

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

QUARTERLY CASE SUMMARIES

April 2003 - June 2003 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Morris v. Ford Motor Company, 2003-0236/JAX (Fla. NMVAB June 3, 2003).

The Consumer contended that her vehicle was a demonstrator vehicle, but mileage at the time of delivery was more than 20,000 miles, and both the retail purchase agreement and the application for certificate of title, issued to the lien holder, identified the vehicle as used. The Consumer testified that the selling dealer told her the vehicle was new. The Manufacturer's witness testified that the vehicle was leased as new to someone prior to Ms. Morris' purchase and that the original lessee had turned-in the vehicle with over 20,000 miles on it. Because the Lemon Law only applies to "new motor vehicles" but does not otherwise define the phrase, the Board looked to other sections of Florida's Statutes for guidance. The Board looked to section 320.60(10), Fla. Stat. (2002), defining "motor vehicle," and section 320.60(13), Fla. Stat. (2002), defining "used motor vehicle." Both sections define a new vehicle to be a vehicle that has never been sold or otherwise transferred to an "ultimate purchaser." The Board ruled that the previous lease was a transfer to an "ultimate purchaser" and, therefore, the vehicle in question was not a new vehicle when Ms. Morris purchased it. Accordingly, the Consumer's case was dismissed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes Written Notification Under §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Seitz v. Toyota Motor Sales, U.S.A., 2003-0335/ORL (Fla. NMVAB June 3, 2003).

The Manufacturer contended that it did not receive written notification pursuant to the statute's requirements. The Consumer made numerous telephone calls and sent many e-mails to Toyota's Customer Assistance Center in which she complained about the problems with the vehicle. In one e-mail, she wrote that the "car is a lemon," but the e-mail did not state that it constituted written notice pursuant to the Lemon Law or that the Consumer was attempting to pursue Lemon Law relief. Upon these facts, the Board ruled that the Consumer failed to provide the statutorily required written notification. Accordingly, the case was dismissed.

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

Harris v. American Suzuki Motor Corporation, 2003-0278/TLH (Fla. NMVAB May 13, 2003). The Manufacturer stipulated that the vehicle was at a manufacturer’s authorized repair facility for at least 30 days for repair of a nonconformity. However, the Manufacturer contended that the days were not “out-of-service” days, because the nonconformity was not covered under the Manufacturer’s limited warranty. The Manufacturer argued that the vehicle was “out of warranty” when the Consumer first reported the nonconformity to an authorized service agent, because it had approximately 39,362 miles on its odometer at the time. Since the nonconformity first arose outside the time period covered by the Manufacturer’s written, limited warranty, the manufacturer contended that the days attributable to repair were not “out of service” days under the statute. Rule 2-30.001(2)(c) provides that an “out-of-service day” is any day that a vehicle is left for repair of defects which are covered by the manufacturer’s warranty. The Board found that the nonconformity was first reported during the “Lemon Law rights period,” which, in this case, was longer than the term of the limited warranty. The Manufacturer’s statutory duty to repair arises if the defect is first reported during the Lemon Law rights period, irrespective of whether the warranty has expired. The Board noted that expiration of a written warranty does not operate to exclude a vehicle from lemon law coverage or to relieve a manufacturer of its duty to repair the vehicle; rather, the expiration of a written warranty simply means that the Consumer may be charged for the cost of the repair. The Board found the days to be “out of service days” and ultimately awarded the Consumer a refund.

What Constitutes a Reasonable Number of Attempts §681.104(2), F.S.; §681.1095(8), F.S.

Guso v. Jaguar Cars, 2003-0364/MIA (Fla. NMVAB June 6, 2003). The Manufacturer contended that the nonconformity was cured at the final repair attempt; whereas, the Consumer claimed that the problem was mitigated by the final repair attempt, but continued to occur intermittently, especially when the vehicle was driven in the morning hours after having been parked over night. The entire fuel delivery system was replaced at the final repair attempt, and subsequent testing revealed no “fault” codes stored in the on-board computer or illumination of warning lights. A witness for the Manufacturer testified that he test drove the vehicle at the Manufacturer’s pre-hearing inspection and was unable to detect any abnormalities. He admitted, however, that no attempt had been made to replicate the problem by driving the vehicle when the engine was cold and the vehicle was parked all night. The Board found the Consumer’s firsthand testimony more persuasive that the nonconformity continued after the final repair attempt and concluded that it was not corrected within a reasonable number of attempts. The Consumer was awarded a refund.

Molina v. BMW of North America, LLC, 2003-0064/MIA (Fla. NMVAB June 11, 2003). The Consumer complained of an intermittent illumination of the brake warning light and the “service engine soon” light. The Manufacturer contended that the defect was corrected before the final repair attempt, because the service agent was unable to duplicate the problem or find electronic evidence of it

at the final repair attempt. The Consumer testified that the problem had recurred since the final repair attempt. However, during the pre-hearing inspection, the Manufacturer's agent did not find electronic evidence that the warning lights had illuminated. The Manufacturer's representative argued that there would be electronic evidence if the warning lights had in fact illuminated since the final repair attempt. The Board found that the defect continued to exist after the final repair attempt. Accordingly, the Consumer was awarded a refund.

Cabrera v. Ford Motor Company, 2003-0306/MIA (Fla. NMVAB June 20, 2003).

The Manufacturer argued that it had not been afforded a reasonable number of repair attempts, because the Consumer had rejected a repair. The Consumer complained that black smoke intermittently emitted from the vehicle's exhaust pipe and had left a black soot stain surrounding the exhaust pipe. The Manufacturer contended that the Consumer refused the service agent's offer to install an extended exhaust pipe. The Consumer testified that he refused the repair because he did not consider the extended exhaust pipe to be an acceptable fix for the problem. The Board found that the intermittent emission of black smoke was a defect that substantially impaired the use, value and safety of the vehicle, that was not corrected within a reasonable number of attempts. The Board found no merit in the Manufacturer's claim that the Consumer rejected a repair. Accordingly, the Consumer was awarded a refund.

Dumas v. Nissan Motor Corporation USA, 2003-0377/JAX (Fla. NMVAB June 20, 2003).

The Consumer complained of a water leak on the front passenger side of the vehicle when it was driven in heavy rain. The Manufacturer contended that the defect was cured at the final repair attempt. On the final repair attempt, the Manufacturer's service agent attempted to duplicate the problem, driving the vehicle for a total of 21 miles and driving it during a rain storm; however, he could not duplicate the problem, so no repairs were performed. The Consumer continued to experience the passenger side water leak after the final repair attempt and eventually took the vehicle to a different manufacturer service agent. The new service agent was able to duplicate the leak and ultimately cured the problem. The Consumer testified that she had not experienced the leak since that repair. The Board ruled that it was irrelevant that the nonconformity may have been cured after the final repair attempt, except to confirm the continuance of the nonconformity. The nonconformity was not corrected within a reasonable number of attempts and the Consumer was awarded a refund.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair §681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

Leoni v. Land Rover of North America, 2003-0300/TLH (Fla. NMVAB June 19, 2003).

The Manufacturer argued that some of the 32 days that the vehicle was out of service were not "out-of-service" days, because the Consumer delivered the vehicle to Jacksonville Land Rover, despite being informed beforehand that the dealership would not be able to perform the repairs. The Manufacturer's witness testified that he informed the Consumer that another dealership was in the process of taking over as the service agent in Jacksonville and only small repairs would be preformed

by Jacksonville Land Rover in the meantime. The witness testified that he suggested the Consumer take the vehicle to the Tampa or Orlando Land Rover service agent. The Consumer testified that he had a scheduled repair appointment and would not have traveled from Tallahassee to Jacksonville without an appointment. Jacksonville Land Rover opened a repair order and provided the Consumer with alternative transportation while the vehicle was being repaired. The Board ruled that it was unreasonable to expect a Consumer to drive from Tallahassee to Orlando or Tampa when there was at all times an authorized service agent in Jacksonville. The Board concluded that the vehicle was out of service for repair of a nonconformity for 32 days. 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.

Leoni v. Land Rover of North America, 2003-0300/TLH (Fla. NMVAB June 19, 2003).

The Consumer complained of a loud noise emanating from the dash area of the front passenger compartment of the vehicle. The Manufacturer contended that the defect did not substantially impair the use, value or safety of the vehicle. The noise was characterized as a constant and ear-piercing vibration noise. The Consumer claimed that the noise impeded his ability to concentrate on driving and as a result he did not drive the vehicle as much as he would like. The Manufacturer did not test drive the vehicle while it was out of service for repair, and none of the Manufacturer's witnesses could confirm whether the repair technician drove the vehicle or heard the noise of which the Consumer complained. Noting that the only credible evidence concerning the defect was presented by the Consumer, the Board found that the noise was a defect or condition that substantially impaired the use, value and safety of the vehicle. The Consumer was awarded a refund.

Sparks v. Nissan Motor Corporation USA, 2003-0060/JAX (Fla. NMVAB April 24, 2003).

The Consumer complained that trim tape over the driver's side door was bubbled and crimped despite the service agent's numerous attempts to repair the tape. The Consumer testified that the defective trim tape substantially impaired the value of the vehicle. She was also concerned that she would have to continue to replace the tape at her own expense after the Manufacturer's warranty expired, because the service agent had been unable to permanently correct the problem. The problem with the tape did not affect the operation of the door. The Board inspected the vehicle during the hearing and found the tape was rippled and uneven, but ruled that the crinkled tape did not substantially impair the use, value or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Carslake v. Ford Motor Company, 2003-0033/FTM (Fla. NMVAB April 24, 2003).

The vehicle was towed to an authorized service agent for failure to start. The Manufacturer's service agent informed the Consumer that the problem was the result of the vehicle having been submerged in

salt water, which caused corrosion of the wires and connectors. The Consumer was advised to report the damage to his insurance company. Neither the Consumer nor his insurance company authorized repairs, and the vehicle remained at the authorized service agent. Eight months later, the Consumer filed a Request for Arbitration. At the hearing, a manufacturer's witness testified that he inspected the vehicle and observed that there was "no communication" with the power control module due to corrosion of the wires and connectors, the driver's side shock and frame suffered from rust and corrosion, the driver's door had a residue line where salt water had intruded under the door, sand was found under the carpet and insulation in the rear cargo area, and there was extensive rust in the gas cap area. The Board concluded that the failure to start problem was the result of abuse or neglect of the vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Verger v. Mitsubishi Motor Sales of America, Inc., 2003-0260/FTL (Fla. NMVAB May 26, 2003). The Consumer requested reimbursement for rental car expenses incurred when the Consumer's mother, who is also the co-owner of the vehicle, visited on Mother's Day. The Consumer testified that the vehicle was too hot to use with her elderly mother because of the air conditioning nonconformity. The Board included in its award, reimbursement to the Consumer for the rental car expenses.

Shorb v. DaimlerChrysler Motors Corporation, 2003-0329/JAX (Fla. NMVAB June 5, 2003). The Consumer requested reimbursement for repair costs the Manufacturer's service agent charged him directly. The repair expenses stemmed from a "throttle body service" that was performed when the Consumer presented the vehicle for repair of the nonconformity, an engine ping. The service agent charged the Consumer \$122.40 for the throttle body service. A witness for the Manufacturer admitted that the throttle body service was not a service required by normal maintenance and that the service was performed when the vehicle failed the minimum air-flow test. The witness testified that a failed air-flow test is indicative of carbon build-up in the engine, that could cause the engine noise. The Board found the expense to be directly caused by the nonconformity and included it in the award as an incidental charge.

Net Trade-in Allowance §681.102(19), F.S.

Richmond v. BMW of North America, LLC, 2003-0085/FTL (Fla. NMVAB June 3, 2003). After stipulating that the vehicle was a "lemon," the Manufacturer argued that the Consumer's refund should not include an amount for a net trade-in allowance. The Lemon vehicle was leased and in leasing the vehicle the Consumer traded in a vehicle that was itself a leased vehicle. On the lease agreement for the vehicle that the Board determined to be a "lemon," the net allowance for the trade-in

was specified as “N.A.” The trade-in allowance specified on the lease agreement was not acceptable to the Consumer, and the Consumer opted for the NADA retail value instead. In calculating the Consumer’s refund, the Board applied the NADA Southeast edition retail value of \$39,825.00, deducted the payoff amount for the lease of the trade-in of \$37,000.00, and awarded the difference, \$2,325.00, as the net trade-in allowance to the Consumer.

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

Umphress v. Ford Motor Company, 2003-0428/JAX (Fla. NMVAB June 20, 2003).

Prior to requesting an arbitration before the Florida New Motor Vehicle Arbitration Board (state-run Board), the Consumer submitted to an arbitration hearing by Ford’s informal dispute resolution procedure (Ford Dispute Settlement Board), which is not certified by the State of Florida. At the subsequent hearing before the state-run Board, the Manufacturer stipulated that the vehicle was a “lemon” under the statute, but objected to the Board’s use of the mileage attributable to the Consumer as of the date of the Ford DSB arbitration hearing to calculate the reasonable offset for use, on the grounds that there was no settlement reached between the parties at the time of the DSB proceeding. The Board rejected the Manufacturer’s argument, noting that the statute’s reference to an “arbitration hearing” does not specify that it be a hearing before a state-certified procedure or before this Board. The Board, therefore, found that the mileage attributable to the Consumer was that mileage as of the date of the Ford DSB arbitration hearing for purposes of calculating the reasonable offset for use.

PROCEDURAL ISSUES

Riley v. Mazda Motor of America, Inc., 2003-0346/ORL (Fla. NMVAB June 6, 2003).

At the hearing, the Manufacturer sought to assert the statutory affirmative defense that the alleged transmission problems were the result of abuse by persons other than the Manufacturer or its authorized service agent. Contrary to the Board’s rules of procedure, the affirmative defense was not raised in the Answer or any amendments thereto filed prior to the hearing. Furthermore, prior to the hearing, counsel for the Consumer requested that the Manufacturer produce all documents it intended to use at the hearing; however, the Manufacturer failed to comply with the discovery request. Notwithstanding such failure, the Manufacturer sought to have its witnesses testify using documents that were not provided to the Consumer or the Board prior to the hearing. The Board noted that the Consumer had no opportunity to prepare for the Manufacturer’s affirmative defense because of the Manufacturer’s failure to timely assert the defense or provide the requested documents. Consequently, the Board did not permit the Manufacturer to assert the untimely raised affirmative defense at the hearing. In addition, testimony from the Manufacturer’s witnesses based upon documents that were not provided to the Consumer prior to the hearing was not permitted.

Classic Construction of Central Florida, Inc. v. BMW of North America, LLC, 2003-0264/TPA (Fla. NMVAB May 16, 2003).

The Consumer contended that the same defect was the subject of four separate repair attempts. However, the authorized service agent failed to provide repair orders for the last two repair attempts, and the Manufacturer argued that the Consumer failed to meet its burden to prove the Manufacturer had been provided a reasonable number of attempts to cure the nonconformity. The Manufacturer argued that, because the Consumer has the burden of proof, it should have propounded a request to produce the repair orders or served a subpoena on the Manufacturer's authorized service agent. The Manufacturer contended that it is the service agent's, rather than the manufacturer's, obligation to provide repair orders to consumers. The Board disagreed, noting that section 681.103(4) places the duty to provide repair orders to consumers upon the manufacturer. The Board reasoned that the Manufacturer would like to ignore its duty to provide written repair orders to the Consumer and then use the Consumer's inability to obtain the repair orders as a defense in a lemon law claim by arguing that the Consumer cannot prove a sufficient number of repair attempts. Finding the Consumer's testimony convincing, the Board ruled that the Manufacturer was provided three repair attempts plus a final repair attempt, pursuant to the requirements of the Statute, and failed to correct the nonconformity. The Consumer was awarded a refund.

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

Byrd v. DaimlerChrysler Motors Corporation, 2003-0145/ORL (Fla. NMVAB April 8, 2003). The Consumers requested that the Board not consider evidence that was gathered during the Manufacturer's pre-hearing inspection, because the Manufacturer failed to provide the information to the Consumer seven business before the hearing as required by the Board's rules. The Manufacturer contended that there was no prejudice to the consumer, because the repairs did not change the vehicle. The Board ruled that the Manufacturer was prohibited from testifying about the pre-hearing inspection during the hearing, because the Manufacturer failed to provide the information gathered to the consumer within the time mandated by the applicable rule.