

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

QUARTERLY CASE SUMMARIES

April 1999 - June 1999 (2nd Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Boucher v. Ford Motor Company, 1999-0100/ORL (Fla. NMVAB April 5, 1999)

The Manufacturer contended, among other things, that the Consumer was not eligible for relief under the Lemon Law because she purchased the vehicle as a “used motor vehicle.” The Board rejected this contention. The Consumer purchased the vehicle from the original owner during the duration of the Lemon Law rights period, and used it primarily for personal, family or household purposes just as the original owner did. As such, the Consumer was a subsequent transferee and met the definition of “Consumer” under the statute. Since the vehicle was sold to the original owner as a new vehicle, the Board concluded that the Consumer’s vehicle was a “motor vehicle” as defined by statute, and that the subsequent transferee stands in the shoes of the original purchaser for purposes of the Lemon Law. However, the Board dismissed the case because the vibration problem, although it may have existed, did not substantially impair the use, value or safety of the vehicle.

Palm Coast Management, Inc. v. Ford Motor Company and Mark III Industries, 1999-0233/ORL (Fla. NMVAB April 26, 1999)

Mark III Industries contended, among other things, that the case should be dismissed because the vehicle was purchased by a corporation and used for commercial, business or professional use, not for personal, family, or household use. The Board rejected this contention on the basis of *Results Real Estate v. Lazy Days R.V. Center*, 505 So.2d 587 (Fla. 2d DCA 1987). The *Results* Court looked to the statutory definition of “Consumer,” which included a third clause that defined a Consumer as “any other person entitled by the terms of the warranty to enforce the obligations of the warranty.” This Board, as well as the *Results* Court, found that this clause does not contain the “personal, family or household use” restriction found in the first two clauses of the definition, and concluded that business use of the vehicle was irrelevant. The Board found that Mark III Industries did not present any evidence to prove that the Consumers were not entitled by the terms of the warranty to enforce the obligations of Mark III Industries’ warranty; therefore, the Consumers were qualified “Consumers” under the Lemon Law. The Board granted a refund on a successful days-out-of-service case against Mark III Industries, holding that the electrical problem caused by water intrusion constituted a nonconformity. The case as against Ford was dismissed.

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

Maddox v. Ford Motor Company, 1999-0165/ORL (Fla. NMVAB April 13, 1999)

The Manufacturer contended that the case should be dismissed because the Consumer's pickup truck exceeded 10,000 pounds gross vehicle weight according to the definition of "motor vehicle." The Consumer's registration certificate indicated the actual weight as 6,095 pounds, and the gross vehicle weight as 9,900 pounds. The Consumer testified that on occasion he pulled a trailer weighing 700 pounds and transported a pickup truck weighing 4,000 pounds. The Manufacturer argued that by adding the weight of the trailer and the load carried by it, to the actual weight of the vehicle, the gross weight exceeded 10,000 pounds, even if the Consumer only towed the trailer and pickup truck on one occasion. Since the Lemon Law statute does not define "gross vehicle weight," the Board relied on Section 320.01(12)(a), Florida Statutes, which for heavy trucks, with a net weight of more than 5,000 pounds, but less than 8,000 pounds, the gross vehicle weight is calculated by adding to the net weight of the heavy truck the weight of the load carried by it, which is the maximum gross weight as declared by the owner or person applying for registration. Based on the net and gross vehicle weights as recorded on the registration certificate, the Board found that the gross vehicle weight did not exceed 10,000 pounds; accordingly, it rejected the Manufacturer's argument. The Board declared the truck a lemon because the intermittent engine stalling when the vehicle approached a stop, accompanied by blue smoke and the odor of burned oil constituted a nonconformity.

Courtot v. Ford Motor Company, 1999-0224/TPA (Fla. NMVAB April 26, 1999)

The Manufacturer contended that the case should be dismissed because the Consumer's pickup truck did not meet the definition of "motor vehicle" because the dealer's invoice listed the pickup truck's gross vehicle weight rating as 11,200, which exceeded the statutory limit of 10,000 pounds gross vehicle weight. The Consumer's registration certificate indicated the net weight as 5,823 pounds, and the gross vehicle weight as 9,999 pounds. Since the Lemon Law statute does not define "gross vehicle weight," the Board relied on the definition in Section 320.01(12)(a), Florida Statutes, which for heavy trucks with a net weight of more than 5,000 pounds, but less than 8,000 pounds, the gross vehicle weight is calculated by adding to the net weight of the heavy truck the weight of the load carried by it, which is the maximum gross weight as declared by the owner or person applying for registration. Based on the net and gross vehicle weights as recorded on the registration certificate, the Board found that the gross vehicle weight did not exceed 10,000 pounds; accordingly, it rejected the Manufacturer's argument. The Board declared the truck a lemon because the vibration in the vehicle's rear substantially impaired the use of the vehicle, thus constituting a nonconformity.

Marsh v. Fleetwood Motor Homes, and Ford Motor Company, 1999-0174/TPA (Fla. NMVAB April 23, 1999)

Prior to the hearing on the merits, and pursuant to a Prehearing Order of the Board, Ford Motor Company was dismissed from the case. The Consumers complained of a leak in the seal around their recreation vehicle's slide-out room. The Manufacturer contended that the Board had no jurisdiction to hear the case because the slide-out is designed to enhance the vehicle's living facilities and as such, the leak problem related solely to the vehicle's living facilities, which is excluded from Lemon Law coverage. The Board found that the leak occurred when the slide-out was retracted and the vehicle was driven in the rain, as well as when the vehicle was stationary and the slide-out was extended. When the slide-out was retracted, and the vehicle was driven, the slide-out served as the exterior wall of the vehicle. The Board held that the specific intent of the Lemon Law was to cover those mechanical or structural nonconformities in recreational vehicles which were analogous to those that might occur in other motor vehicles, and not those defects which are solely related to the vehicle's living facilities. The Board concluded that the leak in the vehicle's exterior wall or structure, which occurred when the vehicle was being operated as a motor vehicle, did not solely relate to the vehicle's living facilities, and as such, the complaint was properly before the Board. The Board concluded that the leak substantially impaired the use of the vehicle and awarded the Consumers a refund.

NONCONFORMITY §681.102(15), F.S. (1995); §681.102(16), F.S. (1997)

Rutsky v. Kia Motors America, Inc., 1999-0094/FTL (Fla. NMVAB April 7, 1999)

The Consumers complained that the vehicle's brakes were mushy and soft which made it hard to stop the vehicle. The Manufacturer did not file a Manufacturer's Answer with the Board and was therefore precluded from raising any affirmative defenses at the hearing. The Board concluded that the brake problem was a defect that substantially impaired the use, value and safety of vehicle; thus, awarding the Consumers a refund of their purchase price.

Matuschak v. American Suzuki Motor Corporation, 1999-0127/TLH (Fla. NMVAB April 7, 1999)

The Consumer complained that when pressing the brake pedal to stop on uneven surfaces, such as dirt and clay roads, the pedal felt like it went to the floor, and it shuddered, and the vehicle took a longer distance to come to a full stop. The Manufacturer contended that this was the normal operation and sensation of the anti-lock brake system (ABS) when the vehicle was operated over an uneven surface. The Board found that the greater weight of the evidence supported the Manufacturer's affirmative defense; accordingly, the Board concluded that the performance of the brakes was not the result of a defect or condition that substantially impaired the use, value or safety of the vehicle. The case was dismissed.

Grasso v. General Motors Corporation, Pontiac-GMC Division, 1998-1228/WPB (Fla. NMVAB April 8, 1999)

The Consumer complained of the following problems: paint “blurring” on the hood; a rattle from the right front dash area; a “broken” convertible top bracket; and brakes that squealed and shook on an average of 60 percent of the time when applied, with the squeal as “about a four” on a scale of one to 10, with 10 being the loudest. The Manufacturer contended that only the paint blemish and rattle were brought to the Manufacturer’s attention for a final repair attempt, and were minor defects that did not substantially impair the use, value or safety of the vehicle. The Board determined it necessary to inspect and test drive the vehicle during the hearing. The Consumer, who did not bring the vehicle to the hearing, refused to make the vehicle available for the Board’s inspection at a continued hearing date. Based upon the testimony and evidence presented, the Board concluded that the defects did not constitute nonconformities; accordingly, the case was dismissed.

Weaver and Kidder v. General Motors Corporation, Pontiac-GMC Division, 1999-0177/WPB (Fla. NMVAB May 3, 1999)

The Board concluded that a fuel gauge that fluctuated when the vehicle was stopped, in neutral and with the brake pedal “depressed slowly,” did not constitute a nonconformity. The Board also concluded that the Manufacturer brought the vehicle into conformity for an engine problem within a reasonable number of attempts, following the replacement of a new engine on the second repair attempt. Additionally, the Board found that a “loose” steering condition had only been subjected to one repair attempt. Under the circumstances presented to the Board, one repair attempt for the steering condition was not sufficient to afford the Manufacturer a reasonable number of attempts to conform the vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the case was dismissed.

Almoradie v. Ford Motor Company, 1999-0245/ORL (Fla. NMVAB May 5, 1999)

The Consumers complained of an intermittent hesitation upon acceleration. The vehicle had to be towed to the hearing because it could not be driven in reverse gear. The Manufacturer stipulated that the hesitation upon acceleration problem was presented for at least three repair attempts, plus a final repair attempt after written notice. However, the Manufacturer contended that the hesitation problem did not constitute a nonconformity because it was cured within a reasonable number of attempts. The Manufacturer also contended that the inability to drive the vehicle in reverse was a separate and distinct problem from the hesitation upon acceleration, and the Manufacturer had not been afforded a reasonable opportunity to repair this problem. The Manufacturer’s attorney argued that the inability to drive in reverse related to the transmission and the hesitation problem related to the engine. A Manufacturer witness testified that the vehicle had never been presented for repair of a transmission concern. The Board relied on the statutory definition of “nonconformity,” which is a defect or condition that substantially impairs the use, value or safety of the vehicle. The Board further relied on Florida Administrative Code Rule 2-30.001(3)(1), which defines “condition” as a “general problem (e.g.,

vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part.” Upon review of the evidence, the Board concluded that the hesitation upon acceleration and the inability to drive the vehicle in reverse was a condition that substantially impaired the use, value or safety of the vehicle, and as such, it constituted a nonconformity which was not corrected after a reasonable number or repair attempts; accordingly, the vehicle was declared a lemon and the Consumers were awarded a refund.

Hamdan v. Mercedes-Benz of North America, Inc., 1999-0423/TLH (Fla. NMVAB June 24, 1999)

The Consumer complained that water leaked into the vehicle under the dashboard, saturating the carpet on the passenger side. The Consumer testified that the carpet of the vehicle under the all-weather floor mats stayed wet and, when the vehicle was left in the garage overnight, the windows were left open to minimize the mildew odor. The Manufacturer contended that this leak did not substantially impair the use, value or safety of the vehicle, because the leak only occurred after the Consumer washed the vehicle at a particular car wash that utilized a high pressure and volume of water. The Manufacturer’s authorized service agent did duplicate the leak at the car wash, but could not duplicate it when it performed water tests at its facilities. The Consumer testified that the water continued to leak into the vehicle during heavy rain storms following the final repair attempt. Neither the Manufacturer nor its authorized service agent test drove the vehicle in a rain storm. During the Board’s inspection of the vehicle during the hearing, the carpet under the floor mat on the front passenger side was damp and a faint mildew odor was detected. The Board found that this water leak substantially impaired the value of the vehicle and awarded the Consumer a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Ruff v. Ford Motor Company, 1998-1254/FTL (Fla. NMVAB May 7, 1999)

The Consumer complained that the vehicle’s RPM’s were excessively high causing the RPM gauge to register in the “redline” area. The Consumer characterized this as a transmission problem, which was subjected to two repair attempts prior to the Consumer sending the Manufacturer written notification of a final opportunity to repair the problem. The invoice evidencing the second repair attempt indicated that no repairs were performed, because the problem could not be duplicated. Likewise, for the same reason, no repairs were performed at the final repair attempt. The Manufacturer contended that the alleged defect did not constitute a nonconformity because it could not be duplicated and, furthermore, the defect was not subjected to a reasonable number of repair attempts. The Board held that the transmission problem constituted a nonconformity. The Board further held that, although the Lemon Law statute does not specifically define how many attempts are considered reasonable, there is a presumption of a reasonable number of attempts under the statute if the terms of the presumption are

met. The Board recognized, however, that a Consumer is not required to establish the statutory presumption in order to qualify for relief. Since the Consumer was told by the Manufacturer's authorized service agent that no further repairs would be performed, it would have been fruitless for the Consumer to have to bring the vehicle back a third time before mailing written notification. Moreover, since the Manufacturer contended that there was no defect in the vehicle, there would have been little benefit to either party in making the Consumer submit to one more repair attempt. Under those circumstances, the Board concluded that, the two repair attempts followed by written notification and a final repair opportunity, were sufficient to afford the Manufacturer a reasonable number of attempts to conform the vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the vehicle was deemed a lemon and the Consumer was awarded a refund.

Final Repair Attempt §681.104(1)(a); §681.104(3)(a)1.:

Gaudino v. Mitsubishi Motor Sales of America, Inc., 1999-0220/TPA (Fla. NMVAB April 21, 1999)

Within 10 days following its receipt of the Consumer's written notification to provide the Manufacturer with a final repair attempt, the Manufacturer directed the Consumer to present his vehicle to a particular authorized service agent on a specific date. The Consumer presented the vehicle as directed, at which time, the Consumer and Manufacturer's representative performed a test drive of the vehicle. The Consumer then refused to allow repairs to be performed on the vehicle. The Board concluded that the Consumer refused to afford the Manufacturer a final repair attempt; consequently, the Board dismissed the case.

Courtot v. Ford Motor Company, 1999-0224/TPA (Fla. NMVAB April 26, 1999)

The Board concluded that the vibration in the vehicle's rear substantially impaired the use of the vehicle, thus it constituted a nonconformity. The Board found that the vehicle remained at the Manufacturer's authorized service agent for the final repair attempt for a total of 11 days. The Board concluded that the requirement that the Manufacturer be given a final repair attempt did not apply, since the statute only allows the Manufacturer 10 days to correct a nonconformity after the vehicle is delivered for the final repair attempt. Accordingly, the Board held that the Manufacturer failed to correct the vibration within a reasonable number of attempts and awarded the Consumers a refund.

Boles v. Ford Motor Company, 1999-0260/TPA (Fla. NMVAB May 5, 1999)

On the date the Consumers' vehicle was towed to the Manufacturer's authorized service agent, and repairs were performed to address a vibration when braking, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the written notification five days after it was mailed and after the vehicle was towed to its authorized service agent. The Consumers had never retrieved, nor driven the vehicle, prior

to mailing the notification, and no repairs were conducted after the Manufacturer's receipt of the notification. On the date of the hearing, the vehicle remained at the authorized service agent's facility where it had been towed. The Manufacturer argued that the Consumers had not met their burden of proving that the problem continued to exist because the vehicle had not been driven since the repairs were performed on the date it was towed to the authorized service agent, and the Consumers had no way of knowing whether or not the repairs were successful. In addition, the Manufacturer contended that it was not afforded a final opportunity to repair the vehicle. The Board concluded that the Consumers mailed the written notification to the Manufacturer without determining whether repairs performed on the date of their mailing the notification corrected the alleged defect. The Board held that, under the circumstances, the Manufacturer had not been afforded a final opportunity to conform the vehicle to the warranty and, furthermore, the Consumers did not know whether the alleged defect continued to exist; consequently, the Board ruled that, at the time of the hearing, the Consumers were not qualified for relief and dismissed the case.

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

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

Harris v. Ford Motor Company, 1999-0041/ORL (Fla. NMVAB April 1, 1999)

The Board dismissed the Consumer's claim concluding that the greater weight of the evidence supported the Manufacturer's affirmative defense that the intermittent braking problem complained of was caused by the Consumer's manner of driving, i.e., "riding" the brakes, and as such was the result of abuse or neglect of the vehicle by persons other than the Manufacturer or its authorized service agent.

REFUND §681.104(2)(a)&(b), F.S.:

Collateral Charges §681.102(3), F.S.

Kotch v. Ford Motor Company, 1999-0098/ORL (Fla. NMVAB April 9, 1999)

The Board declared the vehicle a lemon because the intermittent electrical malfunction, which included the malfunction of the automatic lamp sensor, was a defect or condition that substantially impaired the safety of the vehicle. The Board granted a reimbursement of \$238.50 for an alarm system as a collateral charge. However, the Board denied payment for the purchase of a new cellular telephone to be installed in a future vehicle as not contemplated within the statutory definition of "collateral charges." The Consumer had a cellular telephone that she purchased in 1995 installed in the lemon vehicle, and claimed that wiring changes would prevent her from using that telephone in a future vehicle.

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

Masden v. Mitsubishi Motor Sales of America, Inc., 1999-0083/JAX (Fla. NMVAB May 11, 1999)

The Board concluded that the leaking convertible top on the Consumer's vehicle constituted a nonconformity. The Consumer sought reimbursement of \$66.76 as incidental charges for two rental cars. The Manufacturer objected because its policy was to only provide a Consumer a loaner car if the Consumer's vehicle was kept overnight for repair. The Manufacturer argued that, as this vehicle was not kept overnight for repairs, the expense was one incurred by the Consumer voluntarily, and not as a result of the alleged nonconformity. The Board agreed that these expenses were not incurred as a direct result of the nonconformity and denied this reimbursement.

Kotch v. Ford Motor Company, 1999-0098/ORL (Fla. NMVAB April 9, 1999)

The Board declared the vehicle a lemon because the intermittent electrical malfunction, which included the malfunction of the automatic lamp sensor, was a defect or condition that substantially impaired the safety of the vehicle. The Board granted reimbursement of incidental charges in the amount of \$10.60 for inspection of the alarm system, and \$35.35 for postage expenses. However, the Board denied reimbursement of lost wages as not contemplated within the statutory definition of "incidental charges."

Net Trade-in Allowance §681.102(19), F.S. (1997):

Saunders v. Ford Motor Company, 1999-0167/WPB (Fla. NMVAB April 21, 1999)

The Manufacturer disagreed with the net trade-in allowance reflected in the purchase documents and argued that the trade-in allowance should be the amount reflected in the NADA Official Used Car Appraisal Guide (Southeastern Edition), reduced by the debt that was owed on the trade-in vehicle at the time it was traded in. However, contrary to the statutory requirement, the Manufacturer did not provide the NADA Guide that was in effect at the time of the trade-in. Instead, the Manufacturer provided the Board with an illegible photocopy of two pages, purportedly from the NADA Official Use Car Guide. The Board concluded that Section 681.102(19), Florida Statutes (1997) did not permit the Board to make an adjustment unless the Manufacturer submitted the applicable NADA Official Use Car Guide. The photocopy submitted by the Manufacturer was illegible; therefore, the request for a reduction of the trade-in allowance was denied. The vehicle was declared a Lemon and the Consumer was awarded a refund.

Poole v. Ford Motor Company, 1999-0040/FTM (Fla. NMVAB April 6, 1999)

The net trade-in allowance as reflected on the buyer's order was not acceptable to the Consumer. The

Consumer and Manufacturer provided conflicting documentation regarding the trade-in. The Manufacturer stipulated that the documentation provided by the Consumer was accurate. The Consumer was awarded a net trade-in allowance as reflected in the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, less the amount of the outstanding lien on the trade-in.

MISCELLANEOUS PROCEDURAL ISSUES:

Harris v. Ford Motor Company, 1999-0041/ORL (Fla. NMVAB April 1, 1999)

The Consumer in his hearing via telephone conference call and requested that the Manufacturer present its case first, because the Manufacturer listed numerous affirmative defenses and because the Manufacturer had witnesses, and the Consumer had none. Counsel for the Manufacturer objected to the Consumer's request, and withdrew all affirmative defenses, except the defense that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Board denied the Consumer's request that the Manufacturer present its case first. The Board dismissed the Consumer's claim concluding that the greater weight of the evidence supported a conclusion that the intermittent braking problem complained of was caused by the Consumer's manner of driving, and was not the result of a defect in the braking system.

Rutsky v. Kia Motors America, Inc., 1999-0094/FTL (Fla. NMVAB April 7, 1999)

The Manufacturer did not file a Manufacturer's Answer with the Board and was therefore precluded from raising any affirmative defenses at the hearing.

Jones v. General Motors Corporation, Buick Motor Division, 1999-0128/ORL (Fla. NMVAB April 12, 1999)

Because the Manufacturer's Answer was untimely filed, the Board did not permit the presentation of affirmative defenses by the Manufacturer's representative; however, the Board permitted limited testimony. The Board declared the vehicle a lemon because a vibration, which could be felt through the steering wheel, floor and seats, constituted a nonconformity.