

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

QUARTERLY CASE SUMMARIES

October 2000 - December 2000 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Carlin v. Ford Motor Company, 2000-0889/MIA (November 1, 2000).

Prior to the hearing, the Consumer's vehicle was repossessed. The Manufacturer argued that the Consumer's case should be dismissed, because he no longer owned the vehicle. The Board found that if a Consumer prevails at a Board hearing, the Lemon Law requires that the Consumer must deliver clear title to and possession of the motor vehicle upon receipt of a refund or replacement; moreover, the definition of "Consumer" includes a person who is entitled to enforce the obligations of the warranty. Because the vehicle was repossessed and sold prior to the Board hearing, the Board concluded that the Consumer would not be able to tender possession of the vehicle if he prevailed at the hearing, nor would he be able to enforce the terms of the warranty, and would not, therefore, qualify as a "Consumer." Accordingly, the case was dismissed.

Cox v. Ford Motor Company, 2000-0799/STP (Fla. NMVAB November 7, 2000).

The Manufacturer argued that the case should be dismissed, because the Consumer could not assume the original owner's status as a "consumer" as defined under the Lemon Law, since the vehicle was not "transferred" to the second owner during the Lemon Law rights period of the original owner. The vehicle was "sold" during the original Lemon Law rights period. The Manufacturer argued that the use of the word "transferred" in the second clause of the definition of "Consumer," rather than the word "sold," reflected a legislative intent to cover transfers between family members. To otherwise interpret the definition would provide Lemon Law coverage to individuals who purchase used vehicles from dealers during the rights periods of the original purchasers. In the subject case, the original owner sold the vehicle to the second owner during the rights period of the original owner, and both used the vehicle for personal, family or household purposes. Based on the remedial nature of the Lemon Law, the Board concluded that the second owner was an eligible "consumer" as defined under the statute; however, the case was dismissed, because the alleged defects or conditions did not constitute nonconformities.

Motor Vehicle §681.102(14), F.S. (1995); §681.102(15), F.S. (1997)

Davis v. AM General, 2000-0717/ORL (Fla. NMVAB October 9, 2000).

The Manufacturer contended that the Consumer's Hummer was a military off-road vehicle adapted for civilian use and designed to be driven over rough terrain and carry a heavy load. The Manufacturer argued that the Consumer's claim should be dismissed, because the Hummer was a truck weighing more than 10,000 pounds gross vehicle weight and as such, did not constitute a "motor vehicle" as defined by the statute. The Manufacturer pointed to the federal vehicle identification number classification of the vehicle as a "heavy truck" and the gross vehicle weight rating as support. The Board agreed that the Hummer was a truck weighing more than 10,000 pounds gross vehicle weight and dismissed the case.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes a Reasonable Number of Attempts §681.104, F.S.

O'Neal v. Mazda Motor of America, Inc., 2000-0771/JAX (Fla. NMVAB October 3, 2000).

The Board found that two repair attempts were sufficient to constitute a reasonable number of attempts under the statute for a very unusual nonconformity. The Board held that the statute did not specify the number of attempts necessary to constitute a "reasonable number of attempts." The Consumer took the vehicle in for a third repair attempt, but the Manufacturer, through its service agent, declined to perform a third repair attempt; moreover, the Manufacturer declined the opportunity to conduct a final repair attempt after receiving the Consumer's written notification. The Consumer complained that he and his passengers would intermittently receive electrical shocks upon entering and exiting the motor vehicle, which the Board concluded substantially impaired the use and safety of the vehicle. The Board rejected the Manufacturer's contention that the problem was the result of atmospheric conditions and static electricity. Although the Board found the vehicle to be a "Lemon," the Consumer was awarded a negative refund due to a high amount of mileage attributable to the Consumer's use of the vehicle.

Woodall and Hicks v. Ford Motor Company, 2000-0881/TPA (Fla. NMVAB October 11, 2000)

The Board concluded that a transmission fluid leak, water leak, and brakes that squealed and vibrated constituted nonconformities. The Manufacturer contended that the Consumers' case should be dismissed because the Manufacturer was not afforded an opportunity to repair the defects. The evidence established that the brakes and water leak nonconformities were subjected to repair on one occasion, and the transmission leak nonconformity was subjected to repair on two occasions, because parts were not available to effect further repairs, and some parts were still not available at the date of the hearing. Considering that the failure to provide the opportunity to repair was not due to any action by the Consumers, the Board held that the Manufacturer was afforded a reasonable number of attempts to correct the nonconformities as contemplated by the Lemon Law. A consumer was not required to prove the elements of the statutory presumption of a reasonable number of attempts to qualify for relief.

The Consumers were awarded a refund.

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

Tisdale v. General Motors Corporation, Chevrolet Motor Division, 2000-1009/STP (Fla. NMVAB November 21, 2000).

The Consumer complained of a vibration at highway speeds. On an agreed upon date for the final repair attempt, the Consumer presented the vehicle at the Manufacturer's designated repair facility. At that time, four new tires and two rims were special ordered, and the vehicle was returned to the Consumer. Thereafter, approximately 19 days later, at the request of the Manufacturer's representative, the Consumer returned the vehicle to the authorized service agent for installation of the tires and rims. The Manufacturer contended at the hearing that the vibration was cured when the tires and rims were installed during the "continuation" of the Manufacturer's final repair attempt. The statutory provision governing final repair attempts required that Manufacturer had 10 days to conform the vehicle to the warranty, commencing on the date the vehicle was delivered to the Manufacturer's authorized service agent. Because the vehicle was returned to the Consumer on the same day it was delivered to the dealership, the Manufacturer failed to correct the nonconformity after a reasonable number of attempts. The Consumer was awarded a refund.

Days Out of Service §681.104(1)(b), 681.104(3)(b), F.S.

Vorasarn and Phongsackdy v. Ford Motor Company, 2000-0874/STP (Fla. NMVAB Oct. 9, 2000).

The Consumers complained that the air conditioner did not blow cold air and the dash had a rattle noise, and that the vehicle was out of service for more than 30 cumulative calendar days. The Consumers day-count began from the date the vehicle was dropped off at the Manufacturer's authorized service agent and ended the date the Consumers picked up the vehicle, at their convenience, following notification by the authorized service agent that repairs were completed. The Manufacturer contended that the dash rattle did not constitute a nonconformity and that the alleged defects were cured within a reasonable number of repair attempts. The Board relied on the definition of "out-of-service day" at Rule 2-30.001(3)(c), Florida Administrative Code, and determined that the dates reflected in the repair orders constituted the most credible evidence of the number of days out of service, which established that the vehicle was out of service for repair of the nonconformities for a total of 21 cumulative calendar days. The case was dismissed.

Esperas v. Mazda Motor of America, Inc., 2000-1032/ORL (December 1, 2000).

In this days-out-of-service case, the Manufacturer argued that the Consumer was not entitled to relief because all problems were cured as of the Manufacturer's "final repair attempt." The Manufacturer relied on *BMW of North America, Inc. v. Singh*, 664 So.2d 266 (Fla. 5th DCA 1995) in support of its argument. The Board looked to the statutory presumption language and its related notice provision and concluded that there exists no requirement that any problems continue to exist following the Manufacturer or service agent's post-notice opportunity to inspect or repair. The Board relied on the

Singh case cited by the Manufacturer, which held that, unlike the single nonconformity provision (recurring defect), the thirty days out of service provision does not depend on there being something wrong with the vehicle at the time notice is given or at the expiration of thirty days. The Board found that the Consumer's vehicle had been out of service for repair of nonconformities for 32 days, therefore, the Consumer was entitled to a refund.

Written Notification to the Manufacturer §681.104(1), F.S.

Lynch v. Ford Motor Company, 2000-0848/FTL (Fla. NMVAB November 7, 2000).

The written notification by the Consumer was not sent to or received by the Manufacturer. The Consumer sent the notification to the Dispute Settlement Board, an informal dispute settlement procedure sponsored by the Manufacturer. The Board held that notification to the Dispute Settlement Board did not constitute notification to the Manufacturer; therefore, the Manufacturer had not been given a reasonable number of attempts to conform the vehicle to the warranty. The case was dismissed.

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.

Elmore v. Toyota Motor Sales, U.S.A., 2000-1048/TLH (Fla. NMVAB December 18, 2000)

The Consumers complained of a wet spot on the rear seat of the vehicle, where their young son generally sat, that usually appeared following a heavy rain. During the hearing, the Consumers testified that they never noticed water on the floor of the vehicle, or noticed the water coming in through the door, and were unsure how the wet spot occurred. The Manufacturer's authorized agent conducted various water tests during the course of repairs, including squirting water all over the vehicle with a heavy pressure hose, and never noticed any water intrusion, evidence of rust, wetness or other residue that would be indicative of a water leak into the vehicle. The Board conducted an inspection of the vehicle during the hearing and observed a slight stain on the right rear seat, overlapping another darker stain, which the Consumers acknowledged was caused by melted crayons. The Board inspected under the seats and did not observe any evidence of wetness, rust or water intrusion into the vehicle; additionally, there was no musty, moldy or mildew odor inside the vehicle. The Board concluded that there was no evidence of water intrusion into the vehicle and, therefore, the water leak complained of by the Consumers did not substantially impair the use, value or safety of the vehicle. The case was dismissed.

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

Sivic v. American Suzuki Motor Corporation, 2000-1040/ORL (Fla. NMVAB December 5, 2000)
The Consumer complained of total clutch failure. The Manufacturer asserted the defense that the premature clutch failure was caused by “driver input,” specifically, that the Consumer was “riding the clutch,” which caused it to wear out. The Manufacturer’s witnesses testified, however, that he had no firsthand knowledge of the Consumer’s driving habits. The Board rejected the Manufacturer’s defense of “driver input” as not credible under the facts of the case, and awarded the Consumer a replacement vehicle.

Untimely Filing of the Request for Arbitration §681.109(4), F.S.

Ware v. Toyota Motor Sales, U.S.A., Inc., 2000-0964/JAX (December 5, 2000)
The Consumers sent their Request for Arbitration to the Florida Department of Agriculture and Consumer Services, Division of Consumer Services, where it was date-stamped as filed within 60 days of the expiration of the Consumers’ Lemon Law rights period. The Division deemed it “ineligible” upon its initial screening, because it lacked complete information. The Division thereafter requested and received the additional information from the Consumers and deemed the claim eligible, whereupon it was approved for arbitration before the Board. The Manufacturer contended that the claim should not have been considered “filed” until after the missing information was supplied, which was more than 60 days following the expiration of the Consumers’ rights period. The Manufacturer further argued that, because the Consumers did not send the written notification to give the Manufacturer its final repair opportunity until after the expiration of the rights period, the Consumers could not show three repairs, notice given, and a final repair attempt undertaken during the rights period as required by §681.104(3), F.S. (1999). The Board rejected the Manufacturer’s contention that the Consumers’ claim was untimely, and concluded that the “filed” date, which was stamped on the Consumers’ Request for Arbitration, was within 60 days after the expiration of the rights period as required by §681.109(4), F.S. (1999). The Board also concluded that the presumption in §681.104(3)(a), F.S. (1999), did not contain a filing requirement or otherwise relate to the time within which a request for arbitration must be filed under §681.109(4). The Consumers’ case was dismissed because the Board concluded that the complained of noise in the suspension did not constitute a nonconformity.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S. (1995); §681.102(8), F.S. (1997)

Clubb v. Ford Motor Company, 2000-0878/FTL (Fla. NMVAB October 26, 2000).
The Consumers were awarded a refund because of an engine nonconformity. The Consumers sought reimbursement of a prepaid wheel alignment service policy. The Board denied the reimbursement because the expense was not directly caused by the nonconformity of the vehicle.

Reasonable Offset for Use §681.102(18), F.S. (1995);§681.102(20), F.S. (1997)

Hamm v. Mercedes-Benz USA, Inc., 2000-0858/TPA (Fla. NMVAB October 11, 2000).

The Board concluded that water intrusion into the Consumer's vehicle around the retractable roof constituted a substantial impairment to the value of the vehicle and awarded the Consumer a refund. The Consumer's request that the miles attributable to her be reduced by miles driven to and from the Manufacturer's authorized service agent for repair, or that the Board utilize the mileage attributable to the Consumer as of the first repair attempt was denied by the Board.

Peterson v. Ford Motor Company, 2000-0844/TPA (Fla. NMVAB October 13, 2000).

Regarding the calculation of the offset for use, counsel for the Manufacturer argued that the Dispute Settlement Board procedure was not an "arbitration" as intended by Section 681.102(20), Florida Statutes (1999), because it is not a state-certified procedure, and because the Consumers had not provided the Manufacturer with a final repair attempt at the time of the Dispute Settlement Board procedure. Prior to filing for Arbitration before the Board, the Consumers participated in a hearing with the Manufacturer's sponsored non-certified dispute resolution program. The Board concluded that the Dispute Settlement Board hearing was not an "arbitration hearing" as contemplated under the Lemon Law, and utilized the mileage attributable to the Consumers as of the date of the Board hearing.

MISCELLANEOUS PROCEDURAL ISSUES

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

Lallave v. Mitsubishi Motor Sales of America, Inc., 2000-0939/FTM (Fla. NMVAB November 20, 2000)

At the outset of the hearing, the Consumer advised the Board that she presented her vehicle to the Manufacturer's authorized service agent for a prehearing inspection as requested by the Manufacturer; however, when she requested to be present during the inspection, her request was denied and she was told to wait in the waiting area of the dealership during the inspection of her vehicle. Additionally, the Consumer reported during the hearing, and the Manufacturer's representative acknowledged, that, during the prehearing inspection, repairs were made to a component of the vehicle that was unrelated to the air conditioner complaint that was the subject of the Consumer's hearing. Because the rule regarding prehearing inspections allows the Consumer to be present during the Manufacturer's vehicle inspection, unless the Consumer expressly waives this right in writing, and because no repair procedures are permitted during the inspection, the Board did not permit the Manufacturer to present any evidence or testimony at the hearing regarding the prehearing inspection. The case was dismissed because the Board found that the original air conditioner complaint had been cured within a reasonable number of repair attempts, and the existing condition relating to the air conditioner did not constitute a nonconformity.