

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

**QUARTERLY CASE SUMMARIES**

April 2004 - June 2004 ( 2nd Quarter)

**JURISDICTION:**

**Prior Resort to a State-certified, Manufacturer-sponsored Program §681.108(1), F.S.; §681.103(3), F.S.**

*Perkins v. Isuzu Motors America, Inc.*, 2004-0305/TPA (Fla. NMVAB May 26, 2004).

The Manufacturer contended that the Consumer did not satisfy the Lemon Law's requirement of resort to a Manufacturer's state-certified informal dispute settlement procedure, prior to requesting Arbitration before the Board. However, at the time of purchase, the Consumer was not provided with any written materials such as a warranty manual or an owner's guide for the vehicle, and he was not provided with any written instructions for filing a claim with the Manufacturer's state-certified informal dispute settlement procedure. The Consumer repeatedly asked for the owner's guide and warranty manual, but he did not receive them until after the first repair attempt. The Consumer filed a claim with the Manufacturer's state-certified informal dispute settlement procedure, but he withdrew his claim prior to the completion of the program's review process. The Board found the evidence established that the Consumer was not informed in writing at the time of his acquisition of the vehicle how and where to file a claim with the Manufacturer-sponsored dispute settlement procedure; consequently, the prior resort requirement did not apply to the Consumer. The Consumer's case was ultimately dismissed on other grounds.

**Motor Vehicle §681.102(15), F.S.**

*Rosenberg v. BMW of North American, LLC*, 2004-0049/WPB (Fla. NMVAB May 17, 2004).

The Manufacturer argued that the subject vehicle was not a "motor vehicle" under the terms of the statute, because it was not new when the Consumer purchased it. An employee of the Manufacturer had used the vehicle prior to the Consumer's purchase, and at the time of the Consumer's purchase, the odometer registered 11,465 miles. The Board found that the vehicle had not been transferred to an "ultimate purchaser" before the Consumer purchased it, and therefore, the vehicle was a "motor vehicle" as defined by the Lemon Law. Ultimately, the Consumer was awarded a refund.

*H.S.W. Financial Group, Inc. v. DaimlerChrysler Motors Corp.*, 2004-0196/TPA (Fla. NMVAB April 22, 2004).

The Manufacturer contended that the Consumer's vehicle was not a motor vehicle as defined by the Lemon Law, because it was a truck with a gross vehicle weight greater than 10,000 pounds.

The Consumer presented the Certificate of Registration for the vehicle, identifying the vehicle's gross vehicle weight as 11,000 pounds and the actual weight of the vehicle as 6,116 pounds. No other evidence was presented as to the vehicle's gross vehicle weight. Noting that the only evidence presented on the weight issue indicated that the vehicle's gross vehicle weight was more than 10,000 pounds, the Board ruled that the vehicle was not a "motor vehicle" under the terms of the statute. Accordingly, the Consumer's case was dismissed.

### **Warranty §681.102(23), F.S.**

*Lafferty v. Nissan Motor Corp., U.S.A., 2004-0237/WPB* (Fla. NMVAB May 14, 2004).

The Manufacturer contended that the steering wheel vibration problem was caused by the vehicle's tires, which were not covered by the Manufacturer's written limited warranty. However, the Manufacturer did not install new tires on the vehicle during the course of repairs. The Board found that the Manufacturer failed to prove its defense that the problem was caused by the tires. The Board noted that the Manufacturer could have easily proven its defense by installing new tires on the vehicle during the course of repairs. Ultimately, the Consumer was awarded a refund.

### **NONCONFORMITY §681.102(16), F.S.**

*Roebuck v. Toyota Motor Sales, U.S.A., 2004-0149/FTM* (Fla. NMVAB April 15, 2004).

The Consumers complained of a pronounced, pulsing engine sensation and an engine surge. The Manufacturer contended that the pulsing sensation was "normal" and did not constitute a nonconformity. The Manufacturer's witness testified that the pulsing sensation was caused by the normal operation of the vehicle's exhaust gas re-circulation valve. The operation of the valve could not be altered without violating the federal emissions standards. In finding the problem to be a nonconformity, the Board noted that the issue was not whether the Manufacturer thought the problem to be "normal." The issue was whether the pulsing engine sensation and the engine surge were so pronounced and significant as to substantially impair the use and value of the vehicle. Ultimately, the Consumers were awarded a refund.

### **Statutory definition of "nonconformity" vs. written warranty coverage terms**

*Dzidzovic v. Nissan Motor Corp., U.S.A., 2004-0167/ORL* (Fla. NMVAB May 5, 2004).

The Consumers complained of excessive corrosion on the vehicle's body and undercarriage. The Manufacturer's representative argued that the problem was not covered by the Manufacturer's written, limited warranty, because the warranty covered corrosion only when it was attributable to a manufacturing defect. The Manufacturer's representative contended that the corrosion on the Consumers' vehicle was caused by abuse or neglect. The Consumers' vehicle had a rust spot on the inside of the door jam and a rust spot on a fender. During one repair attempt, the authorized service agent noted the presence of an extraordinary amount of corrosion on all non-coated metal parts under the hood and on the undercarriage. The BBB/AUTOLINE independent inspector's report claimed the excessive corrosion was caused by

long-term exposure to excessive amounts of moisture or salt. The Board rejected the Manufacturer's contention that excessive corrosion must be a manufacturing defect to be covered by the Lemon Law, noting that the statutory definition of "nonconformity" is controlling over the terms of the written, limited warranty. The statutory definition of "nonconformity" does not limit coverage to "manufacturing defects." The Board ultimately found the excessive corrosion to be a defect or condition that substantially impaired the value of the vehicle. Accordingly, the Consumers were awarded a refund.

### **Florida Administrative Code Rule 2-30.001(2)(a), Definition of "Condition"**

*Wallace v. General Motors Corp., Chevrolet Motor Div.*, 2004-0371/TLH (Fla. NMVAB June 25, 2004).

The Consumers complained about a thumping noise that seemed to emanate from the front-end area of the vehicle. The Consumers initially thought the noise was caused by a problem with the brakes. The Manufacturer's authorized service agent attempted to repair the problem by replacing the rear and front rotors on a number of occasions; however, those repairs did not correct the noise. The noise remained relatively consistent from the day the Consumers first heard the noise, (at less than 1,000 odometer miles) to the date of the hearing. The Manufacturer contended that the problem was caused by a "scalped" tire. A test drive and inspection was performed by the Board during the hearing. The tires did not exhibit any unusual tire wear, and some scalloping was observed on the left front tire. The Board heard a thumping noise coming from the front-end area of the vehicle as it was driven, but the noise did not appear to be related to the application of the brakes. Upon these facts, the Board determined that the thumping noise was a condition of unknown origin that substantially impaired the use, value and safety of the vehicle. Ultimately, the Consumer was awarded a refund.

### **REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.**

#### **What Constitutes Written Notification Under §681.104(1)(a), F.S.**

*Collins v. Ford Motor Co.*, 2004-0257/ORL (Fla. NMVAB June 1, 2004).

The Manufacturer contended that the Consumer did not provide written notification of the defect. The Consumer mailed a letter to the Manufacturer and to one of the Manufacturer's authorized service agents, Greenway Ford. The letter outlined the problems the Consumer was having with his vehicle and advised that the vehicle would be delivered to Sun State Ford for repairs. The letter further requested repurchase or replacement relief, and warned that the Consumer intended to pursue his rights under the Lemon Law. The Manufacturer responded to the Consumer and asked him to deliver the vehicle to Greenway Ford for the final repair attempt. However, the Consumer declined to deliver the vehicle to Greenway Ford as requested, because he contended that the repair at Sun State Ford was the Manufacturer's final repair attempt. The Board ruled that the Consumer's letter was sufficient to provide written notification under the terms of the statute. However, the Board ultimately dismissed the Consumer's case on the ground that the Consumer failed to provide the Manufacturer a final opportunity to repair the

vehicle. The Board reasoned that the Sun State Ford repair attempt was not the Manufacturer's final repair attempt, because the Manufacturer had designated Greenway Ford, and not Sun State Ford, as the facility for the final repair attempt.

*Williams v. Ford Motor Co.*, 2004-0218/FTM (Fla. NMVAB April 26, 2004).

The Manufacturer contended that it was not provided the statutory written notification, because the letter that the Consumers sent to the Manufacturer did not request a final repair attempt. The Consumers sent a letter to Ford Motor Company in Detroit, Michigan. The letter bore the heading, "Letter of Notification of Defect to Manufacturer," and it contained the vehicle's identification number, the dates of three repair attempts, and requested the Manufacturer replace or repurchase the vehicle pursuant to the Lemon Law. The Manufacturer responded by letter indicating that someone would contact the Consumers within seven days. The Consumers also received a telephone call from the Manufacturer's authorized service agent directing the Consumers to present the vehicle at a place certain for the final repair attempt. The Consumers complied with the service agent's instruction and a final repair attempt was conducted. Upon this evidence, the Board found the Consumers' letter provided the statutory notice to the Manufacturer. Ultimately, the Consumer was awarded a refund.

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

*Schroeder v. Ford Motor Co.*, 2004-0056/STP (Fla. NMVAB April 6, 2004).

The Consumer complained of a steering wheel vibration and shudder that occurred during slow left turns. On two repair attempts, the Manufacturer's authorized service agent performed no repairs. Thereafter, the Consumer sent written notification of the defect to the Manufacturer and provided the Manufacturer with the opportunity for a final repair attempt. During that repair attempt, the Manufacturer again performed no repairs, contending that the steering vibration and shudder were "normal" for the Lincoln Aviator. During the Manufacturer's pre-hearing inspection of the vehicle, the Manufacturer's Field Service Engineer authorized the replacement of the vehicle's steering gear and rack and pinion. The repair reduced the severity and frequency of the steering problem but did not completely eliminate it. Upon these facts, the Board found the Manufacturer had been afforded a reasonable number of attempts to cure the problem. The Board noted that a Consumer is not required to meet the three-plus-one statutory presumption in order to establish a reasonable number of attempts. The Board found that it would be unreasonable to require the Consumer to continue to seek repair where the Manufacturer had consistently elected not to undertake repairs. Accordingly, the Consumer was awarded a replacement vehicle.

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

*Carbono v. Ford Motor Co.*, 2003-1183/ORL (Fla. NMVAB April 12, 2004).

The Manufacturer contended that the Consumer failed to provide a final opportunity to repair the vehicle. The Manufacturer mailed to the Consumer a post card that directed the Consumer to present the vehicle to the Manufacturer's authorized service agent for the final repair attempt.

The post card was mailed one day after the Manufacturer received the Consumer's written defect notification. The Manufacturer also attempted to contact the Consumer by telephone but was unsuccessful. The Manufacturer's representative left a message on the Consumer's cellular number asking the Consumer to return his phone call to schedule a final repair attempt. The Consumer did not receive the message, because his cell phone was inoperable at the time. The Manufacturer's representative also attempted to contact the Consumer at the Consumer's home telephone, but there was no answer and no means to leave a message. In addition to the Manufacturer's direct attempts to contact the Consumer, the Manufacturer's authorized service agent also attempted to contact the Consumer. The Consumer did not present the vehicle at the repair facility as directed by the post card and did not respond to the numerous telephone calls; consequently, the Manufacturer did not conduct a final repair attempt. Under these circumstances, the Board found that the Consumer failed to provide a final repair attempt. Accordingly, the Consumer's case was dismissed.

*Shaw v. Ford Motor Co.*, 2004-0068/TPA (Fla. NMVAB April 14, 2004).

The Consumer failed to send written notification to the Manufacturer at the address indicated in the warranty book for receipt of such notifications, and as a consequence, the Manufacturer's response was delayed. An unknown recipient of the letter forwarded it to the correct address, and when the Manufacturer received the notification at the correct address, the Consumer was promptly contacted to arrange a final repair attempt. However, the Consumer contended that the Manufacturer's response was untimely and refused to present the vehicle for a final repair attempt. The Consumer's postal return receipt contained a receipt date that corresponded to the date that the written notification was received at the incorrect address. The Manufacturer contended that it responded to the Consumer's written notification within 10 days of receipt at the correct address. The Manufacturer's warranty, which the Consumer received at the time of purchase, provided the correct address for receipt of such notification. Upon these facts, the Board ruled that the Manufacturer's receipt date was the date the Manufacturer received the forwarded defect notification at the correct address. Thus, the Manufacturer's response to the defect notification was timely, and the Manufacturer was entitled to a final repair attempt. The Board dismissed the Consumer's case for failure to provide the Manufacturer with a final opportunity to repair the vehicle.

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

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

*Harris v. Toyota Motor Sales, U.S.A., 2004-0277/ORL* (Fla. NMVAB June 1, 2004).

The Manufacturer contended that the stalling problem was caused by accident, abuse, or neglect by persons other than the Manufacturer or its authorized service agent. In support of the defense the Manufacturer's witness testified that a fuel sample from the vehicle's fuel tank was examined and found to be off-color and to have an uncharacteristic odor. In addition, the spark plugs were contaminated and the diagnostic computer showed a misfire, which were indicators of contaminated fuel. Upon these facts, the Board found the stalling problem to be the result of accident, abuse, or neglect by persons other than the Manufacturer or its authorized service agent. The Board noted that there was no evidence presented that would support finding that the fuel contamination was caused by the Manufacturer or its authorized service agent. Accordingly, the Consumer's case was dismissed.

### **REFUND §681.104(2)(a)(b), F.S.:**

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

*Thompson v. Toyota Motor Sales, U.S.A., Inc., 2004-0431/STP* (Fla. NMVAB June 24, 2004).

The zero net trade-in allowance reflected in the lease agreement was not acceptable to the Manufacturer. The Manufacturer provided a copy of a NADA Official Used Car Guide (Southeastern Edition) for February 2004, which was not the guide in effect on the date of the trade-in (July 19, 2003). The Consumer's trade-in vehicle, a 2003 Toyota Tacoma, was not listed in the July 2003 NADA Guide. The February 2004 NADA Guide was the first NADA Guide to list the trade-in vehicle. The Manufacturer's representative argued that the Consumer's net trade-in allowance was "inflated," because the actual purchase price of the leased vehicle was higher than the Manufacturer's Suggested Retail Price. The Manufacturer's representative asked the Board to subtract the Manufacturer's Suggested Retail Price from the purchase price to arrive at the amount of the so-called "over allowance." He contended that the Board should reduce the Consumer's net trade-in allowance by the amount of the "over allowance," which would result in a negative net trade-in allowance. The Board declined the Manufacturer's request as being beyond the plain meaning of s. 681.102(19), F.S. To calculate the Consumer's refund, the Board used the zero net trade-in allowance as reflected in the lease agreement.

*Gottlieb v. Mercedes-Benz USA, Inc., 2003-1066/WPB* (Fla. NMVAB May 7, 2004).

The Consumer was not satisfied with the net trade-in allowance reflected on the lease agreement and opted for the NADA retail value. The Manufacturer objected to the Board using the NADA Guide to calculate the net trade-in allowance, on the ground that the trade-in vehicle was itself a leased vehicle. The lease agreement reflected that the Consumer received a negative net trade-in allowance of \$4,589.80. The negative net trade-in allowance was identical to the charge incurred by the Consumer for terminating the lease early on the traded-in vehicle. The

Manufacturer's counsel argued at the hearing that the leased vehicle should not be treated as a trade-in vehicle, because lessees have no equity in such vehicles. The Board disagreed with the Manufacturer, noting that the statutory definition of net trade-in allowance is determinative of the issue. The Board calculated the net trade-in allowance by subtracting from the NADA retail value the residual value of the trade-in vehicle and the early termination charge.

## **PROCEDURAL ISSUES**

*Sports Development, Inc. v. General Motors Corp., Cadillac Div.*, 2004-0212/FTL (Fla. NMVAB April 29, 2004).

At the hearing, the Manufacturer sought to raise the affirmative defense that the engine malfunction was the result of an accident. Specifically, the Manufacturer sought to show that the vehicle was driven through a large puddle of water that caused the malfunction. However, the Manufacturer failed to raise that affirmative defense in its Answer or in a timely filed Amended Answer. Therefore, the Board did not permit the Manufacturer to raise the defense. Ultimately, the Consumer was awarded a refund.

*Fontaine v. Mercedes-Benz USA, Inc.*, 2004-0072/ORL (Fla. NMVAB April 7, 2004).

At the hearing, the Manufacturer's counsel sought to present the testimony of a witness who was not listed on the Manufacturer's Prehearing Information Sheet or otherwise identified in writing five days before the hearing, as required by the Board's procedures. The Consumer objected to the witness being permitted to testify. The Manufacturer's counsel argued that the witness should be permitted to testify, because he was present at the hearing to take the place of a listed witness who was on vacation. The Board noted that the Prehearing Information Sheet makes clear that any witness not included on the form, or otherwise identified in writing within the required time, would not be allowed to testify. The Manufacturer was free to amend the Prehearing Information Sheet in a timely fashion prior to the hearing, but failed to do so. Upon consideration of the Consumer's objection and having heard no sufficient explanation for the Manufacturer's failure to comply with the prehearing notice requirements, the Board ruled that the witness could not testify at the hearing.

*Davis v. Ford Motor Co.*, 2004-0379/TPA (Fla. NMVAB June 15, 2004).

The Consumer's husband appeared at the hearing intending to represent his wife's interests. The Consumer did not personally appear, and her husband presented a faxed letter from the Consumer that purportedly authorized the Consumer's husband to speak on her behalf at the hearing. The Request for Arbitration was not filed jointly by the Consumer and her husband, and the husband had no ownership interests in the subject vehicle. The Manufacturer objected to the husband's request to represent the interests of his wife in this case. The Consumer's husband requested that the hearing be rescheduled so that the Consumer could appear, to which the Manufacturer's representative objected, citing the expense incurred by counsel in traveling to the hearing, and further citing to the fact that the Consumer had not requested a continuance or shown an unforeseeable circumstance or good cause to support a continuance. The Board denied the Consumer's husband's request to reschedule the hearing and denied his request to represent

the interests of the Consumer. Accordingly, the Board dismissed the Consumer's case for failure to appear at the hearing.