

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

QUARTERLY CASE SUMMARIES

October 2001 - December 2001 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Germain v. General Motors Corporation, Cadillac Motor Division, 2001-0761/JAX (Fla. NMVAB December 11, 2001).

The Manufacturer argued that the vehicle was not a “motor vehicle” as defined under the “Lemon Law,” because it was not a new or demonstrator vehicle. When the vehicle was sold to the Consumer, the sale documents identified the vehicle as “used” and the Used Vehicle Buyer's Guide affixed to the window of the vehicle identified the vehicle as being sold as “used” with the “remainder” of the factory warranty. The application for title submitted by the selling dealer also identified the vehicle as “used,” and the Consumer was not charged by dealer the \$2.00 “Lemon Law fee” that is normally charged to buyers of new and demonstrator vehicles. In addition to the documentation submitted, the Manufacturer relied on the definition of “used motor vehicle” in Section 320.60(13), Florida Statutes. The Consumer argued that the vehicle was titled as “New” by the Florida Department of Highway Safety and Motor Vehicles, because it had not been titled previously and title was applied for with a Manufacturer’s Statement of Origin; therefore, the vehicle was sold to the Consumer as a new vehicle, subject to the coverage of the “Lemon Law.” Prior to the vehicle being purchased by the Consumer, it was utilized by an employee of General Motors Corporation as a “company car” for approximately one year. The vehicle was taken out of service as a “company car” and sent to an auction where it was purchased by the General Motors dealership that subsequently sold the vehicle to the Consumer, who was the first retail purchaser of the vehicle. The Board concluded that, as the purchaser other than for purposes of resale who was entitled to enforce the terms of the warranty, Ms. Germain was a “consumer” as defined under Section 681.102(4), Florida Statutes. The Board further concluded that the prior use of the vehicle by a GM employee as a company car was temporary with the intent that the vehicle be offered for retail sale before the expiration of the Manufacturer's limited warranty. The auction at which the vehicle was purchased by the selling dealership after the vehicle was taken out of service as a GM company car, was a closed auction, and not open to the public. The evidence established that neither General Motors Corporation, nor the dealer, ever transferred title or possession of the vehicle to an ultimate purchaser prior to its acquisition by the Consumer. Under the Chapter 320 definition of “motor vehicle” the Consumer was the “ultimate purchaser,” and under the definition of “used motor vehicle” the Consumer was the person who first acquired the vehicle from the dealer; thus, the vehicle was not “used.” Moreover, the vehicle was issued an “original, new” title upon its purchase

by the Consumer, and a warranty was issued as a part of the sale. Accordingly, the subject vehicle was a “motor vehicle” as defined by Section 681.102(15), Florida Statutes (2001). The Board then declared the vehicle a “Lemon” because of a vibration nonconformity, and awarded the Consumer a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Campbell v. BMW of North America, LLC, 2001-0897/STP (Fla. NMVAB November 9, 2001). The Manufacturer argued that the Consumer did not “go through the hoops” prior to filing her Request for Arbitration, because she failed to provide written notification to the Manufacturer pursuant to Section 681.104, Florida Statutes, before she filed her Request for Arbitration, or alternatively, the Manufacturer failed to receive the notification before the expiration of the Lemon Law rights period plus the 60-day filing period provided in Section 681.109(4), Florida Statutes. In response to the Manufacturer’s request for dismissal, the Consumer argued that she provided verbal notice to the Manufacturer that she was asserting her rights under the Lemon Law. The Board concluded that the Consumer failed to properly preserve her rights under the Lemon Law; consequently, the case was dismissed.

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

De Landaburu v. DaimlerChrysler Motors Corporation, 2001-1002/MIA (Fla. NMVAB December 27, 2001).

The Manufacturer contended that the Consumer could not show that the vehicle was out of service for 30 or more cumulative days for repair of nonconformities. The Manufacturer argued that a repair visit of September 13-24, 2001, should not count as 12 out-of-service days, because the repairs were completed on September 22, 2001; however, the Consumer did not pick up the vehicle until September 24, 2001. The Board concluded that there were 12 days out of service, even though repairs were completed on September 22, 2001, because a reasonable interpretation of Rule 2.30.001(2)(c), F.A.C., requires that adequate notice be given to a consumer upon completion of repairs. The Consumer telephoned the service agent several times prior to September 22, 2001, to inquire if repairs were completed. The Manufacturer did not attempt to notify the Consumer that the repairs were completed until the afternoon of September 22, 2001; however, the Consumer’s family had left town for the weekend. The repair facility was closed on Sunday. When the family returned from their weekend trip, the vehicle was retrieved on Monday, Sept. 24. The Board held that there wasn’t adequate notice to the Consumer that repairs were completed on September 22, 2001; accordingly, it was presumed that a reasonable number of attempts were undertaken to conform the vehicle to the warranty, because the vehicle had been out of service for repair of nonconformities for 31 days. 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.

Houston v. Ford Motor Company, 2001-0830/JAX (Fla. NMVAB October 23, 2001).

The Board concluded that an engine idle fluctuation and stalling may or may not have been related to each other; however, they did constitute nonconformities under the statute. The Consumer did not experience the engine stalling nonconformity after the repair attempt of May 7, 2001, when several fuel system components were replaced. This repair attempt was prior to the Manufacturer's final repair attempt of July 2, 2001. During the final repair attempt, the transmission was malfunctioning and causing a fluctuation in the engine rpm's that would be detectable by the driver. After the final repair attempt, as evidenced by test drives and diagnostic testing of the vehicle on October 1, 2001, and the Board's inspection of the vehicle during the hearing, the engine idle fluctuation returned to normal levels. Because the nonconformities were corrected within a reasonable number of attempts, the Consumer was not entitled to the requested repurchase remedy.

Final Repair Attempt under §681.104(1)(a), F.S. and Post-notice inspection or repair under §681.104(1)(b), F.S.

Leoni v. BMW of North America, LLC., 2001-0815/TLH (Fla. NMVAB October 11, 2001).

The Manufacturer argued that it was not afforded its statutory 10-day final attempt to cure the nonconformity, or its "statutory final opportunity to inspect or repair" the Consumer's vehicle. The Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days, and to provide the Manufacturer with a final opportunity to repair the vehicle, because three or more repair attempts had been made to repair an air conditioner nonconformity. Following the Manufacturer's receipt of the written notification, an appointment was scheduled in Tallahassee for August 22, 2001, to allow the Manufacturer's Jacksonville representative an opportunity to address the Consumer's concerns. According to the Manufacturer's general practice, the Consumer was told that he could drop off the vehicle one day early if that was more convenient for him. The Consumer dropped off the vehicle two days early on August 20, 2001. Although this was unexpected, the dealership provided him with a loaner vehicle to use in the interim. On August 21, 2001, the Consumer retrieved his own vehicle, because the loaner vehicle's air conditioner did not work to his satisfaction. Based on these facts and circumstances, the Board held that, although the Consumer sent the required written notification to the Manufacturer, he failed to permit the Manufacturer its statutory opportunity for either a final repair attempt, or a post-notice inspection or repair; therefore, the case was dismissed because the Board could not conclude that the Manufacturer had a reasonable number of attempts to conform the vehicle to the warranty.

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

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

Sahlman v. DaimlerChrysler Motors Corporation, 2001-0906/TPA (Fla. NMVAB November 9, 2001).

The Manufacturer argued that the Consumer's case should be dismissed, because the Request for Arbitration was filed more than 60 days after the expiration of the Lemon Law rights period. The Manufacturer contended that the Consumer's last day to file was September 17, 2001; however, the Consumer filed one day late on September 18, 2001. The date 60 days after the expiration of the Consumer's Lemon Law rights period was Sunday, September 16, 2001. The consumer signed and dated the Request for Arbitration on Saturday, September 15, 2001, and sent it by express mail on Sunday, September 16, 2001. The Express Mail postal receipt was marked "NO SVC GUARANTEE." The Consumer claimed that the terrorist events of September 11, 2001, caused the United States Postal Service to be unable to accomplish overnight delivery, and requested that the Board consider his filing timely. The Board concluded that the 60th day being a Sunday, the last day to file the Request for Arbitration was Monday, September 17, 2001; therefore, the filing was untimely when received and filed on Tuesday, September 18, 2001. The case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Gilbert v. Toyota Motor Sales, U.S.A., Inc., 2001-0862/TLH (Fla. NMVAB October 22, 2001). The Board found that the Consumer's vibration upon braking was a nonconformity. The Consumer claimed the following incidental charges were incurred as a direct result of the nonconformity: \$9.09 for registered mail and return receipt postage in mailing the written defect notification to the Manufacturer; \$13.95 for express mail and return receipt postage in mailing the Request for Arbitration to the Florida Department of Agriculture and Consumer Services, Division of Consumer Services; and \$8.80 for certified mail and return receipt postage in mailing the Consumer's Prehearing Information Sheet to the Office of Attorney General and Toyota Motor Sales, U.S.A., Inc. The Manufacturer objected to reimbursement of the charges that the Consumer incurred in sending the Request for Arbitration and Prehearing Information sheet, because the statute and rules did not require that the Consumer send these pleadings via express or certified mail. The Consumer testified that she sent the pleadings in this fashion so that she had verification and proof that they were received by the intended recipient. The Board concluded that these postage charges constituted reasonable costs directly caused by the nonconformity and included reimbursement of these charges as part of the refund awarded the Consumer.

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

Lindstrom v. Ford Motor Company, 2001-0770/ORL (Fla. NMVAB October 3, 2001).

The net trade in allowance of \$7,200.00 reflected on the purchase contract was not acceptable to the Consumer. In accordance with Section 681.102(19), Florida Statutes, the Manufacturer provided a copy of the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, which the Board was required to utilize, and which reflected a retail price of the Consumer's trade-in vehicle of \$12,975.00, inclusive of \$125.00 for power seats. The Manufacturer argued that the Board should reduce this amount by \$700.00 for "high mileage," and by \$200.00 for "reconditioning costs." In support of this argument, the Manufacturer relied on the guide, which provided at the bottom of its pages, "adjust for mileage," and "deduct for reconditioning." The Consumer objected to the deduction for reconditioning arguing that all trade-in vehicles are reconditioned. The Consumer testified that she had some scratches in the paint, and she agreed that a dealer trade-in appraisal reflected that the cost of reconditioning the vehicle was \$200.00. The Board concluded that, in calculating the amount to be refunded as the net trade-in allowance, the reference in Section 681.102(19), Florida Statutes to the NADA Official Used Car Guide (Southeaster Edition) contemplated utilizing the entire book, including the high mileage chart and the cost of reconditioning. Accordingly, the Board awarded \$12,075.00 as the net trade-in allowance.

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

Nagar v. Mercedes-Benz USA, Inc., 2001-0703/FTM (Fla. NMVAB October 25, 2001).

The Manufacturer stipulated that the Consumer's vehicle was a "Lemon." The Consumer leased the vehicle from the dealer. During the remedy phase of the hearing, the Board was required to calculate the Manufacturer's reasonable offset for the Consumer's use of the vehicle. The statutorily mandated calculation requires that the Board utilize the "purchase price" of the vehicle in determining the offset for use. The "lease price" is not the "purchase price." Counsel for the Consumer asserted that the price at which the dealer purchased the vehicle from the Manufacturer should be utilized as the purchase price for purposes of calculating the reasonable offset for use. The lease agreement provided that, if Mercedes-Benz Credit Corporation (MBCC) was not the lessor, the lessor (dealer) may assign all rights, title and interest in the lease and vehicle to MBCC. The Consumer's Request for Arbitration listed MBCC as the lessor, and lease payments were made to MBCC. The Manufacturer submitted an invoice reflecting the sale of the vehicle by the dealer to MBCC at a sale price of \$40,640.00, which the Manufacturer contended was the purchase price of the vehicle. The Board concluded that MBCC was the lessor and the "purchase price" of the vehicle was \$40,640.00, which was utilized in calculating the reasonable offset for use.

DeWitte and Murphy v. DaimlerChrysler Motors Corporation and Centurion Vehicles, Inc., 2001-0942/WPB (Fla. NMVAB December 28, 2001).

Prior to the Board's hearing, the Consumers voluntarily participated in an arbitration proceeding conducted by the National Center for Dispute Settlement, a non-certified dispute resolution program

sponsored by DaimlerChrysler. The mileage on the vehicle's odometer, and attributable to the Consumers, on the date of the NCDS arbitration hearing was approximately 25,000 miles. The Board's arbitration hearing was more than one year later, and the mileage attributable to the Consumers was 50,658 miles. During the calculations of the reasonable offset for use, the Consumers requested that the Board utilize the mileage as of the date of the NCDS hearing. The Board denied this request, because the National Center for Dispute Settlement was not a certified procedure, and because of the passage of time since their participation in that program.

PROCEDURAL ISSUES

Gilliam v. General Motors Corporation, Pontiac-GMC Division, 2001-0850/TLH (Fla. NMVAB October 19, 2001).

Prior to the commencement of the hearing, the Board considered the Consumers' timely filed written request to amend their Request for Arbitration to include an additional problem; to wit: "driver side door hinge welding breaking away from body of vehicle." Upon review of the record, the Board noted that the Consumers complained to the Manufacturer's authorized service agent about a popping noise caused by a dry door hinge during one repair visit, and this problem was one of many problems that was presented at the BBB/AUTOLINE hearing, the state-certified informal dispute program established by the Manufacturer. Consequently, the Board determined that it was appropriate to take testimony on and consider this additional problem. However, after considering the evidence, the case was dismissed, because the Board concluded that the problems did not substantially impair the use, value or safety of the vehicle.