

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

**QUARTERLY CASE SUMMARIES**

January 2004 - March 2004 ( 1st Quarter)

**NONCONFORMITY §681.102(16), F.S.**

*Degance v. DaimlerChrysler Motors Corp.*, 2003-1082/FTL (Fla. NMVAB February 4, 2004). The Consumer complained of a mold odor in the vehicle that grew stronger the longer the vehicle was driven. The Manufacturer's witness testified that the odor was caused by an evaporator leak that allowed a portion of the refrigerant to escape. The Manufacturer contended that the replacement of the evaporator cured the problem, and that the odor remaining was caused by "after market" floor mats and golf shoes left in the Consumer's vehicle. The Manufacturer's witness also testified that the Consumer was advised against using the re-circulation setting on the air conditioner for prolonged periods of time, because it could produce an odor. The Board rejected the Manufacturer's contentions, finding the mold odor to be a nonconformity that substantially impaired the vehicle's use and value. Accordingly, the Consumer was awarded a refund.

*Siegel v. Nissan Motor Corp.*, 2004-0010/WPB (Fla. NMVAB February 22, 2004). The Consumer complained that the car alarm activated at all hours of the night without provocation. The alarm woke him in the middle of the night, about three times a week. The Consumer contended that the sleep disruptions were hurting his health, and his neighbors were complaining about the annoyance. The issue even became the target of a petition signed by residents of the Consumer's retirement community and he had earned the nickname, "Mr. Hornblower." The Manufacturer contended that the erratic alarm was not a nonconformity, because it did not impact the safety of the vehicle and the vehicle had never left the Consumer stranded. The Board found the defective car alarm substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.

*Herlth v. Ford Motor Co.*, 2004-0095/FTL (Fla. NMVAB March 11, 2004). The Consumer complained of a creased and frayed head-liner. The Board inspected the vehicle and found that the rear portion of the passenger side of the head-liner was noticeably creased with a slight amount of fraying. The Board also found that the driver's side of the head-liner did not exhibit a similar pattern of creasing and fraying. The Board ruled that the head-liner problem substantially impaired the value of the vehicle. Accordingly, the Consumer was awarded a refund.

*Lazlo v. Ford Motor Company*, 2004-0009/ORL (Fla. NMVAB March 18, 2004). The Consumer complained of a grinding noise that occurred intermittently. The grinding noise lasted a couple of seconds and occurred upon deceleration or acceleration. On occasion, a

transmission “slipping” sensation was also experienced in association with the grinding noise. During the Manufacturer’s final repair attempt, the vehicle was road tested for 129 miles. No repairs were performed during the final repair attempt. The Manufacturer, through counsel, argued that the alleged defect did not substantially impair use, value or safety. The Manufacturer’s witness observed the problem complained of by the Consumer, but he did not know what was causing it. He speculated that the grinding noise could be “chatter” from the rear differential or could be emanating from the anti-lock braking system. The witness characterized the noise as “abnormal,” but because the noise was not duplicated again and the transmission fluid was not burned, the transmission pan was not dropped and no work was performed on the transmission. The Board ruled that the intermittent transmission grinding problem was a defect that substantially impaired the value of the vehicle. The Consumer was ultimately awarded a replacement vehicle.

## **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.**

*Dougherty v. Ford Motor Co.*, 2003-1165/ORL (Fla. NMVAB March 19, 2004).

The Manufacturer, through counsel, argued that it was not afforded a final opportunity to conform the vehicle to the warranty because the Consumers failed to send written notification to the Manufacturer as required by the Lemon Law. The Consumers sent a letter to the Manufacturer ostensibly to provide the Manufacturer with a final opportunity to repair the vehicle. The letter was addressed “To Whom It May Concern.” The letter did not contain any information to identify the intended recipient. The Consumers did not know to what address they had sent the letter, and they could not provide proof of delivery of the letter. The Board ruled that the Consumers failed to send the required written notification to the Manufacturer. Accordingly, the Consumers’ case was dismissed.

*Bustamante v. BMW of North America, LLC*, 2004-0070/MIA (Fla. NMVAB March 5, 2004).

The Manufacturer contended that the Consumer failed to provide the statutory notice. The Manufacturer also contended that it was not afforded the opportunity to inspect the vehicle or perform a final repair attempt, because of the Consumer’s failure to provide the statutory notice. The Consumer sent seven letters to the Manufacturer complaining about the problems the Consumer was having with the vehicle. The letters did not specify that the problems had been the subject of three repair attempts or that the vehicle had been out of service for repair for 15 or more days. Some of the letters contained requests for repurchase relief, but none of the letters referred to the Lemon Law or offered to provide a final repair attempt or opportunity to inspect the vehicle. The Consumer mailed a Motor Vehicle Defect Notification form to the Department of Legal Affairs, but he did not mail a copy of the form to the Manufacturer. The Board ruled that the Consumer failed to provide written notification. Accordingly, the Consumer’s case was dismissed.

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

*Holzer v. Mercedes-Benz, USA, Inc.*, 2004-0022/WPB (Fla. NMVAB February 25, 2004).

The Manufacturer was provided two opportunities to correct a door latch problem, and after receipt of the Consumer's defect notification, the Manufacturer conducted a final repair attempt. The door latch problem continued to exist after the final repair attempt, albeit, with a different door on the vehicle. The Consumer claimed the door latch problem substantially impaired the vehicle's safety and use; however, the Consumer admitted driving the vehicle from Florida to New York while the problem existed. The Board ruled that under the circumstances the Manufacturer was not provided a reasonable number of attempts to repair the vehicle. Accordingly, the Board dismissed the Consumer's case.

*Casas v. Mazda Motor of America, Inc.*, 2004-0015/MIA (Fla. NMVAB February 9, 2004).

The Consumer complained of a windshield condensation problem. He presented the vehicle for repair of the problem on two occasions prior to sending written notification to the Manufacturer. Thereafter, the Manufacturer conducted a final repair attempt, but the problem continued to exist. The Manufacturer's witnesses testified at the hearing that no further repairs would be undertaken to correct the problem, because windshield condensation is a "normal characteristic" that can be remedied by adjusting the air conditioner or defrost settings. Under these circumstances, the Board found a reasonable number of attempts and ultimately awarded the Consumer a refund.

*Arain v. Mercedes-Benz USA, Inc.*, 2004-0021/WPB (Fla. NMVAB March 23, 2004).

The Consumer complained of a rough-running engine and the intermittent illumination of the "check engine" warning light. After two repair attempts for the problem, the Consumer sent written notification to the Manufacturer. Thereafter, the Manufacturer conducted a final repair attempt, but the problem continued to exist after the final repair attempt, so the vehicle was again presented to the Manufacturer's authorized service agent for a fourth repair attempt. The Board found that under the circumstances the Manufacturer was provided a reasonable number of repair attempts. Ultimately, the Consumer was awarded a refund.

**Whether recurring nonconformity corrected within a reasonable number of attempts §681.104(2)(a); 681.104(3)(a)**

*Glenn v. Ford Motor Company*, 2003-1201/FTM (Fla. NMVAB March 18, 2004).

The Consumers complained that the cladding on the doors expanded when exposed to heat. In the past the cladding expansion caused the doors to rub and bind when opened and caused paint on the doors to chip. On the final repair attempt, new cladding was installed on the doors. The new cladding was three millimeters shorter than the original cladding. The shorter cladding resolved the binding problem but the Consumers contended that the shorter cladding impaired the appearance, and consequently the value, of the vehicle. They also contended that the problem was not solved by the shorter cladding, asserting that when the cladding was exposed to the summer heat, the new cladding would expand and interfere with the opening of the doors.

The Board found that the cladding problem was a nonconformity, but that the installation of the shorter cladding corrected the problem on the final repair attempt. The Board characterized the Consumer's assertion that the problem would return in the summer as being speculation. Accordingly, the Consumer's 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.**

*David v. American Honda Motor Company*, 2003-1200/JAX (Fla. NMVAB March 15, 2004). The Consumer complained that his Honda Civic hybrid did not achieve the fuel economy set forth in the EPA estimates. The EPA estimates for fuel economy for the vehicle were 48 miles per gallon for city driving and 47 miles per gallon for highway driving, as indicated on the Monroney label (window sticker) attached to the vehicle. The Monroney label also warned that the actual fuel economy would vary according to driving conditions, driving habits, vehicle options, and vehicle condition. The Consumer presented a mileage log as evidence of the vehicle's fuel economy. The mileage log indicated a range of miles per gallon from a low of 32 mpg to a high of 42 mpg, for driving that was characterized as city and highway from August 2002 to March 11, 2003. However, from December 2002 through the date of the hearing the primary driver of the vehicle was the Consumer's daughter, who used the vehicle to commute to college in Tampa. The Manufacturer contended that fuel economy was not a defect in the vehicle. The Manufacturer's Field Service Engineer test drove the vehicle 134 miles, under various driving conditions. He also tested the fuel management system with a hand-held scanner to detect any defects in the system. The Field Service Engineer found no defects in the fuel management system, and he found the fuel consumption to be within an "acceptable range." Based upon the evidence presented, the Board ruled that the Consumer's complaint did not amount to a nonconformity, noting that there was no evidence of any mechanical failure or other defect. The Board recognized that it was apparent that the vehicle failed to meet the Consumer's expectations with regard to fuel economy; however, such a failure in and of itself did not constitute a nonconformity under the statute. Accordingly, the Consumer's case was dismissed.

*Bridges v. Hyundai Motor America*, 2003-1019/FTM (Fla. NMVAB March 16, 2004). The Consumer complained that the vehicle's seat warmer did not continuously heat the seats. The seat warmer operated only when the temperature inside the vehicle was below a certain level, and it automatically shut off when the inside temperature rose above a certain level. The Consumer suffered from arthritis and decided to purchase an upgraded version of the vehicle in order to have the added feature of heated seats. The Manufacturer contended that the feature was designed to make the vehicle's leather seats more comfortable in cold weather. The Owner's Manual stated, "The seat warmer will not operate if ambient temperature is higher than 82.4 degrees Fahrenheit." The Manufacturer's witness explained that the thermometer which controls the operation of the seat warmer measures the temperature of the seat cushion rather than the ambient temperature. Acknowledging that the vehicle's heated seat feature had not met the Consumer's expectation, the Board rule that the operation of the seat feature was not a

nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

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

*Canoy v. Ford Motor Co.*, 2003-1144/TPA (Fla. NMVAB February 10, 2004).

The Consumers complained about a vibration or wobble in the vehicle which could be felt when it was driven at any speed. After the tires were rotated, the vibration moved from the front to the rear of the vehicle. Thereafter, the Manufacturer's service agent advised the Consumers that both rear tires were excessively cupped and needed to be replaced; however, the Consumers declined to pay for the replacement tires. The Board ruled that the vibration problem was the result of neglect by persons other than the Manufacturer or its authorized service agent. Ultimately, the Consumers' case was dismissed.

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

*Ploeger v. Ford Motor Co.*, 2004-0017/TPA (Fla. NMVAB March 11, 2004).

The Consumer's Lemon Law rights period expired on October 29, 2003, which was 24 months after the date of delivery of the vehicle to the Consumer. The Consumer filed his Request for Arbitration on Monday, December 29, 2003, seeking a refund. The Manufacturer, through counsel, argued at the hearing that the Consumer's Request for Arbitration was untimely filed, because the last day for the Consumer to timely file his Request was December 28, 2003, which was a Sunday. It was the Manufacturer's contention that the Consumer should have filed his Request for Arbitration on the Friday prior to Sunday, December 28, 2003. The Board ruled that the Request for Arbitration was timely filed, finding that (1) State Offices are closed on Sundays, and (2) the Consumer would be deprived of his full filing time provided by statute if the Board required him to file on the Friday prior to December 28, 2003. Nevertheless, the Consumer's case was ultimately dismissed on other grounds.

**REFUND §681.104(2)(a)(b), F.S.:**

**Collateral Charges §681.102(3), F.S.**

*Aiello v. General Motors Corp., Chevrolet Motor Div.*, 2003-1051/TPA (Fla. NMVAB January 15, 2004).

The Consumers paid the lienholder periodic payments and a lump sum payment of \$17,532.00. The lump sum payment was paid by the Consumers from their home equity credit line. The Consumers did not have readily available the amount of the finance charges paid in connection with the \$17,532.00 lump sum payment, so the Board did not consider those charges in calculating the Consumers' refund.

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

*Goldenberg v. Mercedes-Benz USA, Inc.*, 2003-1045/MIA (Fla. NMVAB January 16, 2004).

The Manufacturer's representative asserted at the hearing that one of the repair orders contained

a typographical error in that the repair order indicated that a test drive of 987 miles was taken. The Manufacturer's representative argued that the 987 miles should be included in the mileage attributable to the Consumer, for purposes of calculating the reasonable offset for use. The Board disagreed with the Manufacturer and ruled to exclude the 987 miles from mileage attributable to the Consumer.

## **PROCEDURAL ISSUES**

*Harwell v. Toyota Motor Sales, U.S.A., Lexus Division*, 2003-1196/ORL (Fla. NMVAB March 5, 2004).

At the hearing, the Manufacturer's representative sought to assert affirmative defenses that were not raised in the Manufacturer's Answer, any attachments to the Answer, or in any amendments to the Answer. The Manufacturer also sought to present testimony of witnesses who were not identified in writing to the Consumer and the Board at least five days prior to the hearing. Consequently, the Manufacturer's representative was not permitted to present the un-noticed witnesses or raise the un-noticed affirmative defenses. The Manufacturer's representative was, however, permitted to cross-examine the Consumer and present a closing argument. Similarly, the Consumer sought to introduce the testimony of her husband who was not identified in writing to the Manufacturer and the Board at least five days prior to the hearing. As the Consumer's husband was not an owner of the vehicle and was not listed as a Consumer on the Request for Arbitration, or on any amendment thereto, the Board did not permit the Consumer's husband to testify during the hearing. Ultimately, the Board awarded a replacement vehicle to the Consumer, after she proved her case.

*Grillo v. Jaguar Cars*, 2003-1197/STP (Fla. NMVAB February 20, 2004).

The Consumer listed as a witness on his Prehearing Information Sheet the attorney for Jaguar Cars, William Bromagen. At the hearing, Mr. Bromagen objected to being called as a witness, contending that he had no personal knowledge of the Consumer's vehicle. The Consumer stated that he sought Mr. Bromagen's testimony in order to elicit information about Jaguar's affirmative defenses asserted in the Manufacturer's Answer. The Manufacturer's Answer was signed by Mr. Bromagen. The Board denied the Consumer's request to call Mr. Bromagen as a witness.

*Erickson v. Ford Motor Co.*, 2003-0957/ORL (Fla. NMVAB January 8, 2004).

The Consumer indicated on his Prehearing Information Sheet that he would be bringing an interpreter to the hearing. However, at the hearing, the Consumer informed the Board that he wanted the interpreter to speak on the Consumer's behalf and represent him at the hearing. The interpreter was not a lawyer and was not otherwise authorized to practice law in the State of Florida. Accordingly, the Board did not allow the interpreter to represent the Consumer.

## **MISCELLANEOUS ISSUES**

***Additional Arbitration for the same vehicle - Hearings Before the Florida New Motor***

***Vehicle Arbitration Board, ¶(71)***

*Smith v. Toyota Motor Sales, U.S.A., Lexus Division, 2003-1027/MIA (Fla. NMVAB January 15, 2004).*

The Consumer, whose prior arbitration request was dismissed after a hearing, alleged that there had been a significant change in circumstances since that hearing and requested an additional arbitration, which was approved. The Board adopted the Findings of Fact of the previous Decision, in which the Board found a nonconformity but found that it had been cured within a reasonable number of repair attempts. In the second arbitration, the Board found that the problem had recurred after the first arbitration hearing and after the final repair attempt. Accordingly, it was presumed that the Manufacturer failed to conform the vehicle to the warranty within a reasonable number of repair attempts. The Consumer was awarded a refund.