

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

**QUARTERLY CASE SUMMARIES**

January 2001 - March 2001 (1st Quarter)

**JURISDICTION:**

**Consumer §681.102(4), F.S.**

*B & P Duplicating Service, Inc. v. General Motors Corporation, Chevrolet Motor Division, 2001-0014/ORL (Fla. NMVAB February 22, 2001).*

The Manufacturer moved to dismiss the Consumer's case on the grounds that B & P Duplicating Service, Inc., was not a "consumer" eligible for relief under the Lemon Law, because the legislature did not intend for the protection of the Lemon Law to extend to vehicles purchased solely for business purposes and utilized by multiple drivers. The vehicle was purchased to be added to the Consumer's fleet of 15 vehicles which were driven by various technicians and salesmen in the course of their employment with the Consumer. Approximately seven to 10 employees had access to and drove the vehicle in the course of their employment. The Board relied on the statutory definition of "consumer" and looked to the intent provision of the Lemon Law which, in pertinent part, recognizes that a motor vehicle is a major consumer purchase. The Board concluded that the vehicle was purchased as a commercial fleet vehicle and not as a "major consumer purchase" and, therefore, B & P Duplicating Service, Inc. was not a "consumer" as defined in the Lemon Law. The case was dismissed.

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

*Crown Cleaning Supplies and Equipment, Inc. v. Ford Motor Company, 2000-1105/ORL (Fla. NMVAB January 26, 2001).*

The Consumer's Request for Arbitration was initially rejected by the Division of Consumer Services because the Consumer indicated that the vehicle was a truck with a gross vehicle weight over 10,000 pounds. Thereafter, the Consumer re-registered the vehicle declaring the gross vehicle weight as 9,900 pounds, and subsequently filed a new Request for Arbitration indicating that the vehicle was a truck weighing less than 10,000 pounds gross vehicle weight. The Manufacturer asserted that the case should be dismissed because the vehicle was not a "motor vehicle" as defined in the Lemon Law statute. The Manufacturer argued that the vehicle was registered at the time of purchase has having a gross vehicle weight of 14,999 pounds; that all repairs, including the Manufacturer's final repair attempt, were conducted when the vehicle was registered at 14,999 pounds, and that the Consumer re-registered the vehicle only to gain Lemon Law eligibility. The Board concluded that, when a Request for Arbitration is rejected, a Consumer has the opportunity to cure any deficiency in order to become

eligible for arbitration, which the Consumer did. The vehicle was found to be a truck with a gross vehicle weight of 10,000 pounds or less and was a “motor vehicle” as defined by the Lemon Law. The Board also rejected the Manufacturer’s contention that Consumer was not qualified for Lemon Law relief because the vehicle was primarily used for commercial or business purposes. The Board found that the vehicle was used for personal as well as business use, and relied on the appellate court case of Results Real Estate v. Lazy Days R.V. Center, 505 So.2d 587 (Fla. 2d DCA 1987) in rejecting the Manufacturer’s contention. However, a majority of the Board concluded that the brake vibration did not constitute a nonconformity and dismissed the Consumer’s case.

*Randall & Gregrow v. DaimlerChrysler Motors Corporation*, 2001-0034/JAX (Fla. NMVAB February 23, 2001).

The Manufacturer requested that the Board dismiss the Consumers’ case because the truck did not meet the definition of “motor vehicle” under the Lemon Law statute, as it had a gross vehicle weight of more than 10,000 pounds. The Manufacturer relied on the definition of gross vehicle weight in Section 320.12(a), Florida Statutes, which provides that the “gross vehicle weight” for heavy trucks weighing more than 5,000 pounds but less than 8,000 pounds “is calculated by adding the net weight of the heavy truck to the weight of the load carried by it, which is the maximum gross weight as declared by the owner or person applying for registration.” The Consumers testified, and the documentary evidence showed, that they did originally declare the vehicle’s gross vehicle weight to be 14,999 lbs. when registering the vehicle, and later raised the weight to comply with Department of Transportation rules. They towed a trailer weighing approximately 5,800 pounds, and at any given time, they would tow a boat weighing 900-1000 pounds and swimming pools weighing 1,200 pounds. The Board utilized Section 320.12(a), Florida Statutes, and the evidence and testimony of the Consumers and held that the truck exceeded 10,000 pounds gross vehicle weight and, therefore, did not constitute a “motor vehicle” as defined. The case was dismissed.

**Whether Written Notification Sent After 3 Repair Attempts or 15 Days Out Of Service §681.104(1)(a), F.S.; §681.104(1)(b), F.S.**

*Cappiello v. DaimlerChrysler Motors Corporation*, 2000-1217/TPA (Fla. NMVAB February 1, 2001).

The Manufacturer asserted that it did not receive written notification of the alleged defect and was not afforded a final repair attempt. The Consumer testified that he mailed a Motor Vehicle Defect Notification form to the Manufacturer; however, he did not recall to what address it was mailed, he did not receive a return receipt showing that the notification was received, and he did not receive any contact from the Manufacturer following the mailing of the notification. The Consumer submitted a postal receipt showing an item was mailed, and that the Consumer’s name and address was listed in the box labeled “Recipient’s Name.” A copy of a Motor Vehicle Defect Notification form was received from the Consumer by the Office of Attorney General, and was provided to the Manufacturer’s representative during the hearing. The Board concluded that the Consumer failed to send the required written notification to the Manufacturer; therefore, the Manufacturer was not given a final opportunity to

repair the defect. The Board held that the Consumer was not qualified for Lemon Law relief at the time of the hearing; however, the Manufacturer having received a copy of the written notification at the hearing, the time period for response would commence as of the date of the arbitration hearing. The case was dismissed.

*Mackenzie v. DaimlerChrysler Motors Corporation*, 2001-0024/STP (Fla. NMVAB February 7, 2001).

The Manufacturer requested that the case be dismissed, because it did not receive written notification of the alleged defect and was not afforded a final repair attempt. In support of this request, the Manufacturer contended that the address to which the Consumers mailed the Motor Vehicle Defect Notification form was for the National Center for Dispute Settlement (NCDS), a company that contracts with the Manufacturer to provide mediation and arbitration services. The Manufacturer also relied on correspondence received by the Consumers from the NCDS which explained that its process was “not a Lemon Law proceeding.” The Lemon Law requires that, after three attempts have been made to repair the same nonconformity, the Consumer shall give written notification to the Manufacturer, of the need to repair the nonconformity to allow the Manufacturer a final attempt to cure the nonconformity. The Board concluded that the Consumers failed to send the required written notification to the Manufacturer; accordingly, the Consumers were not qualified for relief, and the case was dismissed.

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

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

*Mitchell v. Ford Motor Company*, 2000-1107/ORL (Fla. NMVAB January 24, 2001).

The Manufacturer contended that it was not afforded a reasonable number of attempts to conform the vehicle to the warranty because its authorized service agent was afforded only two repair attempts prior to the Manufacturer’s receipt of written notice of the defect. The Consumer complained of an exhaust smoke problem, which occurred almost every time the vehicle was started after sitting overnight. When the Manufacturer’s authorized service agent contacted the Consumer after completing the second repair attempt and indicated that the vehicle was ready to be picked up, because the problem could not be duplicated, the Consumer requested the Manufacturer’s authorized service agent to keep the vehicle and conduct further testing and repairs. The authorized service agent agreed to keep the vehicle and further testing was conducted the next day. Thereafter, the Consumer sent the Manufacturer written notification to provide the Manufacturer with a final opportunity to repair the vehicle, because the condition still existed. The Board concluded that the Manufacturer was afforded three opportunities to repair the exhaust smoke nonconformity prior to notice; thereafter, a final repair was attempted and the nonconformity continued to exist and was not corrected within a reasonable number of attempts. Accordingly, the Consumer was awarded a refund.

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

*Tate v. Ford Motor Company*, 2000-1176/ORL (Fla. NMVAB February 2, 2001).

The Manufacturer asserted that the Consumers failed to allow the Manufacturer a final repair attempt after the Manufacturer's receipt of the written notification. The Manufacturer further contended that it complied with the Lemon Law by mailing a postcard to the Consumers within 10 days of the Manufacturer's receipt of the Consumers' written notification; thereafter, it became the Consumers responsibility to accomplish the scheduling of the final repair attempt. The Board found that the Manufacturer received written notification and responded within 10 days, but failed to provide to the Consumers the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the Consumers' receipt of the response. The Board held that the statute contemplates that the Manufacturer must take affirmative action and contact the Consumer with a scheduled date or negotiate with the Consumer a date for the final repair attempt. Moreover, a manufacturer acts at its peril when it simply sends a postcard in an attempt to shift the burden to the consumer to set up a manufacturer's final repair attempt. As a result, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply, and the Manufacturer having failed to correct the vibration nonconformity after a reasonable number of attempts, the Consumers were entitled to 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.**

*Bournias v. Ford Motor Company*, 2000-1252/TLH (Fla. NMVAB February 13, 2001).

The Consumers complained of an intermittent air conditioner vent noise, which the Consumers testified sounded like paper flapping around the inside of the air conditioner vent, and became louder as the vehicle's speed increased. During the hearing, the Manufacturer's witnesses testified that there may have been "faint" noises in the Consumers' vehicle caused by a loose piece of insulation behind the radio panel, which was re-glued in place, and the movement of the air vent control knob, which was also modified and secured during the course of repairs. The Board concluded that the intermittent vent noise did not substantially impair the use, value or safety of the vehicle and dismissed the case.

*McNutt v. DaimlerChrysler Motors Corporation*, 2001-0119/TLH (Fla. NMVAB Mar. 7, 2001).

The Consumer complained of tire wear and related slight vibration in the truck bed. During the hearing, he testified that he purchased a truck with a cab and frame, and had an aftermarket truck bed with low sides installed. The Consumer further testified that he pulled a trailer and equipment with the truck, and rotated his own tires following the Manufacturer's recommended maintenance schedule; however, he could not describe exactly what procedure he followed. The Manufacturer contended that under-inflated tires, and towing or pulling a trailer could cause tire wear, necessitating more frequent tire

rotation. However, the slight feathering or cupping of the tires, which the Board did observe during the inspection of the truck at the Lemon Law hearing, did not substantially impair the use, value or safety of the vehicle. The Board concluded that, although there was some tire wear and related slight vibration, these conditions did not substantially impair the use, value or safety of the vehicle and dismissed the case.

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

*Castillo v. Volkswagen United States, Inc.*, 2000-1250/MIA (Fla. NMVAB February 27, 2001). The Consumer complained about tie rod and front suspension noises, and engine failure. The Consumer regularly maintained the vehicle according to the recommendations in the Manufacturer's owner's manual. The vehicle's oil was changed twice by the Manufacturer's authorized service agent, and twice by independent service providers. During the hearing, the Manufacturer contended that the engine failure was a result of abuse or neglect of the vehicle, because the Consumer failed to properly maintain the vehicle. The Manufacturer's witness testified that only two oil changes were performed by its authorized service agent in approximately 45,000 miles of operation. The Manufacturer further argued that the Board should reject the Consumer's testimony regarding the other two oil changes because of the lack of supporting documentation. The Board rejected the Manufacturer's argument that the Consumer lacked credibility because he failed to produce written documents that supported the performance of recommended maintenance on the vehicle by independent service providers, when balanced against the unreliability of the repair orders generated by the Manufacturer's authorized service agent; accordingly, the Manufacturer's abuse or neglect defenses were rejected. The Board found that the problems complained of by the Consumer constituted nonconformities which caused the vehicle to be out of service by reason of repair for more than 30 cumulative days, as such, the vehicle was deemed a Lemon and a refund was awarded.

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

*Valera v. DaimlerChrysler Motors Corporation*, 2001-0044/ORL (Fla. NMVAB Mar. 12, 2001). The Board rejected the Manufacturer's argument that the Consumer's Lemon Law case should be dismissed because the Consumer's Request for Arbitration was not filed within 60 days of the expiration of the Lemon Law rights period pursuant to Section 681.109(4), Florida Statutes. Day sixty fell on Sunday, December 31st, and the following day, January 1st, was a legal holiday. The Request for Arbitration was date-stamped on Tuesday, January 2nd by the Florida Department of Agriculture and Consumer Services, Division of Consumer Services. The Board held that to require the Consumer to have filed the Request for Arbitration prior to December 31st would achieve a result contrary to the remedial intent of the Lemon Law. However, the Board dismissed the case on another ground. When the Manufacturer contacted the Consumer following receipt of the written notification, the Consumer indicated no current problems with the vehicle. The Consumer agreed to contact the Manufacturer if problems resurfaced so that a final repair attempt could be scheduled. Thereafter, an engine noise recurred, and the Consumer presented the vehicle to the Manufacturer's authorized service agent for

repair. This repair was not at the direction of the Manufacturer, and the Board held that the Manufacturer was not given a final opportunity to conform the vehicle to the warranty, and, therefore, not afforded a reasonable number of repair attempts.

**REFUND §681.104(2)(a)(b), F.S.:**

**Incidental Charges §681.102(8), F.S.**

*Lenzion v. Nissan Motor Corporation USA*, 2000-1227/FTL (Fla. NMVAB February 15, 2001).

The Board concluded that a multitude of problems, including a vibration in and swaying of the vehicle, a hesitation and lurching in the transmission, and noisy brakes, constituted nonconformities. The Consumers' van was determined to be a Lemon and a refund was awarded. As part of the refund, the Board awarded reimbursement of monies paid for a tire replacement, parking during the Lemon Law hearing, postage for mailing the written defect notification, and car rental fees while the Lemon vehicle was in the shop for repairs, as reasonable incidental charges. However, the Board denied, as being unreasonable, reimbursement for the charges submitted for motel bills in connection with-out-of town travel.

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

*Lopez v. General Motors Corporation, Chevrolet Motor Division*, 2000-1072/ORL (Fla. NMVAB January 8, 2001).

The Consumers did not agree with the trade-in allowance as reflected in the purchase contract and requested that the Board utilize the retail price as reflected in the NADA Official Used Car Guide (Southeastern Edition) pursuant to the Lemon Law statute. The Manufacturer provided this guide, which did not list the Consumers' 1991 trade-in vehicle. Thereafter, the Consumers presented the NADA Official Older Used Car Guide, which did list their trade-in vehicle, along with a letter from a NADA editor explaining that the Older Used Car Guide was the only appraisal guide applicable in the southeastern United States listing the value of the Consumers' trade-in vehicle. The Manufacturer argued that the Board should not use the Older Used Car Guide because the statute did not authorize the use of this guide. The Board rejected this argument, concluding that the Legislature, in providing an alternative for valuing trade-in vehicles, did not contemplate the situation presented in the instant case; that due to the age of a trade-in vehicle it was not reflected in the Southeastern Edition of the NADA Official Used Car Guide. The Board held that since the Lemon Law is a remedial statute, it should be liberally construed to effectuate its remedial purpose, and under the circumstances of this case, the use of the retail value of the trade-in vehicle, as reflected in the NADA Official Older Used Car Guide and reduced by the amount of the lien on the vehicle, carried out the legislative intent. The Consumers were awarded a refund because of a vibration nonconformity.

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

*Michael & Ely v. General Motors Corporation, Pontiac-GMC Division, 2000-1198/ORL (Fla. NMVAB February 12, 2001).*

During the Arbitration Hearing, the Board utilized the mileage on the odometer of the Consumers' vehicle at the time of a settlement agreement between the parties, which was prior to the hearing of the Manufacturer's certified informal dispute settlement procedure conducted by the BBB/AUTOLINE, and which the Board determined to be the mileage attributable to the Consumers' up to the date of a settlement. A replacement vehicle settlement was reached after the Consumers sent the written defect notification to the Manufacturer; however, the Manufacturer failed to provide the replacement vehicle, and the Consumers were forced to file with the BBB/AUTOLINE after delaying such filing because of their reliance on the apparent settlement.

### **MISCELLANEOUS PROCEDURAL ISSUES**

#### ***Consumer's Failure to Appear at the Hearing ¶¶(33) and (34), Hearings Before the Florida New Motor Vehicle Arbitration Board.***

*Hernandez v. American Suzuki Motors Corporation, 2000-1025/MIA (Fla. NMVAB January 30, 2001).*

Pursuant to a Notice of Hearing mailed to the Consumer and Manufacturer on December 12, 2000, the Board held a hearing on January 10, 2001. After waiting 30 minutes from the scheduled time of the hearing, the Consumer was declared in default for failure to appear, and the case was dismissed. The Consumer contacted the Board Administrator within one business day of the hearing requesting that the dismissal be set aside. Thereafter, a telephone hearing was held to consider the Consumer's request. The Consumer claimed that her failure to appear was as a result of a relative's funeral. She testified that her uncle passed away on January 5, 2001, and the cremation was on January 8, 2001. The Manufacturer contended that the Consumer's explanation did not amount to an "unforeseeable circumstance," because the Consumer made no attempt to contact the Board Administrator at any time after learning of the death of her relative, and prior to the hearing date; consequently, the dismissal should not be set aside. The Board held that the Consumer failed to demonstrate that her failure to appear was due to an unforeseeable circumstance sufficient to set aside the dismissal of her case pursuant to the applicable rules. Accordingly, the case was dismissed with prejudice.