

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

QUARTERLY CASE SUMMARIES

July 2003 - September 2003 (3rd Quarter)

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.

Schaaff v. Mitsubishi Motors North America, Inc., 2003-0619/FTM (Fla. NMVAB September 26, 2003).

The Consumer's counsel sent a letter to the Manufacturer, but the Manufacturer contended that the letter did not constitute written notice pursuant to the statute. Counsel for the Manufacturer argued that the letter was not mailed to the address provided in the vehicle's warranty manual and the content of the letter was contradictory. The letter totaled two and one-half pages, and the majority of the letter discussed revocation of acceptance, attorney's fees, and loss of confidence in the vehicle. The second paragraph of the letter provided that the Consumer was providing a final opportunity to cure the defects pursuant to the Florida Lemon Law and that the Manufacturer should contact the Consumer's counsel within ten days of receipt of the letter. Counsel for the Manufacturer further argued that the obvious purpose of the letter was to advise the Manufacturer's legal department about a claim for revocation, rather than to request a final repair attempt under the Lemon Law. However, the Board disagreed, a majority finding that the letter put the Manufacturer on notice pursuant to section 681.104, Florida Statutes (2002). The Consumer was ultimately awarded a refund.

What Constitutes a Repair Attempt

Stonelake v. Ford Motor Company, 2003-0615/STP (Fla. NMVAB August 27, 2003).

Counsel for the Manufacturer contended that the vehicle had not been subjected to a reasonable number of repair attempts, arguing that one of the three repair attempts occurred while the Consumer's father owned the vehicle. Initially the subject vehicle was purchased by the Consumer's father, in July 2001, for his own personal, family, or household uses. However, in September 2002, the Consumer's father transferred ownership of the vehicle to the Consumer as a gift, and the Consumer used the vehicle for personal, family or household purposes. Noting that it is the nonconformity and not the consumer that is the subject of the repair attempts, the Board found that the electrical problem was subjected to repair by the Manufacturer's authorized service agent on at least three occasions prior to the Manufacturer receiving written notification and a final repair attempt. Accordingly, the Consumer was awarded a refund.

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

Johnson-Wolthuis v. Toyota Motor Sales, U.S.A., 2003-0554/ORL (Fla. NMVAB August 21, 2003).

The Consumer complained of an improperly fitted driver's side window and door seal that resulted in wind noise and water intrusion. The defect resulted from a repair attempt by the authorized service agent. When the Consumer presented the vehicle for repair, complaining of a clicking noise in the driver's side window, the Manufacturer's authorized service agent replaced the window regulator motor assembly. Thereafter, the Consumer experienced a wind noise when driving the vehicle and water intrusion when the vehicle was washed. The vehicle was subsequently presented for repair of the poorly fitted window and door seal on two occasions, plus a final repair attempt. However, the problem continued to exist after the final repair attempt. The Manufacturer contended that the window motor assembly repair was not related to the poorly fitted window and door seal, and therefore, the window and door seal problem had not been the subject of three repair attempts, plus the final. The Board disagreed, finding that there were a reasonable number of attempts to conform the vehicle to the warranty. Ultimately, the Consumer was awarded a refund.

Caporaletti v. Ford Motor Company, 2003-0577/ORL (Fla. NMVAB September 2, 2003).

Although it was provided only two repair attempts, plus a final attempt after receiving the Consumer's written notification, the Manufacturer stipulated that it was provided a reasonable opportunity to conform the vehicle. The Consumer complained of excessive corrosion on the undercarriage parts of the vehicle. After two repair attempts, the Consumer sent the statutory written notice to the Manufacturer and provided the Manufacturer with a final repair attempt. However, no repairs were attempted on the final repair attempt, and the corrosion continued to exist afterwards. The Manufacturer claimed the affirmative defense that the alleged defect did not substantially impair the use, value, or safety of the vehicle. A witness for the Manufacturer contended that the corrosion was simply "surface rust" that was not detrimental to the vehicle. The Board found the corrosion to be a nonconformity, and noting that the Manufacturer stipulated to being provided a reasonable opportunity to cure, the Board ruled that the Consumer was entitled to 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.

Pruitt v. Ford Motor Company, 2003-0420/TPA (Fla. NMVAB August 4, 2003).

The Manufacturer contended that the nonconformity was cured within a reasonable number of attempts, because it was cured on the "final repair attempt." However, the vehicle was out of service for repair of a nonconformity for 73 cumulative days. The Manufacturer argued that it had an unlimited amount of time to make the vehicle "right" under the days-out-of-service provision of the statute and the precedent established by the court in *BMW v. Singh*. The Manufacturer contended that the "final repair attempt" may last an unlimited amount of time

because, unlike the “3-plus-1 presumption,” the days-out-of-service presumption does not require the Manufacturer complete the “final repair attempt” within 10 days. The Board rejected the Manufacturer’s argument, noting that neither the plain wording of the statute nor dicta in *BMW v. Singh* supported the proposition that the Manufacturer has an unlimited amount of time to make the vehicle “right” after receipt of the Consumer’s written notification of time out of service. Ultimately, the Board awarded the Consumer a refund.

Lauzan v. BMW of North America, LLC, 2003-0682/MIA (Fla. NMVAB September 18, 2003). The Manufacturer contended that it was not provided a “final opportunity” to repair the vehicle. The Manufacturer responded to the Consumer’s written notification of time out of service by letter. The letter directed the Consumer to present her vehicle to Braman BMW on May 28, 2003 at 10:00 am for the “final repair attempt.” Joe Garcia, Field Service Engineer for BMW, testified that he went to the Braman BMW dealership at the appointed time, but the Consumer was not there. Mr. Garcia then left the premises, unaware that the subject vehicle was indeed present at the dealership and undergoing repair. On June 6, 2003, a Manufacturer’s representative telephoned the Consumer, and the Consumer informed him that the subject vehicle was still at Braman BMW. Nevertheless, the Manufacturer did nothing further. The Board noted that the statute does not provide for a Manufacturer-only opportunity to inspect or repair; rather, the statute provides that the Consumer shall send written notice to the Manufacturer to give the Manufacturer or its authorized service agent an opportunity to inspect or repair the vehicle. In addition, the Board noted that the Manufacturer was provided more than one opportunity to inspect or repair, because the vehicle was at the Manufacturer’s authorized service agent’s facility from May 14, 2003 through June 23, 2003. The Manufacturer’s failure to perform an inspection or repair was the result of poor communication with its authorized service agent; but, the Board ruled, it was not the result of the Consumer’s refusal to allow a repair. Ultimately, the Consumer was awarded a refund.

DEFINITION OF NONCONFORMITY §681.102(16), F.S.

Digby v. Land Rover of North America, 2003-0686/FTM (Fla. NMVAB September 12, 2003). The Consumer complained that her vehicle surged when the cruise control was used. The surge was felt approximately every 12 seconds when the vehicle was driven on a flat road with the cruise control engaged. The surge created the feeling that the throttle pressure was being applied and released. The Consumer traveled extensively in connection with her business, so the cruise control was very important to her. As a result of the defect with the cruise control, the Consumer stopped using the vehicle and purchased a new one. The Manufacturer’s witness testified that the vehicle was operating within specifications, in that the vehicle maintained the set speed within two miles per hour. However, the Board noted that “operating within specifications” is not a defense to whether such operation substantially impairs the vehicle’s use. The Board ultimately found the surge to be a nonconformity and awarded the Consumer a refund.

Rule 2-30.001(2)(a), F.A.C., Definition of “Condition”

Helms v. BMW of North America, LLC, 2003-0427/FTL (Fla. NMVAB August 1, 2003). The Consumer complained of a computer software problem and a rattling noise in the dash board. The software problem intermittently caused the “I-Drive” screen to go blank, which would variously cause the radio to go off, blast loudly, or make a static noise. At times, the software problem also caused the vehicle’s navigational system to fail and the cellular phone to become inoperable if it was plugged into the vehicle. During the first repair attempt, the dash board was removed and replaced to repair the computer. After that repair, a rattling noise appeared in the dash board, that sounded like a marble rolling around. The vehicle was subsequently subjected to two more repair attempts, plus a final attempt after the Manufacturer received written notification. The problems continued after the final repair attempt. The Manufacturer contended that it was not provided a reasonable number of repair attempts. The Board ruled that the problems with the computer software and the rattle were sufficiently related to constitute a “condition” within the meaning and intent of the Lemon Law, because the dash board rattle was caused by an attempt to repair the computer software malfunction. The Board found that the condition was a nonconformity that was the subject of three repair attempts, plus a final repair after the Manufacturer received written notification. Accordingly, the Consumer was awarded a refund.

Kowalik v. Volkswagen United States, Inc., 2003-0646/FTM (Fla. NMVAB August 27, 2003). The Consumer complained that intermittently various windows in the vehicle did not open or close properly. The Manufacturer contended that it was not afforded a reasonable opportunity to correct the problem, because it was not provided three repair attempts to any one window. The Board found the window problem to be a “condition” that was the subject of three repair attempts, plus a final repair attempt after the Manufacturer received written notice. Accordingly, 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.

Jefferson v. Toyota Motor Sales, U.S.A., 2003-0523/TPA (Fla. NMVAB August 6, 2003). The Consumer complained that the vehicle vibrated when it was cold and driven at a speed of 60 miles per hour. Initially, the vibration was constant when the vehicle was driven at speeds of 50 to 60 miles per hour. After the service agent replaced the vehicle’s tires, the vibration would appear at 60 miles per hour, but it would disappear after the tires warmed up, usually within 10 minutes of driving. Noting that the vibration problems occurred under limited circumstances and went away after a few minutes of driving, the Board ruled that the problem complained of 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.

Meister v. General Motors Corporation, Pontiac-GMC Division, 2003-0620/STP (Fla. NMVAB August 28, 2003).

The Consumer complained that the rear end of the vehicle hopped when was driven at speeds of 40 to 50 miles per hour. The Manufacturer contended that the problem was the result of unauthorized modification, as the Consumer had installed oversized tires on the vehicle that exceeded the Manufacturer's specifications. On each repair attempt, the Consumer was advised that the oversized tires were outside of the Manufacturer's specifications. On the final repair attempt, the Manufacturer's authorized service agent replaced the oversized tires with tires from a stock vehicle. With the stock tires, the vehicle did not present the hopping problem. The Board found the problem was the result of the Consumer's installation of oversized tires, which were not placed on the vehicle by the Manufacturer or its authorized service agent. Accordingly, the Consumer's case was dismissed.

Clayton v. Ford Motor Company, 2003-0475/ORL (Fla. NMVAB July 29, 2003).

The Consumer contracted with an unauthorized agent to perform modifications to the vehicle. The Manufacturer contended that the defects were the result of unauthorized modifications or alterations to the vehicle by persons other than the Manufacturer or its authorized service agent. The vehicle was towed in for the Manufacturer's pre-hearing inspection, because it was not driveable. The Manufacturer found the following issues with the vehicle at the pre-hearing inspection: the aftermarket shifter was loose; the inner fender wells had been removed, exposing the two control modules and fresh air intake to the elements; the air filter was almost completely stopped up with dirt; the air intake tube was not secure; the vehicle was equipped with oversized tires which rubbed against the inner fender; the rims showed evidence of the racing technique of "burn outs" having been performed in the vehicle; the wiring harness had been damaged; and the vehicle had the overall appearance of having been "beaten up." The Consumer first presented the vehicle to the Manufacturer's authorized service agent for repair of an engine misfire and knocking noise. The repair lasted 24 days. Subsequently, the Consumer experienced a myriad of problems with the vehicle, including clutch failure, low coolant, a cracked intake manifold, and a second engine replacement. The Board found the first engine problem was a defect that substantially impaired the use of the vehicle. However, the Board found that the problems that arose thereafter were the result of accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. The Board further found that the initial engine problem was cured within a reasonable number of attempts. Accordingly, the Consumer's case was dismissed.

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

Fountain v. General Motors Corporation, Pontiac-GMC Division, 2003-0680/TPA (Fla. NMVAB September 19, 2003).

The Manufacturer asserted the affirmative defense that the Consumer's Request for Arbitration was untimely filed, because it was filed more than 30 days after the final action of the

BBB/AUTOLINE. According to the Manufacturer's argument, final action by the BBB occurred on June 9, 2003, when the BBB transmitted its decision along with an Acceptance/Rejection Form to the Consumers. The form stated that the Consumers had 14 days to accept or reject the program's decision or it would be deemed rejected. The Consumers did not accept the decision, and on July 23, 2003, they filed a Request for Arbitration with the Division. The Board ruled that the final action of the BBB occurred when the 14 day acceptance period expired, on June 23, 2003, rather than the date that the BBB transmitted its decision and acceptance form to the Consumer. Therefore, the Board ruled, the Consumers had until July 23, 2003 (30 days after the final action of the BBB/AUTOLINE) to file their Request for Arbitration with the Board. A majority of the Board concluded that the Consumers timely filed their Request. However, the Board ultimately dismissed the Consumers' case on other grounds.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Rodhouse v. Toyota Motor Sales, U.S.A., 2003-0631/STP (Fla. NMVAB September 9, 2003). After finding the Consumer's vehicle to be a "Lemon," the Board awarded the Consumer a replacement vehicle. The Board also awarded the Consumer reimbursement for interest that he was required to pay to the motor vehicle lienholder up to the date the Manufacturer provides the Consumer with a replacement vehicle.

Incidental Charges §681.102(8), F.S.

Ferrell v. Mazda Motor of America, Inc., 2003-0470/STP (Fla. NMVAB July 25, 2003). The Board found the intermittent illumination of the "check engine" warning light and rough running engine to be a nonconformity. The Consumer contended that he purchased the vehicle to make out-of-town trips, but he had quit driving the vehicle on long-distance trips because he no longer trusted it. He requested reimbursement for vehicle rental charges for his long-distance travel. The Board ruled that he was entitled to reimbursement for the rental car charges, because they were incurred as a direct result of the nonconformity.

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

Roth v. Toyota Motor Sales, U.S.A., 2003-0611/TPA (Fla. NMVAB September 15, 2003). For purposes of calculating the reasonable offset for the Consumer's use, the Board calculated the "purchase price" by deducting the trade-in allowance (\$3,502.74) from the cash price (\$27,751.41) listed on the purchase order. The Board reasoned that the trade-in allowance should be deducted in order to provide due consideration to the Consumer for the trade-in allowance, and because, to do so was consistent with the definition of "purchase price" at §681.102(19), F.S.

Dattore v. DaimlerChrysler Motors Corporation, 2003-0499/ORL (Fla. NMVAB August 8, 2003).

The Consumer received a net trade-in allowance that was greater than the purchase price of the vehicle that the Consumer sought to purchase. The Consumer received \$37,401.00 as a net trade-in allowance. From the trade-in allowance, the selling dealer deducted the purchase price, taxes and fees associated with the purchase and gave the Consumer \$4,785.98 cash back. The buyer's order further reflected an additional down payment of \$147.36. The Board found the purchase price of the vehicle to be \$32,789.38 (\$37,401.00 trade-in allowance less the \$4,758.98 cash the Consumer received back from the dealer, plus \$147.36 additional down payment).

MISCELLANEOUS ISSUES

Chive v. Volkswagen United States, Inc., 2003-0565/ORL (Fla. NMVAB August 25, 2003).

At the hearing, a consultant employee of the National Center for Dispute Settlement appeared on behalf of the Manufacturer for the purpose of representing the Manufacturer. The consultant employee was neither legal counsel for the Manufacturer nor an employee of the Manufacturer. Paragraph 1 of *Hearings Before the Florida New Motor Vehicle Arbitration Board* provides that parties to the proceedings before the Board consist of consumers and manufacturers. It further provides that parties may be represented by attorneys. The Board concluded that the employee of the National Center for Dispute Settlement could not represent the Manufacturer at the hearing, because he was neither a party to the proceeding nor an attorney for one of the parties. Ultimately, the Board awarded the Consumer a refund.