OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2003 - December 2003 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Southern Investments One, Inc. v. Workhorse Custom Chassis, 2003-0634/JAX (Fla. NMVAB October 10, 2003).
The Manufacturer asserted that the Consumer was not qualified for relief because the vehicle was used solely for commercial purposes (Fed Ex home delivery). The Board rejected the Manufacturer's assertion, noting that the statute defines "Consumer" as "any other person entitled by the terms of the warranty to enforce the obligations of the warranty." The Board found that there was no dispute that Southern Investments One, Inc., was entitled by the terms of the Workhorse warranty to enforce its obligations. Ultimately, the Board awarded the Consumer a refund.

Voyles v. General Motors Corp., Pontiac-GMC Div., 2003-0845/TPA (Fla. NMVAB November 17, 2003).
The consumer in this case, Mr. Voyles, did not purchase the vehicle directly from a selling dealer; rather, he purchased it from the original owner. Importantly, the original owner purchased the vehicle <u>for</u> Mr. Voyles and with funds provided by Mr. Voyles for the purchase. The original owner purchased the vehicle from the selling dealer on the "X-plan" and took title to the vehicle in his name, so as to facilitate a less expensive purchase for Mr. Voyles. Six months after purchasing the vehicle, the original owner transferred title to the vehicle to Mr. Voyles. The Board implicitly found Mr. Voyles was a consumer under the terms of the statute. The Consumer was ultimately awarded a refund.

Motor Vehicle §681.102(15), F.S.

McClellon v. DaimlerChrysler Motors Corp., 2003-0842/JAX (Fla. NMVAB November 5, 2003).
The Consumer contended that the vehicle was "new" when she purchased it, testifying that the selling dealer represented that the vehicle was new. On her application for arbitration, she specified that the vehicle was new when she purchased it. However, the purchase order indicated that the vehicle was sold as "used," and the Manufacturer's representative testified that the vehicle was previously sold to an ultimate purchaser prior to Ms. McClellon's purchase. The Manufacturer's representative also submitted repair orders dated from the time when the previous purchaser owned the vehicle. Upon these facts, the Board ruled that the vehicle was

"used" when Ms. McClellon purchased the vehicle. Accordingly, the Consumer's case was dismissed.

NONCONFORMITY §681.102(16), F.S.

Meilahn v. General Motors Corporation, Chevrolet Motor Division, 2003-0998/WPB (Fla. NMVAB December 17, 2003).
The Consumer claimed that his limited edition "50th Anniversary Corvette" was substantially impaired because the original engine was replaced. The Manufacturer's authorized service agent replaced the original engine when it was determined that an oil leak in the original engine was not repairable. A new engine block was installed in the vehicle with a serial number that did not match the serial number of the vehicle. The Consumer purchased the subject vehicle for its value as a collectible. The Kelley Blue Book was presented as evidence that the vehicle's value declined as a result of the engine replacement. The Manufacturer contended that the original defective engine was cured, and that there was no longer any defect or condition that substantially impaired the use, value or safety of the subject vehicle. A witness for the Manufacturer testified that, although the vehicle was marketed as a "50th Anniversary Celebration" vehicle, it is not a "collectible" vehicle. However, the witness also acknowledged that the replacement engine would decrease the value of the vehicle to some extent. The Board ruled that the irreparable original engine and its replacement with an engine bearing a different serial number substantially impaired the value of the vehicle, thereby constituting a nonconformity as defined by the statute. Ultimately, the Consumer was awarded a refund.

Scuderi v. General Motors Corporation, Chevrolet Motor Division, 2003-0921/ORL (Fla. NMVAB November 19, 2003).
The Consumer complained of paint imperfections and a transmission noise. The day after the Consumer took delivery of the vehicle, he noticed one-inch scratch marks on the hood and fender paint surfaces. The vehicle's painted surfaces were compounded and buffed, resulting in swirl marks and pits on the vehicle's exterior painted surfaces. The transmission noise occurred upon acceleration when the vehicle was driven at lower speeds. The Manufacturer performed no repairs at the final repair attempt. A witness for the Manufacturer testified that the transmission clunk noise was "normal" for rear-wheel drive vehicles so no repairs were necessary. He testified that the vehicle's paint "meets body paint standards in the industry." He also testified that the vehicle, which was "mass produced," was not delivered in "show" condition, and the paint surface looked fine from a distance of 25 feet. The Board inspected the vehicle and found that from a distance of 25 feet away, the vehicle's paint looked fine. However, the Board also found that within approximately three feet away from the vehicle, swirl marks, streaks, and pits were clearly visible. The Board drove the vehicle and the transmission clunk noise occurred. The Board ruled that the paint imperfections and transmission clunk were nonconformities that were not corrected within a reasonable number of attempts. Accordingly, the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Rich v. General Motors Corporation, Chevrolet Div., 2003-0710/JAX (Fla. NMVAB October 10, 2003).
Although the Consumer presented the vehicle for repair fewer than three times prior to sending the defect notification, the Board ruled that the Manufacturer was provided a reasonable number of attempts to cure the nonconformity. The Consumer complained of a loud knocking noise in the engine and excessive oil consumption. The Consumer presented the vehicle for repair on two occasions for the engine noise and on one occasion for repair of the excessive oil consumption. The Consumer contended that the two problems were related. The Manufacturer conducted a final repair attempt, and after the final repair attempt, the Consumer presented the vehicle for repair of the problems on four more occasions. Finding the problem to be a nonconformity, the Board ruled that the Manufacturer was afforded a reasonable number of attempts to correct the problem. Accordingly, the Consumer was awarded a refund.

What Constitutes Written Notification Under §681.104(1)(a), F.S.

Olson v. Ford Motor Company, 2003-0754/STP (Fla. NMVAB October 8, 2003).
The Manufacturer contended that it was not afforded written notice pursuant to the Lemon Law. The letter that the Consumer's counsel sent primarily discussed revocation of acceptance, attorneys' fees, and loss of confidence in the vehicle. The Manufacturer contended that the letter's obvious purpose was to assert a claim for revocation and not to request a final repair attempt under the Lemon Law. However, the second paragraph of the letter stated that the Consumer was providing a final opportunity to cure the defects pursuant to the Lemon Law. A majority of the Board ruled that the letter put the Manufacturer on notice pursuant to the statute. The Board noted that the duty to respond and designate the repair facility rests squarely with the Manufacturer. Finding that the Manufacturer failed to respond to the notification, the Board ruled that the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Ultimately, the Board dismissed the Consumer's claim, on other grounds.

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

Dean v. BMW of North America, LLC., 2003-0943/ORL (Fla. NMVAB December 16, 2003).
The Manufacturer contended that it was not provided a final repair attempt. The Manufacturer received the Consumer's written defect notification on August 4, 2003. On August 6, 2003, the Manufacturer responded to the written notification by directing the Consumer to deliver the vehicle to Gainesville BMW on September 23, 2003, some 48 days after the Manufacturer received the Consumer's defect notification. The Consumer was to be met at the dealership on September 23, 2003 at 10:00 a.m. by a BMW employee. The Consumer presented the vehicle on the date and at the time specified by the Manufacturer; however, the employee did not arrive at the dealership until after 10:00 a.m. By the time the BMW employee arrived, the Consumer had already departed with the vehicle. The employee testified at the hearing that the final repair date

and time were set to accommodate his (the employee's) schedule. The Board ruled that the requirement that the Manufacturer be given a final repair attempt did not apply, as the Manufacturer scheduled the final repair attempt some 48 days after receipt of the Consumer’s notification and then failed to keep the appointment.

Ratcliffe v. BMW of North America, LLC, 2003-0862/STP (Fla. NMVAB November 14, 2003). On September 5, 2003, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer responded by letter dated September 10, 2003, but the letter merely stated that someone would contact the Consumer at a later date to discuss the problems with the vehicle. The Consumer received further communication from the Manufacturer on September 23, 2003. The Board found that the Manufacturer’s September 10 letter failed to direct the Consumer to a repair facility for the final repair attempt. As the statute requires the Manufacturer to contact the Consumer <u>and</u> direct him to a repair facility, the Board ruled that the Manufacturer failed to timely respond to the Consumer’s written notification. Under the terms of the statute, the Manufacturer’s failure to timely respond resulted in a waiver of the final opportunity to repair the vehicle. Accordingly, the Board ruled that the requirement that the Manufacturer be given a final repair attempt did not apply. The Consumer was awarded a refund.

Munn v. Mitsubishi Motors North America, Inc., 2003-0843/JAX (Fla. NMVAB November 3, 2003).
The Consumer complained of an intermittent transmission jerk and hesitation between gears. Initially it appeared that the problem was cured on the fourth repair attempt, but within a few days of the repair, the problem arose again. The Consumer then sent written notification of the problems to the Manufacturer and provided the Manufacturer a final opportunity to cure the problem. However, the Manufacturer was unable to duplicate the problem on the final repair attempt, so no repairs were performed. At the hearing, the Consumer testified that the intermittent transmission problem continued after the final repair attempt. The Consumer also testified that the problem occurred during the drive to the hearing. The Board drove the vehicle during the hearing, but the problem with the transmission did not occur. Nevertheless, a majority of the Board found that the transmission problem was a nonconformity that continued to exist after the final repair attempt. In finding that the problem continued after the final repair attempt, the Board noted that the Consumer’s testimony was credible and supported by the repair orders. The Board explained that the fact that the problem was not experienced during the Board’s one-time, six-mile test drive was not persuasive to the majority. Ultimately, the Consumer was awarded a refund.

What Constitutes an “Out-of-Service Day,” Rule 2-30.001(2)(c), F.A.C.

Reagan v. DaimlerChrysler Motors Corp., 2003-0867/FTM (Fla. NMVAB November 16, 2003). The Consumer claimed the vehicle was out of service for more than 30 days. However, the Manufacturer argued that some of the days were not out-of-service days under the terms of the statute. Specifically, the Manufacturer alleged that the days attributable to the Consumer’s failure to authorize repairs should not be included in the total out-of-service days. The dispute

stemmed from an engine failure that was not covered by the Manufacturer's warranty. At the time of the engine failure, the vehicle's odometer registered 45,876 miles, so the Manufacturer's 36,000-mile warranty did not apply; therefore, the Consumer would be required to pay for the repairs. The Consumer refused to pay for the repair, contending that the engine failed prematurely. Eventually, the Manufacturer agreed to pay for one-half of the repair bill. When the Consumer agreed to pay the remainder and authorized the Manufacturer's service agent to proceed, repairs were begun. The Manufacturer contended that out-of-service days should be counted from the date the Consumer authorized the repairs, rather than from the date the Consumer first presented the vehicle to the service agent. The Board agreed with the Manufacturer, finding that the out-of-service days began to run from the date the Consumer agreed to pay for one-half of the repairs and authorized the service agent to proceed, resulting in a total of 12 days out of service. Finding that 12 days out of service did not constitute a reasonable number of attempts sufficient to trigger the mandatory statutory remedy of repurchase as contemplated by the Lemon Law, the Board dismissed the Consumer's case.

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

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

Alfieri v. Ford Motor Company, 2003-0487/FTL (Fla. NMVAB October 13, 2003).
The Consumer experienced an intermittent rough idle which occurred when the vehicle was coming to a stop. When the problem would arise, the r.p.m. level dropped to below 450, causing the subject vehicle to shake and nearly stall. The Manufacturer contended that the alleged defects were caused by the Consumer's driving habits and lengthy disuse of the vehicle. A witness for the Manufacturer testified that on the first repair attempt on the rough idle problem the injectors were flushed. However, after that initial repair attempt, the rough idle or near stalling condition complained of by the Consumer was not duplicated by the service agent. Subsequently, a "vehicle data recorder" was provided to the Consumer so he could operate the vehicle over a period of time with the recorder. No abnormalities were found. The Manufacturer's witness testified that the Consumer was a "two-footed" driver, and he allowed the vehicle's engine to idle for lengthy periods of time. The witness opined that either of these factors could be contributing to the rough idle problem. The Board was not persuaded by the Manufacturer's defense, finding that the Manufacturer's assertions were not supported by the evidence. The Board ruled that the problem was a nonconformity and, ultimately, awarded the Consumer a refund.

Harmatuk v. Explorer Van Co. and *Ford Motor Co.*, 2003-0823/TPA (Fla. NMVAB December 17, 2003).
The Consumers complained of electrical problems with their Ford conversion van. Bill Currie Ford, a Ford authorized service agent, authorized Explorer Van Co. and Parkwood Medical to modify and build the conversion van, specifying the options to be included in the van. Ford argued at the hearing that the electrical problems complained of by the Consumers were not covered by Ford's warranty, because Ford's warranty excludes damage caused by modification,

or addition of non-Ford parts, after the vehicle leaves Ford's control. The Board disagreed, noting that the statute defines a "nonconformity" to exclude only those modifications or alterations by persons other than a manufacturer or its authorized service agent, and the modifications in this case were authorized by the service agent. The Board ruled that it is the statute's definition, and not the conflicting language of Ford's written warranty, that determines coverage under the statute. Ultimately, the Board awarded the Consumers a refund.

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

Fernandez v. Mercedes-Benz USA, Inc., 2003-0795/MIA (Fla. NMVAB October 15, 2003). Although the Consumer's Request for Arbitration was untimely filed, the Consumer contended that the Lemon Law rights period should be extended, because she did not receive the booklet entitled *Consumer Guide to the Florida Lemon Law*, at the time of acquisition of the vehicle, as required by section 681.103(3), Florida Statutes (2002). The Board rejected the Consumer's contention that her time for filing should be extended and ultimately found that the Consumer's request was untimely. The Board explained that it was regrettable that the Consumer did not receive the Lemon Law booklet advising her of her rights. However, the Board was constrained by the provisions of Chapter 681, Florida Statutes, in rendering its decisions and could not apply theories of equity. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

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

De La Luz v. BMW of North America, LLC, 2003-0588/TLH (Fla. NMVAB November 7, 2003). The purchase document indicated that the Consumers received a net trade-in allowance of $7,500.00. However, the net trade-in allowance reflected in the purchase document was not acceptable to the Consumers. In accordance with the statute, the Manufacturer provided a copy of the pertinent parts of the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in. The NADA guide reflected a retail price totaling $19,925.00, after an addition of $1,450.00 for low mileage. The Manufacturer objected to the use of the retail price as reflected in the NADA guide, asserting that the Board should utilize the wholesale value of the vehicle. In the alternative, the Manufacturer argued that the Board should use the retail sale price actually paid to the selling dealer by the first purchaser of the traded-in vehicle. However, the Manufacturer could not cite any legal authority to support the use of the wholesale value or the value actually paid by the first purchaser of the traded-in vehicle. Noting that the statute specifies the NADA retail price as the only alternative to using the net trade-in allowance reflected in the purchase documents, the Board rejected the Manufacturer's assertions. Ultimately, the Consumer was awarded a refund.

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

Murphy v. Hyundai Motor America, Inc., 2003-0878/WPB (Fla. NMVAB November 6, 2003).

The Manufacturer contended that the mileage attributable to the Consumer as of the date of the hearing before the Board should be utilized to calculate the offset for use, because the mileage as of the date of the BBB/AUTOLINE arbitration hearing was unavailable. The Consumer asserted that mileage attributable to Consumer use should be determined as of the date of the BBB/AUTOLINE arbitration hearing. The Board agreed with the Consumer, and because the mileage as of the date of the BBB hearing was unavailable, the Board estimated the mileage by extrapolating from the odometer mileage as of the repair immediately preceding the BBB/AUTOLINE hearing.