was the result of the Consumer's driving habits, for example, aggressive braking or riding the brakes. The Manufacturer's representative was unable to explain why the vehicle did not experience any brake noise during the first 14 months of operation if the Consumer's aggressive driving was the cause of the brake noise. The Board awarded the Consumers a refund and held that the Manufacturer's affirmative defense was not supported by the evidence because the Consumers drove the vehicle for more than a year before the defect occurred, during which time the defect should have manifested itself, if the cause, as the Manufacturer claimed, was Consumer driving habits.

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.

Nguyen v. Mazda Motor of America, Inc., 2001-0234/PEN (Fla. NMVAB April 13, 2001). The Consumer believed his van to be a Lemon because he could feel a vibration through the steering wheel, especially when driving the vehicle at speeds between 60-70 miles per hour. The Manufacturer asserted that the Consumer was experiencing "normal" road and tire feel with his van, which did not substantially impair the use, value, or safety of the vehicle. During the Arbitration Hearing, the Board test drove the vehicle at speeds between 60-75 miles per hour, and experienced normal "road feel" through the steering wheel when the vehicle was driven over roads with bumps, holes, concrete separations and other road hazards. Accordingly, the Board found that the vibration did not constitute a nonconformity and dismissed the case.

Brumfield v. General Motors Corporation, Pontiac-GMC Division, 2001-0233/PEN

(Fla. NMVAB April 16, 2001).

When the Consumer attempted to tow a trailer within the first week of purchasing his pickup truck, the bumper was angled so low that both the bumper and trailer almost touched the ground. Upon inspection, he discovered that the frame was bent. Following the one and only repair to the chassis, he was able to tow his trailer and put more than 45,000 miles on the truck's odometer without any frame or towing related problems. The Consumer believed he was entitled to a refund because the trade-in value on this truck was diminished due to the repaired chassis damage and the significant number of miles on the odometer. The Manufacturer did not dispute that there was some damage to the chassis initially; however, the Manufacturer asserted that the defect was cured and no longer substantially impaired the use, value or safety of the vehicle. Inasmuch as the evidence established that the Consumer was able to successfully tow his trailer truck following the only repair, and that he put an excessive amount of mileage on the odometer in a short period of time, the Board agreed with the Manufacturer's assertion and dismissed the case.

McNeil v. Ford Motor Company, 2001-0140/FTL (Fla. NMVAB April 19, 2001).

The Consumer complained of paint damage to the vehicle's rear door lift gate. The Manufacturer contended that the paint damage was excluded from the warranty because it was not "factory" damage and occurred after the vehicle left the Manufacturer's control; therefore, the paint damage was a dealer problem. In rendering its decision, the Board held that "a defect does not have to be a 'factory' defect to be potentially covered under the Lemon Law." The types of defects that are covered by the law are those that fall within the statutory definition of "nonconformity," and this definition is not restricted to "factory" defects. Moreover, contrary to the Manufacturer's assertion, the Board found that paint damage was covered by the Manufacturer's warranty. A majority of the Board found that some minor paint damage did exist; however, it did not constitute a substantial impairment to the use, value or safety of the vehicle, and dismissed the case.

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

Rushing v. DaimlerChrysler Motors Corporation, 2001-0103/JAX (Fla. NMVAB April 5, 2001).

The Consumers complained of a "tapping" noise in their vehicle's engine. The Board found that this noise was the result of a build up of sludge in the engine, caused by the Consumers' failure to regularly maintain the vehicle. Since the defect was the result of neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent, the defect was not a nonconformity as defined under the Lemon Law. The case was dismissed.

MULTIPLE MANUFACTURERS

Caswell v. Ford Motor Company, 2001-0237/TPA (Fla. NMVAB May 11, 2001).

Manufacturer Ford Motor Company argued that it could not be held responsible for a “ground effects” defect of the Consumer’s Ford Econoline conversion van, because, according to Ford, the defect was covered by the warranty of the van converter, and excluded from the coverage of Ford’s written warranty. The repairs to the Consumer’s vehicle were performed at the van converter’s facility and were listed on a Ford dealership repair order provided to the Consumer. The Board held that the legislative intent establishes that “a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in” Chapter 681. The Consumer purchased a vehicle manufactured by Ford Motor Company from an authorized service agent of Ford Motor Company, and was instructed to present the vehicle to Ford’s authorized service agent for all repairs to the vehicle. As no evidence was presented that the modifications and repairs performed by the van converter were not authorized by Ford Motor Company, the board held that Ford was responsible for the failure to correct the “ground effects” nonconformity after a reasonable number of attempts and ordered Ford to repurchase the conversion van and provide the Consumer with a refund of his purchase price.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8)

Cameron v. Kia Motors America, Inc., 2001-0226/STP (Fla. NMVAB April 10, 2001).

Counsel for the Consumers asserted that the Consumers were entitled to reimbursement of their attorney’s fees as an incidental charge as a result of the intermittent stalling of the vehicle’s engine, and intermittent illumination of the “check engine” warning light nonconformities. In support of this assertion, Counsel relied on non-binding remarks of the appellate court in the case of *Holzhauser-Mosher v. Ford Motor Company*, 772 So.2d 7 (Fla. 2 DCA 2000). The Board held that, contrary to Counsel’s reading of the appellate court’s comment in *Holzhauser-Mosher*, recovery of attorney fees for arbitration before the Board is not authorized by Chapter 681, Florida Statutes. Accordingly, the request for an award of attorney’s fees was denied.

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

Jorgensen v. Nissan Motor Corporation USA, 2001-0253/TPA (Fla. NMVAB April 20, 2001).

In computing the mileage attributable to the Consumer for purposes of calculating the reasonable offset for use, the Board deducted 840 miles for six trips to the Manufacturer’s authorized service agent for repair of a steering wheel vibration nonconformity.

Ayers v. DaimlerChrysler Motors Corporation, 2001-0228/ORL (Fla. NMVAB April 24, 2001). The mileage attributable to the Consumer as of the date of the hearing was 79,787 miles. Because of the high amount of mileage the Consumer put on the truck's odometer, the Manufacturer was entitled to a statutory offset for use in the amount of \$24,501.26. Consequently, although the Consumer's vehicle was deemed a Lemon and the Board awarded him a refund, the refund was a negative amount, which the Consumer was required to pay the Manufacturer.

PROCEDURAL ISSUES

Harwick v. Kia Motors America, Inc., 2001-0180/JAX (Fla. NMVAB April 11, 2001). The Manufacturer's representative sought to have witnesses testify at the hearing who were not previously disclosed to the Board or the Consumers or, in the alternative, have the hearing continued so that the witnesses could be properly disclosed and the Manufacturer not prejudiced by the inability to present these witnesses, whose testimony would be crucial to the defense of the case. The Manufacturer had failed to complete and timely file its prehearing information sheet, and the representative learned of this one hour prior to the hearing and immediately faxed a listing of the intended witnesses to the office of the Board Administrator. The Board held that the Manufacturer failed to demonstrate good cause for its failure to properly disclose its witnesses, or for its continuance request; consequently, the witnesses were not permitted to testify and the request for continuance was denied. The Consumers' vehicle was deemed a Lemon, and a refund was awarded.

Andrea Kennedy v. Kia Motos America, Inc., 2001-0213/FTL (Fla. NMVAB May 12, 2001). The Manufacturer's Answer was mailed, but was returned to the Manufacturer because of insufficient postage, then re-mailed with the correct postage. The Answer was filed more than 15 days from the date the Manufacturer received the Notice of Arbitration. The Board determined that the Answer was untimely filed and did not allow the Manufacturer to present testimony in support of its affirmative defenses. The Consumer was awarded a refund.

Manufacturer's Pre-arbitration Vehicle Inspection ¶¶(9)-(14), Hearings Before the Florida New Motor Vehicle Arbitration Board.

Wagner v. General Motors Corporation, Chevrolet Motor Division, 2001-0300/FTM (Fla. NMVAB May 19, 2001).

The Manufacturer conducted a prehearing inspection of the Consumers' vehicle two days prior to the hearing, during which an electronic vibration analyzer was used as a diagnostic tool. The Consumers were not provided with a written report of the results of the prehearing inspection in accordance with *Hearings Before the Florida New Motor Vehicle Arbitration Board*, paragraph (13). Since the Manufacturer failed to comply with the applicable rule, the Manufacturer's witness was not permitted to testify about the prehearing inspection. The motor vehicle was deemed a Lemon because of a vibration nonconformity, and the Consumers were awarded a refund.

MISCELLANEOUS ISSUES

Kelly v. BMW of North America, LLC., 2001-0093/TPA (Fla. NMVAB May 10, 2001).

The Consumer's vehicle was declared a lemon because of an intermittent water leak at the front windows of the vehicle. The Manufacturer requested that the Consumer be required to obtain repairs to scratches and dents to the right rear quarter panel of the vehicle which were noted during the Board's inspection. The Board denied the request because the statute does not contain such a requirement, nor does it delegate to the Board the authority to impose such a requirement upon Consumers.