

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

**QUARTERLY CASE SUMMARIES**

January 1999 - March 1999 (1st Quarter)

**JURISDICTION:**

*Yeargin v. Chrysler Corporation*, 1998-1112/ORL (Fla. NMVAB January 20, 1999)

The Consumer requested a second arbitration. During the initial hearing, the Board found the differential clunk noise to be a nonconformity but dismissed the Consumer's claim for failure to allow the Manufacturer a reasonable opportunity to conform the vehicle to the warranty. After the first hearing, the Consumer presented the vehicle for an additional repair for the same nonconformity. The Board concluded that the Consumer had demonstrated a significant change of circumstances since his last hearing and approved the second arbitration. The Consumer was awarded a refund.

**Consumer 681.102(4), F.S.**

*Yarde v. Vector Aeromotive Corporation*, 1998-1149/TPA (Fla. NMVAB February 19, 1999)

The Manufacturer contended, among other things, that the case should be dismissed because the vehicle was leased to 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 a "personal, family or household use" restriction as does the first two clauses of the definition, and concluded that business use of the vehicle was irrelevant. The Board found that the Manufacturer did not present any evidence to prove that the Consumers were not entitled by the terms of the warranty to enforce the obligations of the Manufacturer's warranty; therefore, the Consumers were qualified "Consumers" under the Lemon Law. The Board granted a refund on a successful days-out-of service case.

**Motor Vehicle 681.102(14), F.S. (1995)**

*Shaw v. Chrysler Corporation*, 1999-0058/TPA (Fla. NMVAB March 17, 1999)

The buyer's order and financing agreement indicated that the vehicle was a used vehicle, as did the application for registration and title. The Consumer failed to provide evidence to refute the Manufacturer's evidence that the vehicle was purchased as a "used vehicle." The Consumer's case was dismissed.

*Vickers v. Ford Motor Company*, 1999-0108/TLH (Fla. NMVAB March 29, 1999)

The Board dismissed the case holding that the Consumer's vehicle did not meet the definition of "Motor vehicle," because it exceeded 10,000 pounds gross vehicle weight. The vehicle registration certificate stated the actual weight as 6,040 pounds, and the gross vehicle weight at 7,999 pounds. The Consumer testified that he occasionally pulled a horse trailer that weighed 4,700 pounds. Using the definition of gross vehicle weight under Chapter 320, Florida Statutes, the Board added the net weight of the truck and the trailer, which totaled more than 10,000 pounds gross weight. Notwithstanding the fact that the vehicle registration certificate listed the gross vehicle weight at 7,999 pounds, the Board held that the truck was not a motor vehicle as defined and dismissed the case.

**Motor Vehicle 681.102(15), F.S. (1997)**

*Nunez v. Ford Motor Company*, 1998-0861/FTL (Fla. NMVAB March 16, 1999)

The Consumer purchased a utility vehicle with 7,088 miles on the odometer at the time of delivery. In addition to other defenses raised, the Manufacturer contended that Consumer was not qualified for Lemon Law relief because the vehicle was "used" and did not constitute a "Motor vehicle" as defined under the statute. The Manufacturer's attorney did not produce a clear copy of the document, but asserted that the Buyer's Order indicated the vehicle was used. The copies which were before the Board did not clearly indicate that the vehicle was "used." Since the term "new vehicle" was not defined in Chapter 681, the Board looked at the definitions of "Motor vehicle" and "Used motor vehicle" in Chapter 320, Florida Statutes. The Board concluded that the Manufacturer failed to present any evidence to substantiate its assertion that the vehicle was sold to the Consumer as a "used" vehicle; as such, the Board held that the vehicle was a "demonstrator" vehicle and granted relief on a "driveability" nonconformity.

**Warranty 681.102(20), F.S. (1995)**

*Bryant v. Caterpillar, Inc., Damon Corporation, and Freightliner Custom Chassis Corporation*, 1998-1176/TPA (Fla. NMVAB March 15, 1999)

The Consumers complained of an intermittent vibration that occurred when the recreational vehicle was driven at steady speeds. The vibration was covered under Freightliner's (chassis Manufacturer) warranty and excluded from coverage under Damon's (coach Manufacturer) and Caterpillar's (engine Manufacturer) warranties. The Board dismissed the case as against Damon and Caterpillar holding the alleged problem was not covered by their respective warranties. The Board dismissed the case as against Freightliner, holding that the Consumers were not entitled to relief at the time of the hearing because Freightliner was not afforded a final repair attempt.

### **Warranty 681.102(23), F.S. (1997)**

*Fraser v. American Honda Motor Company*, 1998-1076/JAX (Fla. NMVAB January 24, 1999)

The Consumer complained of scratches in the paint and rust in various places of the vehicle that he did not discover until two days after the purchase of the vehicle. The Manufacturer contended that the problems complained of were not covered under the Manufacturer's warranty, nor did the problems constitute nonconformities. The Manufacturer presented the owner of its authorized paint and body shop as a witness who testified that the damage appeared to be the result of something falling on the paint as opposed to a manufacturing defect, which would cause a "bubbling in paint." Other Manufacturer witnesses testified that there were no claims filed under the warranty because the dealership paid for the work performed at the repair attempts. The Board found that Honda's "New Car Limited Warranty" did not cover "Any item concerning your vehicle's general appearance that is not due to a defect in material or workmanship" and the "Rust Perforation Limited Warranty" did not cover "rust caused by immersion of the body panel in water, mud, or sand; or resulting from exposure to corrosive gas or industrial fallout." The Board concluded that the rust and paint problems were not covered by the Manufacturer's warranty and dismissed the case.

*Licker v. Ford Motor Company*, 1998-0978/FTL (Fla. NMVAB February 10, 1999)

The Board concluded that an engine replacement repair after the final repair attempt for a coolant problem was not related to the coolant system nonconformity, and was not covered under the Manufacturer's warranty. The Consumer drove through a rain puddle, causing water to be ingested into the engine, resulting in serious damage to the engine, and necessitating its replacement. The Manufacturer's authorized agent refused to repair the vehicle under the vehicle's warranty; as a result, the Consumer's insurance company paid for the engine replacement repair.

### **Whether Problem First Reported During Lemon Law Rights Period 681.103, F.S.**

*West v. Mazda Motor of America, Inc.*, 1998-0918/STP (Fla. NMVAB March 1, 1999)

The Consumers first reported a rough-running engine problem to the Manufacturer's authorized service agent approximately three and one-half months after the expiration of the Lemon Law rights period,

which occurred eighteen months after the date of original delivery of the vehicle, prior to the Consumers attaining 24, 000 miles of operation. The Board dismissed the case, holding that the Consumers failed to qualify for relief because they did not first report the problem during the Lemon Law rights period.

*Berg v. Toyota Motor Sales, U.S.A.*, 1999-0088/TPA (March 29, 1999)

The Consumer complained of brake noise, brake light problem, low pedal problem and looseness/shaking in the vehicle's front end. The vehicle was subjected to one repair during the first 24,000 miles of operation. The repair facility noted the Consumer's problems as a pull to the right, vibration, and illumination of the brake light; the service agent performed a tire rotation, tire balance, front-end alignment, topped off the brake fluid and adjusted the emergency brake. On four subsequent repair attempts, the Consumer complained of squeaky brakes and paid for the replacement of front brake pads, the steering column was replaced to address steering problems, the master cylinder was replaced because the Consumer reported that the brake pedal traveled to the floor, and the brakes were bled; thereafter, the Consumer sent written notification to the Manufacturer. The Manufacturer argued that the steering and brake defects were not first reported during the Lemon Law rights period, and that the one repair performed during this period was routine maintenance. The Board concluded that the first repair attempt was the only repair attempt during the rights period. Based on the nature of the problems reported and repairs performed on the first attempt, the passage of time and the miles driven between the first repair and the subsequent repair attempts, and the nature of the problems reported and repairs performed subsequent to the first repair attempt, the Board concluded that the problems which formed the basis of the Consumer's claim were not first reported during the rights period. The case was dismissed.

**Whether Notice sent after 3 attempts or 15 days out of service 681.104(1)(a), F.S.**

*Swearingen v. Chrysler Corporation*, 1998-1180/TLH (Fla. NMVAB February 12, 1999)

The Board concluded that the Consumers' complaint of ABS failure constituted a nonconformity; however, the nonconformity was cured at the first repair attempt. Since the Manufacturer corrected the nonconformity within a reasonable number of attempts, the Consumers were not entitled to relief. The Board took issue with the Manufacturer's argument that the case should not have been considered under the "repair attempts" provision of the law, because the Consumers failed to give the requisite notice to the Manufacturer. The Board concluded that the statute contains no requirements as to the form of the notice, except that it be in writing. In this case, the Consumers utilized a "Motor Vehicle Defect Notification" form and checked the "days out" box, but listed a description of continuing defects or conditions, most of which had been subjected to at least three repair attempts prior to the notice being sent. Based on the evidence, which established that, after receipt of the notice, the vehicle was delivered to the repair facility and repairs were conducted at the authorization of the Manufacturer; the Board concluded that the provisions of §681.104(1)(a) had been met.

**NONCONFORMITY 681.102(15), F.S. (1995):**

*Adams v. Chrysler Corporation*, 1998-1082/MIA (Fla. NMVAB January 6, 1999)

The Consumer complained that the clutch made a loud noise every time the clutch pedal was released. The Manufacturer's witness testified that the noise was the result of fast shifting, which caused the shift fork to snap against the pressure plate; however, this would cause no other problems. The Board inspected the vehicle and found that a noise could be heard when the clutch pedal was released quickly, but that no noise was heard upon releasing the clutch pedal slowly; therefore, the Board concluded there was no nonconformity and dismissed the case.

*Vega v. Ford Motor Company*, 1998-1172/WPB (Fla. NMVAB February 3, 1999)

The Consumers complained of a grinding noise when accelerating the vehicle with the air conditioner on. This condition was not evident until the vehicle's odometer reached 12,675 miles. The noise progressed over time and eventually exhibited itself with the air conditioner turned off. The acceleration capacity of the vehicle deteriorated to a point where it did not feel like it was going into gear, making it difficult to pass other vehicles. The Manufacturer argued that the problems were not related and therefore each problem was not presented for a sufficient number of repairs. The Manufacturer also argued that there was no problem with the vehicle; rather, the Consumers experienced normal noises and acceleration capacity of the vehicle. The Board concluded that the noise and lack of acceleration was one problem that was a defect or condition that substantially impaired the use and value of the vehicle. The Board rejected the assertion that this condition was "normal," relying on the evidence that the problem did not become evident until the Consumers had owned the vehicle for approximately one year. The Consumers were awarded a refund.

**NONCONFORMITY 681.102(16), F.S. (1997):**

*Cox v. Ford Motor Company*, 1998-1072/TLH (Fla. NMVAB January 26, 1999)

Mrs. Cox, the primary driver of the vehicle, complained that the vehicle pulled to the right, which caused her to utilize both hands to keep the vehicle straight, and this caused pain to the one arm of which she had limited use because of health reasons. Mrs. Cox testified that the Board would experience the pulling and that the vehicle would jerk to the left or right when the brakes were applied, if the Board test drove the vehicle during the hearing. The Board took three test drives and experienced a slight vibration upon application of the brakes, however, no pulling was experienced. The Board concluded that the pulling problem did not constitute a nonconformity and dismissed the case.

*Smith v. Ford Motor Company*, 1998-1127/TLH (Fla. NMVAB January 26, 1999)

The Consumer complained of an intermittent “popping” noise. The Manufacturer’s witnesses acknowledged that a noise will occur intermittently under circumstances when the frame or body of the pick-up truck twists or is “in a bind.” The witnesses testified that the noise was not significant, nor was it attributable to any defect in the vehicle. Counsel for the Manufacturer argued that the complained of problem did not constitute a nonconformity. The Board test drove the vehicle and did find that the vehicle made intermittent popping noises; it concluded that, although the noise existed and would constitute an annoyance, it clearly did not substantially impair the use or safety of the vehicle, nor would it significantly reduce the trade-in or resale value of the vehicle so as to constitute a substantial impairment of value. The case was dismissed.

*Oktayer v. Ford Motor Company*, 1998-1138/ORL (Fla. NMVAB January 26, 1999)

The Consumers complained of an intermittent engine hesitation or surge when the vehicle was driven under normal circumstances. The Manufacturer contended that the problem complained of did not constitute a nonconformity. Counsel for the Manufacturer argued that the record showed there were no complaints of the vehicle stalling or illumination of the check engine light. He further argued that the problem complained of was the air conditioner compressor cycling on and off. The Board concluded that, although the engine hesitation or surge existed to a slight degree, it did not constitute a nonconformity. The case was dismissed.

*C.A.H. Services, Inc. v. Mercedes-Benz of North America, Inc.*, 1999-0066/WPB (Fla. NMVAB March 19, 1999)

The Consumer complained of a transmission shifting problem that manifested itself as a clunking noise from the left rear when the steering wheel was turned while accelerating the vehicle from a stop in either “reverse” or “drive” gears. The clunking noise was intermittent. The engine “blew up,” causing the transmission to be replaced; thereafter, the coolant light started to illuminate, which the Board found to be related to the transmission shifting problem. The Manufacturer argued that the clunking noise was intermittent and a “normal operating condition.” The Board rejected this, and concluded that the transmission shifting problem constituted a nonconformity that required the vehicle to be out of service by reason of repair for more than 30 cumulative days. The Consumer was awarded a refund.

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

### **What Constitutes a Reasonable Number of Attempts**

*Mclay v. Mercedes-Benz of North America, Inc.*, 1998-1027/WPB (Fla. NMVAB January 8, 1999)

The Manufacturer's attorney argued that the case should be dismissed because the Consumer did not meet the statutory presumption of three repair attempts within the Lemon Law rights period. The Board found that the surging problem was presented for repair on at least three occasions and that the Manufacturer waived its right to a final repair opportunity. The Board rejected the Manufacturer's argument as unsupported by the law; it held that while a Consumer who proves all the elements of the statutory presumption will prevail, if none of the elements are overcome by proof to the contrary by the Manufacturer, the presumption is just that--a presumption--it is not a requirement. The Board concluded that the Consumer met the requirement in Section 681.104(1)(a), F.S., (1995), and the Manufacturer, admittedly, waived its final repair opportunity; thus, the Consumer was entitled to a refund because the surging problem substantially impaired the use and value of the vehicle.

*Bales v. American Honda Motor Company*, 1998-1222/STP (Fla. NMVAB February 15, 1999)

The Board concluded that the Consumers' complaints of vibration, brake pulsation and windshield wiper chatter and hop were nonconformities. The windshield wiper problem was only subjected to two repair attempts prior to written notification; therefore, the Board ruled that the Consumers were not entitled to relief for this nonconformity. However, the other problems were each subjected to at least three repair attempts before notice, and since the Manufacturer failed to conform the vehicle to its warranty after a reasonable number of attempts, the Consumers were entitled to relief.

*Jordan v. Ford Motor Company*, 1998-1231/ORL (Fla. NMVAB February 23, 1999)

The Board concluded that the Consumer's complaint of intermittent engine stall constituted a nonconformity; however, this problem was only subjected to two repair attempts prior to written notification; therefore, the Board ruled that the Consumer was not entitled to relief for the nonconformity at the time of the hearing. The case was dismissed.

*Palazzo v. Mitsubishi Motor Sales of America, Inc.*, 1998-1245/FTL (Fla. NMVAB February 26, 1999)

The Consumer took his vehicle in for repairs on four occasions prior to sending written notice for a "check engine" warning light that intermittently illuminated. In addition to arguing the problem did not constitute a nonconformity, the Manufacturer argued that, during each repair visit, the computer's code indicated a different cause for the "check engine" light illumination; therefore, the same problem was not subjected to at least three repair attempts prior to the Consumer sending written notice to the

Manufacturer. The Board concluded that the “check engine” light intermittently illuminating was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity. The Board further concluded that the nonconformity was subjected to repair on at least three occasions, notice sent and a final repair attempt conducted by the Manufacturer which did not cure the defect. The Board granted relief.

### **Final Repair Attempt**

*Deane v. Mazda Motor of America, Inc.*, 1998-0987/FTM (Fla. NMVAB January 13, 1999)

The Board concluded that the Consumer’s intermittent engine stalling substantially impaired the use and safety of the vehicle. The Manufacturer’s witness testified that an “aftermarket” anti-theft system may have been the cause of the engine stall. The Manufacturer offered to replace this system during the final repair attempt, but had to order parts. The service agent was unable to provide the Consumer with alternate transportation because of her age; therefore, she requested the use of her vehicle pending receipt of the parts, and was told that this was not possible because the final repair would be “nullified.” The Consumer declined replacement of the anti-theft system under those circumstances. The Board held that the Manufacturer’s unreasonable refusal to allow the Consumer use of her vehicle pending receipt of the special order parts during the final repair attempt should not have been construed against the Consumer; a refund was granted.

*Caster v. Ford Motor Company*, 1998-1248/TLH (Fla. NMVAB February 11, 1999)

The Consumers complained that their air conditioner would intermittently cycle on and off rapidly while the vehicle was stopped and in gear. The Board found that this substantially impaired the use and value of the vehicle. The Board concluded that the post card sent to the Consumers in response to their written notification, which stated, “In order that we may exercise our statutory right to a final repair attempt, we ask that you return your vehicle to 520712158. Prior to doing so, we ask that you contact the service manager or an appointment,” was undecipherable, and did not direct the Consumers to a reasonably accessible repair facility within a reasonable time; therefore, the requirement that the Manufacturer be given a final repair attempt did not apply. Since the Manufacturer failed to correct the nonconformity within a reasonable number of attempts, the Consumers were granted a refund.

*Poole v. Ford Motor Company*, 1999-0040-/FTM (Fla. NMVAB March 30, 1999)

The Board concluded that the Consumer’s complaint of an intermittent hesitation or loss of power problem was a condition that substantially impaired the safety of the vehicle, and therefore, constituted a nonconformity. The Manufacturer timely responded to the Consumer’s notification by sending a postcard which stated, “We ask that you return your vehicle to 1321773108”; however, this response failed to direct the Consumer to a repair facility. Therefore, the requirement that the Manufacturer be given a final repair attempt did not apply. Since the Manufacturer failed to correct the nonconformity

within a reasonable number of attempts, the Consumer was granted a refund.

*Hilton v. General Motors Corporation, Cadillac Motor Division*, 1998-1052/FTL (Fla. NMVAB March 1, 1999)

The Consumers complained of a transmission shifting problem which the Board found to substantially impair the use and value of the vehicle, therefore, constituting a nonconformity. The Manufacturer stipulated that it received written notification, but advised the Consumers that the transmission condition was “normal”. The Board concluded that the Manufacturer failed to respond to the notice as required by law; therefore, the requirement that the Manufacturer be given a final opportunity to cure the nonconformity did not apply. Consequently, since the Manufacturer had a reasonable number of attempts to correct the nonconformity, and failed to do so, the Consumers were entitled to relief.

*Scheller v. Ford Motor Company*, 1999-0056/TLH (Fla. NMVAB March 1, 1999)

The Consumers complained of a whining noise in the power steering system and intermittent fluid leak, which the Board held to be a nonconformity. There was a conflict in the testimony regarding whether the nonconformity continued to exist after the final repair attempt. The Consumers testified that the various repair attempts diminished the noise, but that it still existed and that there was evidence of a fluid leak the day before the hearing. The Manufacturer’s witness testified that the problem could not be duplicated at the final repair attempt and that no abnormal noise could be heard during the Manufacturer’s prehearing inspection test drive of the vehicle. The Board held that the evidence more persuasively supported a conclusion that the nonconformity was corrected at or before the final repair attempt, and that any problem which continued to exist thereafter did not constitute a nonconformity. The case was dismissed because the Manufacturer corrected the nonconformity within a reasonable number of attempts.

*Mulvaney v. Ford Motor Company*, 1999-0011/WPB (Fla. NMVAB March 9, 1999)

The Consumer complained of a loud squealing noise which intermittently occurred when releasing the clutch into first gear. The Manufacturer contended that the noise was repaired at the final repair attempt, or that any remaining noise was minor and therefore did not substantially impair the use, value or safety of the vehicle. The Board concluded that the intermittent squealing noise was a defect or condition that substantially impaired the use and value of the vehicle, thus constituting a nonconformity. The Board further concluded that the nonconformity continued to exist after the final repair; accordingly, since the Manufacturer was afforded a reasonable number of attempts to conform the vehicle to its warranty, but failed to do so, the Consumer was entitled to relief.

*Ford v. BMW of North America, Inc.*, 1998-1229/TLH (Fla. NMVAB March 17, 1999)

The Consumer complained of an air conditioner noise, problems with the convertible top, and an

illuminating ABS Brake warning light, which the Board found to be nonconformities. The evidence established that the convertible top and ABS problems were corrected prior to the final repair attempt. There was a conflict in the testimony regarding whether the air conditioner nonconformity continued to exist after the final repair attempt. The Manufacturer pointed to the absence of air conditioner noise complaints in repair orders documenting presentation of the vehicle to the authorized agent after the final repair attempt. The Board did not find this persuasive since the Consumer is not obligated under the Lemon Law to continue to seek repair of a nonconformity that has not been corrected after a reasonable number of attempts. The Board resolved the conflict in favor of the credible testimony given by the Consumer, the primary driver of the vehicle and the only witness present with firsthand knowledge of the condition of the vehicle after the final repair attempt. The Manufacturer's witness acknowledged that he had not driven the vehicle since the final repair attempt. The Board having found that the Manufacturer failed to conform the vehicle to its warranty after a reasonable number of attempts, the Consumer was granted relief.

### **Days Out of Service**

*Martin v. Toyota Motor Sales, U.S.A.*, 1998-1185/MIA (Fla. NMVAB February 11, 1999)

The Consumer's vehicle was out of service by reason of repair for an engine failure nonconformity for a total of 32 cumulative days; thereafter, the Consumer sent written notification and the Manufacturer was afforded an opportunity to inspect or repair the vehicle after receipt of notice. The Manufacturer contended that engine failure problem was repaired prior to the "final repair attempt." The Board concluded that the Manufacturer had a reasonable number of attempts to conform the vehicle to its warranty; since the vehicle was out of service for repair of the nonconformity for 32 days, and the Consumer was granted a refund. The Board rejected the Manufacturer's contention that the nonconformity did not continue to exist, because the statute does not require this in a days-out-of-service case.

*Shanahan v. Ford Motor Company & Sherrod Vans*, 1999-0031/TPA (Fla. NMVAB March 5, 1999)

The Consumer complained of heat intrusion into the interior of the vehicle emanating from around the "dog house"/center console, and an alignment problem described as a pull to the right and vibration or shimmy felt in the steering wheel, which the Board concluded constituted nonconformities that caused the vehicle to be out of service by reason of repair for a total of three cumulative days. The Consumer also complained of various other problems with her conversion van that the Board held were not nonconformities. Since the Consumer failed to carry her burden of proving the vehicle was out of service for a cumulative total of 30 or more days for repair of nonconformities, the Consumer was not entitled to relief at the time of the hearing.

*Patrick v. Blue Bird Body Company and Spartan Motors, Inc.* 1998-1152/FTM (Fla. NMVAB

March 10, 1999)

The Consumer complained of ride height and air bag suspension problems; electrical problems involving the headlights, battery, dash lights, and alternator; dash air conditioner problems; antifreeze leak and water intrusion, which the Board concluded were nonconformities that caused the RV to be out of service by reason of repair for 69 cumulative days. The Manufacturers argued, among other things, that the Board should only count the number of hours related to repair of non-living facility items, because repairs were also made to living facility items during the 69 days out of service. The Board rejected this argument as contrary to the definition of out-of-service day provided in Rule 2-30.001(3)(c), Florida Administrative Code. The Board held that Blue Bird had a reasonable number of attempts to conform the vehicle to its warranty, and since the vehicle was out of service for repair of nonconformities for 69 days, the Consumer was entitled to relief. The Board dismissed the case against Spartan because the nonconformities were not part of the chassis warranted by Spartan.

*Winston v. Nissan Motor Corporation U.S.A.*, 1999-0074/FTL (Fla. NMVAB March 25, 1999)

The Consumer complained of intermittent engine failure and sent the Manufacturer written notice affording the Manufacturer a final opportunity to repair the alleged problem. The Board concluded that the engine problem was a nonconformity, but that it was cured at the final repair attempt. The Consumer also complained of vehicle vibration through the steering wheel and brakes, and problems with air bag deployment without impact, causing the vehicle to be out of service for repair of these problems for 12 cumulative days. The Consumer argued at the hearing that, adding the 12 days out of service for the vibration and air bag problems to the 16 days out of service for repair of the engine nonconformity, should result in a reasonable number of attempts under the statute. §681.1095(8), Florida Statutes (1995) mandates that “the Board shall grant relief, if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities.” (Emphasis added). The Board found that the nonconformity was corrected by the Manufacturer within a reasonable number of attempts, and held that, the remaining problems complained of by the Consumer, even if considered nonconformities, were not subjected to a reasonable number of repair attempts. The case was dismissed.

### **Written Notification to the Manufacturer**

*Sheehan v. Volvo Cars of North America*, 1998-1108/ORL (Fla. NMVAB January 6, 1999)

The Board concluded that the intermittent electrical condition, and the intermittent steering or suspension clicking or rubbing noises constituted nonconformities that kept the vehicle out of service for repair for 32 cumulative days. The Manufacturer contended that the written notice of defect was not provided to it within a timely manner, because the Consumer should have provided the written notification after exactly 15 days out of service. The Board rejected this contention because the plain wording of the statute requires the Consumer to send notification after “15 or more days” out of service.

The Consumer was granted a refund.

## **MANUFACTURER AFFIRMATIVE DEFENSES:**

### **Accident, Abuse, Neglect, Unauthorized Modification 681.102(15), F.S. (1995)**

*Reyes v. Toyota Motor Sales, U.S.A.*, 1998-1049/MIA (Fla. NMVAB January 22, 1999)

The Consumer complained of a water leak caused by defective weather stripping. The Manufacturer argued that it was not a nonconformity or that, alternatively, it was the result of abuse or neglect by persons other than the Manufacturer or its authorized service agent. The Manufacturer's witness testified that the weather stripping had been replaced three times for "customer goodwill." This witness opined that the weather stripping was being tampered with and torn off; and that the Consumer was not properly lowering the convertible top. The Board rejected the Manufacturer's arguments as being unsupported by the evidence and awarded the Consumer a refund.

*Blanco v. Ford Motor Company*, 1998-0868/MIA (Fla. NMVAB February 11, 1999)

The Consumer complained that it was hard to engage the transmission into second gear at higher RPM's and downshift into first gear. Subsequently, there was a noise underneath the transmission when the clutch was engaged. The Manufacturer contended, among other things, that the alleged nonconformity was the result of abuse and neglect by the Consumer. The Manufacturer's witness testified that vehicle was "run hard," and that the transmission had been speed shifted (shifting without engaging the clutch), causing excessive transmission wear. The Board rejected the Manufacturer's defenses as unsupported by the evidence and awarded the Consumer a refund, including incidental charges for towing and transmission repairs.

*Iskowitz v. BMW of North America, Inc.*, 1999-0007/FTL (Fla. NMVAB February 15, 1999)

The Consumers complained that the leather upholstery on the seats, installed by an independent shop at the direction of the Manufacturer's authorized service agent, was prematurely worn and peeling. The Manufacturer contended that the leather upholstery on the seats nonconformity was the result of an unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent; the leather interior was not warranted by the Manufacturer; the vehicle was not subjected to the requisite number of repairs because one of the repair attempts was conducted by the independent shop at the direction of the authorized service agent, and should not be counted as a repair attempt; and the defect did not constitute a nonconformity. The Board concluded that the leather interior defect substantially impaired the value of the vehicle, and that the evidence established that the "aftermarket" leather interior was installed on the vehicle prior to purchase at the direction of the Manufacturer's authorized service agent. The Manufacturer sought to separate itself from liability

because the leather interior was not factory equipment. The Board rejected this contention since only those alterations or modifications by persons other than the Manufacturer or authorized service agent are excluded from the statutory definition of nonconformity.

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

*Sterman v. Mitsubishi Motor Sales of America, Inc.*, 1998-1205/ORL (Fla. NMVAB February 1, 1999)

The Board found that a power steering belt problem substantially impaired the use and value of the vehicle. The Manufacturer contended that the Consumer's Request for Arbitration was untimely filed. The Board extended the Lemon Law rights period pursuant to Section 681.104(3)(b), Florida Statutes (1995), and concluded that the Consumer's request was filed within six months after expiration of the Lemon Law rights period. The Board awarded a refund to the Consumer, holding that the Manufacturer failed to conform the vehicle to its warranty within a reasonable number of repair attempts.

*Sweat v. Ford Motor Company*, 1999-0099/ORL (Fla. NMVAB March 26, 1999)

The Board found that the various intermittent transmission problems complained of by the Consumer constituted a nonconformity. However, the Board dismissed the Consumer's claim because her Request for Arbitration was untimely filed. The Board concluded that considering the facts of the case in the light most favorable to the Consumer, and if the extension of the Lemon Law rights period were applied pursuant to Section 681.104(3)(b), Florida Statutes (1995), the Consumer's Request for Arbitration was filed more than six months after expiration of the Lemon Law rights period.

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

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

*Richter v. General Motors Corporation, Pontiac-GMC Division*, 1998-1092/TLH (Fla. NMVAB February 9, 1999)

In addition to a net trade-in allowance, the Consumer utilized funds from an unsecured line of credit at his bank, and a credit or rebate from use of his GM credit card to purchase his vehicle. The Consumer sought reimbursement of the interest paid on the portion of the line of credit principal used to purchase the vehicle. The Manufacturer objected to the payment of interest, arguing that it was not associated with the purchase of the vehicle, but with the personal line of credit for which the vehicle was not used as security, and that, as such, it was not a collateral charge as defined by the Lemon Law. The Board rejected this argument. The Consumer and Manufacturer stipulated to a purchase price, the mileage at

the time of the BBB/AUTOLINE hearing, for purposes of calculating the statutory offset, and further stipulated that the offset would be reduced by incidental charges incurred by the Consumer as a result of the nonconformity. In addition, the Manufacturer stipulated, and the Board Ordered, that the GM credit card credit should be reinstated to the Consumer's card.

*Knots v. Ford Motor Company & Newmar Corporation*, 1998-0807/ORL (Fla. NMVAB March 8, 1999)

The Board found that the Consumers' recreational vehicle was out of service for repair of an overweight "box" portion of the vehicle nonconformity for 104 cumulative days. The Consumer sought reimbursement of \$210.00 for "AAA Plus," and \$1,331.35 for vehicle insurance premiums paid from the time of purchase of the vehicle, or alternatively, \$1,011.75 for premiums paid for the time that the vehicle was unusable and in storage. Ford was dismissed from the case because the nonconformity did not relate to the chassis that it warranted. Newmar stipulated to reimbursement for "AAA Plus" and to the insurance premiums while the vehicle was unusable and in storage. Notwithstanding Newmar's agreement to pay, the Board concluded that the Consumers were not entitled to reimbursement for these items as they did not meet the definition of "Collateral charges" under the statute. The Consumers were granted a refund.

**Incidental Charges 681.102(7), F.S. (1995):**

*Blumin v. General Motors Corporation, Pontiac-GMC Division*, 1998-1065/MIA (Fla. NMVAB January 1, 1999)

The Board concluded that the electrical problems with the vehicle constituted nonconformities. The Consumers sought reimbursement, as incidental charges, of \$60.00 for an Amtrack change fee because they were required to change an Amtrack Car Train reservation because of the nonconformity; \$6.00 for parking at the hearing; and \$5,065.00 for rental car expenses because it was necessary to enter into a lease agreement for a minimum of three months for replacement transportation. The Board granted incidental charges for the Amtrack change fee, the parking expense, and \$1,757.25 for the rental car, which the Board determined to be reasonable and directly related to the nonconformities. The balance of the rental car amount requested was denied as being unreasonable.

**Trade-in Allowance 681.102(17), F.S. (1995):**

*Barrett v. Ford Motor Company*, 1999-0085/TLH (Fla. NMVAB March 29, 1999)

The Consumers' trade-in resulted in a negative equity of \$8,651.11. The Consumers made car payments totaling \$10,728.00, and were entitled to incidental charges of \$3.46, for a refund in the amount of \$2,076.89; however, this was reduced by the statutory offset in the amount of \$4,042.63, leaving the Consumers responsible for paying the Manufacturer \$1,962.28, unless the parties agreed

otherwise.

**Reasonable Offset for Use 681.102(18), F.S. (1995):**

*Sergent v. Toyota Motor Sales, U.S.A.*, 1998-1110/ORL (Fla. NMVAB January 7, 1999)

The Board granted the Consumers a second arbitration on an intermittent air conditioner blowing hot air problem. The first case was dismissed because the Consumers failed to allow the Manufacturer an opportunity to perform a final repair attempt. The Board held that the Consumers demonstrated a significant change of circumstances, because the final repair attempt was given to the Manufacturer since the first hearing. Counsel for the Manufacturer argued that the calculation of the Consumers' offset for use should take into consideration the mileage accrued on the vehicle due to the Consumers' failure to initially provide the Manufacturer with a final repair attempt. The Board rejected this argument holding that it had no authority to deviate from the formula provided in the statute; consequently, the Manufacturer's request that the offset be increased was rejected. The Consumers were granted a refund.

**Reasonable Offset for Use 681.102(20), F.S. (1997):**

*Muszynski v. Ford Motor Company*, 1998-1191/TPA (Fla. NMVAB February 10, 1999)

In a days-out-of-service case, the Consumer contended that the vehicle was driven by the Manufacturer's authorized service agent for 423 miles during the course of repairs. The Consumer further contended that a representative of the agent conceded that the vehicle was driven for 225 miles. The Manufacturer argued that the mileage driven by the authorized service agent was encompassed in the "reasonable opportunity to repair" and should not be deducted in determining the offset for use. The Board rejected this argument; and, based on the repair orders in the file, found that the vehicle was test driven 221 miles by the authorized service agent and deducted that mileage as not attributable to the Consumer in calculating the statutory offset.

**MISCELLANEOUS PROCEDURAL ISSUES:**

*Grosskoph v. Land Rover of North America, Inc.*, 1998-1194/FTM (Fla. NMVAB January 25, 1999)

The Consumer complained of a vibration when driving the vehicle at highway speeds. The Manufacturer's Answer was untimely filed and the Board did not permit the Manufacturer's representative to present any affirmative defenses; however, three Manufacturer witnesses were allowed to testify about the repairs performed on the vehicle. The Board concluded that the vibration substantially impaired the use and safety of the vehicle and granted the Consumer a refund.

*Nagurney v. General Motors Corporation, Pontiac-GMC Division, 1998-1147/JAX (Fla. NMVAB February 5, 1999)*

Neither the Consumer nor the Manufacturer appeared at the previously noticed hearing. After waiting 30 minutes from the scheduled time of the hearing, the Consumer was declared in default. Following the hearing, the Consumer did not contact the Board Administrator within one business day of the hearing to request that the default be set aside. The case was dismissed with prejudice.

*Galiano v. Kia Motors America, Inc., 1998-1154/FTL (Fla. NMVAB February 12, 1999)*

The Board rejected the Manufacturer's attempt to raise the affirmative defense that the Consumer's claim was untimely filed since the Manufacturer failed to raise this defense in its answer filed prior to the hearing, and the representative's request to amend its answer was not timely presented. The Board held that the engine light coming on, vehicle running rough, and stalling problems formed a condition that substantially impaired the use, value and safety of the vehicle and granted relief to the Consumer.

*Farinez v. Kia Motors America, Inc., 1998-1048/MIA (Fla. NMVAB February 24, 1999)*

At the commencement of the arbitration hearing, the Manufacturer requested that the Board continue the hearing to allow it time to amend its Answer to assert the affirmative defense that the alleged nonconformity was the result of abuse or neglect of the automobile by persons other than the Manufacturer or its authorized service agent, or in the alternative, to allow the Manufacturer to amend the Answer at the hearing. The Board denied these requests and evidence or testimony regarding the affirmative defense of abuse or neglect was disallowed. The Board granted relief on a defective braking system nonconformity.

*Johnson v. Kia Motors America, Inc., 1998-1241/TPA (Fla. NMVAB March 4, 1999)*

Although a Manufacturer representative was present at the hearing, the Manufacturer was not permitted to assert any affirmative defenses at the hearing, because its Answer was untimely filed. The Board granted relief on an intermittent brake malfunction nonconformity.

*Communications Supply Corporation v. General Motors Corporation, Pontiac-GMC Division, 1999-0030/ORL (Fla. NMVAB March 4, 1999)*

Although a Manufacturer representative was present at the hearing, the Manufacturer was not permitted to assert any affirmative defenses, because its Answer was untimely filed. The Board granted relief on a vibration at high speeds nonconformity.