

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

**QUARTERLY CASE SUMMARIES**

July 1998 - September 1998 (3rd Quarter)

**JURISDICTION:**

*Wilhoite v. Ford Motor Company*, 1999-0698/TPA (Fla. NMVAB September 15, 1998)

The Consumers' initial Request for Arbitration was denied and the case dismissed because they failed to allow the Manufacturer an opportunity to perform a final repair attempt. The Consumers filed a second request which was approved because they demonstrated a significant change in circumstances. The Consumers complained that the vehicle "bottomed out" and "clunked" when driving over bumps or uneven surfaces. The Manufacturer argued that the maximum cargo weight capacity was exceeded when the Consumers and their two children occupied the vehicle. The Board concluded that the "suspension problem" substantially impaired the value and safety of the vehicle. The Manufacturer stipulated that it was afforded a final repair attempt. A recommendation that the tires be replaced was made, but no repairs were performed. Thereafter, the Consumers replaced the tires. The problem continued to exist after the final repair attempt. The Board concluded that the Manufacturer failed to conform the vehicle to the warranty after a reasonable number of repair attempts and granted a refund to the Consumers.

**Consumer §681.102(4), F.S. (1995)**

*Key Buick Company v. Bluebird Body Company, Cummins Engine Company, Inc., Spartan Motors, Inc., and Allison Transmission Company*, 1998-0192/JAX (Fla. NMVAB August 23, 1998)

Cummins and Spartan argued that the Consumer was not a "Consumer" under the Lemon Law, notwithstanding the decision reached by the 2nd DCA in *Results Real Estate v. Lazy Days R.V. Center*, 505 So.2d 587 (Fla. 2d DCA 1987). Counsel argued that, even though the third "catch-all phrase" under the definition of "Consumer" applies to any person who can show that they are entitled to enforce the terms of the warranty, the vehicle must still be used primarily for household and personal use, not for commercial and business purposes as it was used by Key Buick. The Board rejected the Manufacturers' contention based on the *Results* decision, concluding that there was nothing in the language of that decision suggesting that the person entitled by the terms of the warranty to enforce the obligations of the warranty must restrict their use of the vehicle to personal, family or household

purposes. Additionally, the Board held there was no evidence to establish that Key Buick was not entitled to enforce the obligations of the Manufacturers' warranties. The Consumer won on the merits and was granted a refund.

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

*Wieder v. Cummins Engine Company, Inc., Fleetwood Motor Homes & Spartan Motors, Inc.*  
1998-0112/WPB (Fla. NMVAB July 14, 1998)

The Manufacturers contended that the Consumers were not qualified for relief because the vehicle was not "sold" in the state of Florida. The Board relied on the definition of "motor vehicle" under Chapter 681, and the definition of "sale" under the Uniform Commercial Code in rendering its decision. The Board found that the Consumers agreed to accept the subject recreational vehicle from Beaudry RV in Tucson, Arizona, but actually took delivery of the vehicle at Fleetwood's main office in Indiana. The Retail Buyers Order was from Beaudry's in Tucson, Arizona, and the original title and tags, plus the odometer statement was from the state of Arizona. The Board concluded that the vehicle was not sold in Florida; therefore, it did not constitute a "motor vehicle" as defined, and the Consumers were not entitled to relief.

*Bullock v. Ford Motor Company & Lazy Daze, Inc.*, 1998-0648/ORL (Fla. NMVAB September 14, 1998)

Upon receipt of Lazy Daze's motion to dismiss, the Board held a telephone hearing to address the Manufacturer's contention that the recreation vehicle was not a "motor vehicle" as defined in the statute, because the vehicle was not sold in Florida. The original owner purchased the recreation vehicle in California, and subsequently sold the vehicle to the Consumer in Florida. The Board looked to the statutory definitions of "consumer" and "motor vehicle," and concluded that, although a subsequent transferee of a motor vehicle stands in the shoes of the original purchaser for purposes of the Lemon Law, the Consumer did not qualify for relief because the original sale had to take place in Florida; therefore, the vehicle did not meet the statutory definition of "motor vehicle" and as such, the Consumer was not a "consumer" as defined in the Statute.

*Bowling v. Ford Motor Company*, 1998-0503/MIA (Fla. NMVAB July 17, 1998)

The Board rejected the Manufacturer's contention that the Consumer was not entitled to relief because his vehicle was a truck that exceeded 10,000 pounds gross vehicle weight, and was not a "motor vehicle" as defined in the Lemon Law. The Manufacturer argued that, at the final repair attempt, the vehicle weighed 10,220 pounds, including the driver, and that this weight caused the brake

nonconformity. The Consumer had the vehicle weighed at two different weighing facilities after the final repair and the weight with the driver was less than 10,000 pounds. The Board found that the Manufacturer only weighed the vehicle once, and during all previous repair attempts, never indicated that the vehicle exceeded the gross weight or contributed to the nonconformity. The Board rejected the Manufacturer's argument as unsupported by the greater weight of the evidence and granted relief to the Consumer.

*Spires v. American Suzuki Motor Corporation*, 1998-0579/FTM (Fla. NMVAB August 4, 1998)

The Manufacturer contended that the Board lacked jurisdiction to hear the case because the vehicle was not a "motor vehicle" under the statute, since the Consumer purchased it "used." The Board found that the Consumer's financing documentation indicated that the vehicle was "used," and the title history indicated that the dealer, who sold the vehicle to the Consumer, acquired the vehicle from an auction after it had been initially leased to a Lisa Johnson. The Lemon Law defines "motor vehicle" as a new vehicle. Since the term "new vehicle" was not defined under the Lemon Law, the Board looked to Section 320.60, Florida Statutes (1995), and concluded that Lisa Johnson was the ultimate purchaser under that definition of "motor vehicle," and that the Consumer was a second hand purchaser under the definition of "used motor vehicle" in §320.60; therefore, the vehicle was not a new vehicle, and the case was dismissed.

*Tucker v. BMW of North America, Inc.*, 1998-0590/FTL (Fla. NMVAB August 25, 1998)

The Manufacturer asserted that the case should be dismissed because the Consumer purchased her vehicle as a "used" vehicle, and therefore it was not a "motor vehicle" within the meaning of the statute. Prior to the Consumer's purchase, the vehicle was purchased by the dealership for use as a "commercial loaner" vehicle. When the Consumer purchased it, she dealt with the Used Car manager in the Used Car portion of the dealership. The Consumer asserted that she was told it was a demonstrator vehicle not a used vehicle. However, her purchase document, which was received into evidence by the Board, indicated that the vehicle was being sold as a "used" vehicle. The Board dismissed the case because the vehicle was not a new vehicle; therefore, it did not constitute a "motor vehicle" as defined by the statute.

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

*Campos v. Chrysler Corporation*, 1998-0635/FTL (Fla. NMVAB August 25, 1998)

The Manufacturer contended that the Consumer's complaint of paint defects was not covered by its warranty because the defects were the result of "acts of God" or "environmental conditions" which

were expressly excluded from coverage. The Manufacturer presented testimony that, on one occasion when the vehicle was in for repairs, it was covered with bird droppings. When a specific area was examined under a magnifying glass, damage from bird droppings was visible in the paint. The Board inspected the vehicle during the hearing and was able to see the paint problems as described by the Consumer; thereafter, the Board concluded that the written warranty expressly excluded defects caused by “acts of God” or “environmental conditions,” and that the evidence presented, in conjunction with the inspection, established that the defects were the result of outside forces such as bird droppings or rocks hitting the vehicle, and not by defects in the materials or workmanship of the vehicle. Since the defects complained of were not covered by the warranty, the case was dismissed.

**Whether Problem First Reported During the Lemon Law Rights Period §681.103(1), F.S. (1995)**

*Acuna v. Ford Motor Company*, 1998-0563/MIA (Fla. NMVAB August 12, 1998)

The Manufacturer contended that the alleged nonconformity was not first reported during the Lemon Law rights period. The Consumers leased the vehicle on July 11, 1996, and on September 30, 1997, they attained 24,000 miles of operation, before reaching 18 months following delivery. The vehicle was first presented to the Manufacturer’s authorized agent for repair of the alleged nonconformity on December 12, 1997. Mr. Acuna testified that he had verbally reported the problem on July 9, 1997, but no written record was made of this complaint. The Board held that Mr. Acuna’s claim that he verbally reported the defect within the Lemon Law rights period was not supported by the evidence; consequently, the defect was not first reported during the rights period. The case was dismissed.

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

*Chrisan v. Ford Motor Company*, 1998-0418/TLH (Fla. NMVAB July 6, 1998)

The Consumer complained that a noxious odor and intermittent smoke entered the cabin of her vehicle through the ventilation of the heating and air conditioning system. The Manufacturer contended that no nonconformity existed; the alleged nonconformity was corrected at the first repair attempt; no final attempt was afforded to the Manufacturer; and the alleged defects did not substantially impair the use, value or safety of the vehicle. The Board concluded that the noxious odor and intermittent smoke were defects or conditions that substantially impaired the use and safety of the vehicle; as such, they constituted nonconformities. The Board found that the vehicle was subjected to repair for the same nonconformities on at least three occasions; thereafter, a final repair was attempted. The Board held that the Consumer met the statutory presumption regarding a reasonable number of attempts and granted relief to the Consumer.

*Locke v. Ford Motor Company*, 1998-0344/TLH (Fla. NMVAB July 13, 1998)

The Consumer complained of intermittent failure of the electrical system as evidenced by various surges of the vehicle and multiple gauge and lighting problems. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Board concluded that the problem complained of was a defect or condition that substantially impaired the use and safety of the vehicle and as such, constituted a nonconformity. The Board held that the Consumer met the statutory presumption regarding a reasonable number of attempts to conform the vehicle to the Manufacturer's warranty, and granted relief to the Consumer.

*Cadenhead v. Toyota Motor Sales USA, Inc.*, 1998-0538/PEN (Fla. NMVAB July 17, 1998)

The Consumers complained of a roaring sound in the front end of the vehicle which was most prevalent when it was driven at highway speeds. The Manufacturer contended that this problem did not substantially impair the use, value or safety of the vehicle. The Board test drove the vehicle during the hearing and heard noise and felt a vibration in the front end. The Board concluded that this problem substantially impaired the value of the vehicle and, as such, it constituted a nonconformity for which the Consumers were entitled to relief.

*Thomas v. Ford Motor Company*, 1998-0507/PEN (Fla. NMVAB July 29, 1998)

The Consumer complained of excessive wind noise emanating from the front of the vehicle and most notable when the vehicle was driven at speeds greater than 68 miles per hour. The Manufacturer contended that this problem was not a nonconformity. During the hearing, the Board inspected and test drove the vehicle, and experienced noise at various speeds. The Board found that the excessive wind noise was a nonconformity and granted relief to the Consumer.

*Sheppard v. Ford Motor Company*, 1998-0657/TLH (Fla. NMVAB August 31, 1998)

The Consumer complained of severe static and distortion during radio operation causing the radio to be unusable. The Consumer testified that she frequently drove long distances and depended on the radio to operate reliably. The Board rejected the Manufacturer's contention that the problem was not a nonconformity, and awarded the Consumers a refund, because the inoperable radio substantially impaired the value of the vehicle.

*Rains v. Toyota Motor Sales USA, Inc.*, 1998-0520/TLH (Fla. NMVAB July 10, 1998)

The Consumers complained of scratches and swirls in the paint over the entire body of the vehicle. The Manufacturer contended that the alleged defect did not amount to a nonconformity. The Board inspected the vehicle during the hearing and observed fine scratches on the vehicle upon extremely close inspection; thereafter, the Board concluded that the problem complained of by the Consumers did not substantially impair the use, value or safety of the vehicle so as to constitute a nonconformity. The case was dismissed.

*Diaz v. Ford Motor Company*, 1998-0702/MIA (Fla. NMVAB September 9, 1998)

The Consumer complained of a noise in the front end of the vehicle when making turns, which was more noticeable upon first operating the vehicle in the morning. The Manufacturer contended that this alleged defect was not a nonconformity. The Manufacturer asserted that during the prehearing inspection test drive the noise could not be heard. Additionally, during an inspection of the vehicle, no defective parts were discovered, but it appeared that the brake pads and tires were worn and needed to be replaced. The Board concluded that, although the noise existed, it did not constitute a nonconformity. The fact that the Consumer did not file her Request for Arbitration until one year after the Manufacturer received the defect notification, and that no repair attempts were made after the final attempt, were factors that supported the Board's conclusion that the noise problem was not substantial.

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

### **What Constitutes a Repair Attempt §681.104(1)(a), (3)(a)1.:**

*Wills v. Fleetwood Motor Homes and Spartan Motors, Inc.*, 1998-0308/FTM (Fla. NMVAB August 3, 1998)

Spartan Motors, Inc., contended that it was not afforded three repair attempts prior to receipt of written notification from the Consumers. The vehicle was presented for repair of rear axle noise on October 3, 1996, and January 20, 1997. The Consumers initially presented the vehicle for repair on March 18, 1996; however, although the problem was mentioned to the authorized service agent, there was no examination or repair. On February 26, 1997, the Consumers sent a letter to the Manufacturer advising that the problem was worse, and requesting action by the Manufacturer. By response letter dated March 13, 1997, the Manufacturer advised the Consumers that the noise was normal and within specifications and, therefore, no repair would be undertaken. The Consumers sent another letter and again received the same response. A majority of the Board concluded that the third repair attempt occurred on March 13, 1997, when the Manufacturer declined to conduct further repairs. The Board held that the rear axle noise substantially impaired the use of the vehicle, declared the vehicle a "Lemon" and awarded a refund to the Consumers.

### **What Constitutes a Reasonable Number of Attempts §681.104:**

*Toledo v. Chrysler Corporation*, 1998-0607/MIA (Fla. NMVAB August 17, 1998)

The Consumer complained of multiple problems, including air noise in the back of the vehicle. The Manufacturer contended that they did not have a reasonable number of attempts to conform the vehicle to the warranty, and that the alleged defects did not constitute nonconformities. During the hearing, the Board agreed to inspect and test drive the vehicle; however, upon inspection, the Board decided it was unsafe to drive the vehicle because of worn tire tread and tire “cupping.” The Board concluded that the statute does not define how many attempts are reasonable and that the statute creates a presumption of a reasonable number of attempts if the terms of the presumption are met; however, the Consumer is not required to present evidence to meet the statutory presumption. Based on the evidence presented, the Board held that the Consumer failed to prove the alleged nonconformities had been subjected to repair attempts or days out of service sufficient to establish the Manufacturer was given a reasonable opportunity to conform the vehicle to the warranty. The Board further concluded that the air noise problem did not constitute a nonconformity, but was likely caused by the condition of the vehicle’s tires. The Board made no ruling as to whether the other problems complained of constituted nonconformities. The case was dismissed.

*Baustert v. Beaver Coaches, Inc.*, 1998-0409/STP (Fla. NMVAB August 28, 1998)

The Consumers complained of soot and fumes intrusion into their recreation vehicle; broken welds at the rear of the vehicle; and defects in the electrical system. The Board found that the vehicle was presented for repair of the soot and fumes intrusion and electrical problems on two occasions prior to sending notification to the Manufacturer. The broken weld problem was not subjected to repair by the Manufacturer’s authorized agent. The Board also found that during the Consumers’ “walk-through” of the recreation vehicle after paying for it on July 24, 1997, they noticed dirt on the carpet around the bed/engine cover and requested that it be cleaned as part of the delivery preparation conducted by the selling dealer. The Consumers contended that was the first repair attempt to the soot and fumes intrusion and electrical problems. The Manufacturer contended that they were not afforded a reasonable opportunity to conform the vehicle to the warranty since the pre-delivery inspection did not put the Manufacturer’s agent on notice; consequently, the Consumers failed to show three repair attempts prior to sending notification. The Board concluded that the greater weight of the evidence established that the predelivery carpet cleaning did not constitute a repair attempt; therefore, under those circumstances, the Manufacturer was not given a reasonable opportunity to conform the vehicle to the warranty.

*Morrow v. General Motors Corporation, Chevrolet Motor Division*, 1998-0619/WPB (Fla. NMVAB August 31, 1998)

The Consumers presented their vehicle for repair of an intermittent air conditioner malfunction to the Manufacturer's authorized agent on two occasions prior to sending written notification to the Manufacturer. Thereafter, the vehicle was presented for the final repair attempt, during which the vehicle was inspected, the problem could not be verified and no repairs were performed. The problem continued to exist after the final repair attempt, and the vehicle was again submitted for repair of this problem. The Board concluded that, under those circumstances, the two repair attempts prior to sending notification were sufficient to afford the Manufacturer a reasonable number of attempts to conform the vehicle to the warranty. The Consumers were awarded a refund.

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

*Douglas v. Toyota Motor Sales U.S.A., Inc.*, 1998-0378/TPA (Fla. NMVAB July 2, 1998)

The Consumer complained of intermittent grinding and vibration when she applied the brakes. During the Manufacturer's final repair attempt, the front brake rotors were cut, the front pads were replaced and the rear brakes were cleaned and adjusted. The intermittent grinding and vibration did not occur after the final repair attempt; however, the Consumer complained that she experienced stopping problems for the first time since the final repair attempt. The Board found that the intermittent grinding and vibration problem was cured at the final repair attempt, and since the new problem had not been subjected to repair, it was not properly before the Board. The Manufacturer having conformed the vehicle to warranty after a reasonable number of attempts, the Consumer was not qualified for relief.

*Saenz v. Kia Motors America, Inc.*, 1998-0527/MIA (Fla. NMVAB July 21, 1998)

The Consumer sent a defect notice to the Manufacturer which was received by the Manufacturer on September 2, 1997. By letter dated September 4, 1997, the Manufacturer directed the Consumer to present his vehicle to a specific repair agent at 9:00 a.m. on October 1, 1997. The Consumer took the vehicle to the service agent on September 4, 1997, advising the agent that he was presenting the vehicle for the fourth and final repair attempt under the Lemon Law. The Manufacturer was unaware of this repair attempt, and did not have an opportunity to participate in the repair attempt. The Consumer did not present his vehicle on October 1, 1997, because he felt that the Manufacturer's response was untimely and that the defect was repaired on September 4, 1997. The Manufacturer contended that it was not afforded its statutory final repair attempt. The Board concluded that Manufacturer timely responded to the defect notice and directed the Consumer to a reasonably accessible repair facility and scheduled the appointment within a reasonable time after the Consumer's receipt of the Manufacturer's response. The Consumer's untimely response assumption was not substantiated by the evidence, since

the Consumer was unable to dispute the date the Manufacturer received the notice, although this information would have been readily available. The case was dismissed.

*Sergent v. Toyota Motor Sale, U.S.A., Inc.*, 1998-0640/ORL (Fla. NMVAB September 8, 1998)

The Consumers complained of the air conditioner intermittently blowing hot air. The Manufacturer stipulated that the vehicle was brought in for repair of this problem on four dates. While the vehicle was in for repair on the fourth date, the Consumers sent notice for final repair. The vehicle was returned to the Consumers and, shortly thereafter, the Manufacturer received the defect notice and contacted the Consumers by telephone. The Consumers advised the Manufacturer that the air conditioning was working properly and no repairs were necessary. No final repair attempt was scheduled. Approximately eight months later, the Consumers again experienced the same problem, and filed their Request for Arbitration. The Manufacturer contended that it was not afforded a final repair attempt, because at the time of receipt of the defect notice, the problem had been repaired, and there was no reason to conduct a final repair attempt. The Board concluded that the Manufacturer was not afforded a final opportunity to conform the vehicle to the warranty, denied the request for relief and dismissed the case.

*Ortiz & Torres v. Chrysler Corporation*, 1998-0681/ORL (Fla. NMVAB September 11, 1998)

The Consumers complained of intermittent brake pulsation and brake noise. The vehicle was presented to the Manufacturer's authorized agent for a final repair attempt. The Board concluded that the nonconformity was cured at the final repair attempt after the brake rotors, pads, rear brake shoes and drums were replaced, and the calipers were cleaned, and "brake quiet" was applied to the brake shoes and pads. The Board denied the Consumers' request for relief and dismissed the case.

*Medlock v. Ford Motor Company*, 1998-0336/MIA (Fla. NMVAB September 22, 1998)

The Consumers sent written notification to the Ford Dispute Settlement Board, but did not send written notification to Ford Motor Company. The Board agreed with the Manufacturer's contention that it was not provided with the statutorily required written notification and therefore it was denied a final repair opportunity. The Board concluded that the Consumers were not entitled to relief at that time and dismissed the case.

*Johnson v. Beaver Coaches, Inc.* 1998-0448/WPB (Fla. NMVAB July 14, 1998)

The Consumers took their recreational vehicle to the Manufacturer's authorized service agent for repair of water leaks in the cab on at least three occasions prior to sending written notice to the Manufacturer. The Manufacturer received the notice but failed to respond within 10 days; therefore, the requirement that the Manufacturer be given a final repair attempt did not apply. The Board presumed that a reasonable number of attempts had been undertaken to conform the vehicle to its warranty; the Manufacturer having failed to correct the nonconformity within a reasonable number of attempts, the Consumers were entitled to relief. The Manufacturer did not appear at the hearing and did not timely request that the decision be set aside. The Manufacturer subsequently filed an appeal of the Board's decision, and the parties have since settled.

*Goode v. General Motors Corporation, Buick Motor Division*, 1998-0462/MIA (July 29, 1998)

The Manufacturer received written notification of a final opportunity to repair the vehicle; thereafter, a letter acknowledging receipt of the notification was timely sent to the Consumer, however, the Consumer was not directed to deliver her vehicle to a repair facility for a final repair attempt. The Board concluded that the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Board granted relief on the Consumer's engine nonconformity.

*Felsing v. General Motors Corporation, Pontiac-GMC Division*, 1998-0748 (Fla. NMVAB September 18, 1998)

The Consumer complained of excessive oil consumption which resulted in the vehicle's engine being replaced. The Board did not permit the Manufacturer's representative to present any defenses because the Manufacturer's Answer was untimely. The Board found that the Manufacturer timely responded to the defect notification, that the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt, and the valve seals and engine were replaced. However, the final repair attempt was not completed within the statutorily required 10 days. The Board concluded that the Manufacturer failed to complete the final attempt within 10 days of delivery of the vehicle to the repair facility as required by the statute; therefore, the requirement that the Manufacturer be given a final attempt to cure did not apply. Since the Manufacturer failed to correct the nonconformity within a reasonable number of attempts, the Consumer was awarded relief.

*Hayes v. Mitsubishi Motor Sales of America, Inc.*, 1998-0713/TLH (Fla. NMVAB September 24, 1998)

The Consumers complained of a right rear door malfunction and transmission problem. The Manufacturer contended that the final repair attempt was not concluded for either problem. The Board found that the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. No repairs were performed to address the transmission problem, and the Consumers refused to allow the Manufacturer to keep the vehicle overnight so that the appropriate parts to repair the door could be received and installed the next day; moreover, the Consumers did not return the vehicle the next day for the needed repairs. The Board concluded that both problems were nonconformities, because they substantially impaired the value of the vehicle, that the Consumers failed to give the Manufacturer a final opportunity to correct the door nonconformity; however, the Consumers gave the Manufacturer a final opportunity to repair the transmission, the Manufacturer did not do so, and having failed to correct this nonconformity after a reasonable number of attempts, the Consumers were entitled to relief.

**Opportunity to Inspect or Repair After Notice §681.104(1)(b); §681.104(3)(a)2.:**

*Liikala v. Acme Radiator & Air Conditioning, Inc. and Beaver Coaches, Inc.* 1998-0262/ORL (Fla. NMVAB July 14, 1998)

One of Beaver Coaches, Inc.'s contentions was that it was denied the opportunity to conduct repairs of the water leak in the slide-out of the recreation vehicle following receipt of written notice from the Consumers. At the time the Manufacturer received the notice, a pending offer to repair the vehicle, either in Oregon or in Florida when the slide-out rack became available, was already on the table due to previous communications between the Manufacturer and the Consumers. The Manufacturer argued that the Consumers were obligated to allow the repairs. The Board concluded that the water leak in the slide-out did not solely relate to the living facilities of the recreation vehicle and that this problem was a nonconformity; moreover, the vehicle was out of service for repair of nonconformities for 35 days, and the Consumers mailed the required notice to the Manufacturer after 15 or more days. The Board also concluded that the Manufacturer's offer to perform repairs in Oregon or at an undeterminable date in the future in Florida was unreasonable and not contemplated by the statute; furthermore, the offer to repair was not renewed following receipt of the written notice. The Board presumed that a reasonable number of attempts had been undertaken to conform the vehicle to warranty, and since the vehicle was out of service for repair of nonconformities for 35 days, the Consumers were entitled to relief.

**Days Out of Service §681.104(1)(b), (3)(a)2.:**

*Dawes v. Toyota Motor Sale, U.S.A., Inc.*, 1998-0420/TPA (Fla. NMVAB July 2, 1998)

The Manufacturer contended that the Consumers' vehicle was not out of service by reason of repair of nonconformities for 30 or more cumulative calendar days. The Manufacturer argued that the Consumers had alleged 30 days out of service in their Request for Arbitration, and that a portion of those days were attributable to a United Parcel Service strike which impeded the ability of the authorized service agent to procure necessary parts for the Consumers' vehicle. The vehicle was at the Manufacturer's authorized service agent for eight days during this period. The Manufacturer's witnesses testified that the repairs would normally take two days. Based on the evidence, the Board found that the days out on this repair period were three days for a total of 29 cumulative out-of-service days. The Board concluded that the statute does not define how many attempts are required before it can be concluded that the Manufacturer has had a reasonable number; however, the statute presumes a reasonable number of attempts if the vehicle is out of service for a cumulative total of 30 or more days. The Board held that the Consumers were not required to prove the statutory presumption in order to qualify for relief; that the vehicle was out of service for 29 days, and after 15 days, the Consumers sent the required notification. Since the Manufacturer had a reasonable opportunity to conform the vehicle to the warranty, but failed to do so after a reasonable number of attempts, the Consumers were granted relief.

**MANUFACTURER AFFIRMATIVE DEFENSES: §681.104(4)**

*Baker v. General Motors Corporation, Pontiac-GMC Division*, 1998-0611/TLH (Fla. NMVAB August 21, 1998)

The Manufacturer raised three affirmative defenses: the Request for Arbitration was untimely filed; the Request for Arbitration was not filed in good faith; and the alleged defects did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative presented argument at the hearing, but introduced no evidence to support the defenses raised. The Consumers prevailed on a severe brake vibration nonconformity.

**Untimely Filing of the Request for Arbitration §681.109(4)**

*Barlow v. Holiday Rambler Corporation*, 1997-1315/WPB (Fla. NMVAB July 10, 1998)

The Board concluded that the recreation vehicle water leaks constituted a nonconformity under the statute. The Manufacturer contended that the Consumer was not qualified for relief because his Request for Arbitration was not filed within six months after the expiration of his Lemon Law rights

period. Counsel for the Manufacturer argued that the Consumer purchased his vehicle on May 19, 1995, that 18 months from the date of delivery expired on November 18, 1996, that any six-month extension of the rights period expired on May 17, 1997; therefore, the six-month filing period expired on November 16, 1997 and, as a result, the Consumer's Request for Arbitration which was filed on November 17, 1997 was filed one day late. The Board rejected the Manufacturer's determination of the dates, and found that the rights period should be extended six months from November 19, 1996 to May 19, 1997, at which time the period was deemed expired. The Board concluded that the filing date of November 17, 1997, was within six months after the expiration of the rights period; therefore, the Consumer's request was timely filed. The Board granted relief to the Consumer, including multiple collateral and incidental charges.

*Felder v. Ford Motor Company*, 1998-0516/MIA (Fla. NMVAB August 17, 1998)

The Board rejected the Manufacturer's contention that the Consumer's Request for Arbitration was untimely filed, and that there were three repair attempts during the Lemon Law rights period; therefore, the rights period should not be extended. The Board also rejected the Manufacturer's contentions, as unsupported by the greater weight of evidence, that the problem was not a nonconformity and that it was the result of abuse by the Consumer. The Board concluded that the inoperable audio system substantially impaired the use and value of the vehicle and that a reasonable number of attempts had been undertaken to conform the vehicle to the warranty. The Board held that the Lemon Law rights period initially expired in September 1997, when the vehicle reached 24,000 miles of operation. The defect was first reported on September 12, 1996, within the rights period; however, the nonconformity was not cured by the expiration of the rights period. Accordingly, the Board applied the statutory extension and extended the rights period to March 1998. Therefore, the request filed by the Consumer on May 11, 1998, was timely filed and relief was granted.

*Wolff v. Ford Motor Company*, 1998-0392/ORL (Fla. NMVAB July 1, 1998)

The Consumer filed pages one and nine of his Request for Arbitration with the Division of Consumer Services, without any attachments. The Consumer was deemed ineligible for arbitration because the form was incomplete; thereafter, the Consumer submitted a completed form and was deemed potentially eligible. The Manufacturer contended that the case should be dismissed because when the incomplete form was filed, the final repair attempt had not been performed; consequently, the Consumer had not satisfied all preconditions for filing. The Manufacturer also argued that, when the Consumer submitted the completed form, the time for filing had expired. A majority of the Board concluded that, with the statutory extension of the Lemon Law Rights Period, the Consumer's first filing was timely; however, the Consumer was ineligible for arbitration because the final repair attempt had not occurred prior to the date of filing, and the Division could not determine eligibility because the form was incomplete. The Board found that the second filing of the completed form, after the third repair

attempt was performed, was untimely because the time for filing had expired. The case was dismissed.

*Wishengrad v. Toyota Motor Sales U.S.A., Inc.*, 1998-0729/FTL (Fla. NMVAB September 1, 1998)

The Manufacturer contended that the Request for Arbitration was untimely because it was filed more than six months after the expiration of the Lemon Law rights period. In support of its contention, the Manufacturer argued that an extension of the rights period should be granted only when necessary to assist a consumer in acquiring the three repairs required, and since this Consumer had three repair attempts within the rights period, an extension should not be granted because the Consumer was “sitting on her rights.” Further, the Manufacturer argued that the Consumer was not entitled to the extension of the rights period because she did not meet the repair attempts presumption within the extended rights period. The Board concluded that the statutory extension is applied only when necessary to allow the Consumer to meet the statutory presumption. If the rights period was extended, the evidence established that the Consumer did not send notification until after the expiration of the extended rights period; consequently, she did not meet all of the elements to raise the statutory presumption prior to the expiration of the extended rights period, and the extension did not apply. Therefore, the Board held that the request was filed more than six months after the expiration of the rights period, and dismissed the case.

**Accident, Abuse, Neglect, Unauthorized Modification or Alteration §681.102(15), F.S. (1995)**

*Russ v. American Suzuki Motor Corporation*, 1998-0458/WPB (Fla. NMVAB August 10, 1998)

The Consumers complained of a check engine light that intermittently illuminated. There was no pattern as to what conditions caused the light to illuminate. The Consumers did acknowledge that they installed some after-market items, including fog lights, trailer wiring, and a radio. The Manufacturer contended that the problem complained of was the result of after-market wiring modifications made by the Consumers which caused the check engine light to illuminate. The Manufacturer also contended that the problem was not a nonconformity because it did not substantially impair the use, value or safety of the vehicle; additionally, there was never a need for repairs or replacement of parts as a result of the intermittent illumination of the check engine light. The Board concluded that the check engine light problem was caused by the Consumers’ after-market modifications or alterations therefore excluding it from the definition of nonconformity in the statute. The Board also found that even if the problem was not caused by the Consumers’ modifications or alterations, it did not substantially impair the use, value or safety of the vehicle. The case was dismissed.

## **MULTIPLE MANUFACTURERS:**

*Allen v. Ford Motor Company & Holiday Rambler Corporation*, 1998-0126/PEN (Fla. NMVAB July 6, 1998)

The Consumer complained of severe vibration while driving his recreation vehicle at highway speeds. Ford contended that the nonconformity was not warranted by Ford, or alternatively, the alleged defect did not substantially impair the use, value or safety of the vehicle. Holiday Rambler contended that a nonconformity did not exist; it was not allowed sufficient repair attempts, and not provided with a final repair attempt. The Board concluded that the vibration was a defect or condition that substantially impaired the use of the vehicle, thus it constituted a nonconformity. The Board also concluded that both Manufacturers were liable for the nonconformity because the vibration could not be attributable to a specific defect; rather, it was a condition caused by defects in components warranted by both Manufacturers (faulty running gear, including the tag axle). The Board found that a final repair was attempted by Ford; however, since Holiday Rambler did not direct the Consumer to a repair facility, the statutory requirement of a final repair attempt did not apply to Holiday Rambler. The nonconformity continued to exist after Ford's final repair attempt; therefore, it was presumed that a reasonable number of attempts had been undertaken to conform the vehicle to the Manufacturers' warranties. The Board granted relief against both Manufacturers.

*Robertson v. Monaco Coach Corporation, Allison Transmission, and Cummins Engine Company, Inc.*, 1998-0358/JAX (Fla. NMVAB August 12, 1998)

During a prehearing telephone conference, the Board dismissed the case as against Allison Transmission and Cummins Engine Company, Inc., because the Consumers had not alleged any problems or defects pertaining to any components manufactured and warranted by the those Manufacturers. The Board also excluded from consideration complaints regarding the slide-out awning, patio awning, and the slide-out itself as being complaints relating to living facilities which were not covered under the Lemon Law. At the start of the arbitration hearing, the Consumers stipulated that the issues remaining for consideration by the Board were the Consumers' complaints of a windshield water leak, a storage compartment water leak and diesel fumes entering the vehicle. Monaco Coach, the remaining Manufacturer, stipulated to the two water leak complaints, but objected to the Board hearing testimony concerning the diesel fumes problem, because the engine and fuel components were warranted by Cummins Engine Company, Inc., which had been dismissed as a party at the prior prehearing telephone conference. The Board disallowed testimony regarding the diesel fume problem and accepted the parties' stipulations to limit the issues. During the Consumers' testimony, Mr. Robertson testified that the storage compartment leak was cured at the final repair attempt and was no longer a problem. The Board concluded that the windshield water leak was a nonconformity that had been subjected to a reasonable number of repair attempts by Monaco Coach, and since the Manufacturer could not conform the vehicle to its warranty, the Consumers were entitled

to relief.

**REFUND §681.104(2), F.S. (1995):**

*Underwood v. Ford Motor Company*, 1998-0363/WPB (Fla. NMVAB July 31, 1998)

The Board declared the vehicle to be a “Lemon” because of a hesitation problem when turning the vehicle as it would come to a stop. The Consumers sought reimbursement of \$4,000.00 for Owner’s Appreciation Certificates issued to them by the Manufacturer in settlement of a prior claim. The Board declined to award the Consumers the value of the certificates, because they were received by the Consumers as the result of a prior transaction with the Manufacturer.

*Baker v. Toyota Motors Sales U.S.A., Inc.*, 1998-0532/STP (Fla. NMVAB August 19, 1998)

The Board declared the vehicle a “lemon” because of an intermittent vibration felt in the seat and floor when the vehicle was driven at speeds of 52 miles per hour and greater, but lacked sufficient evidence to calculate the refund. The hearing was continued, and following proper notice to the parties, the refund was calculated via telephone conference call. The Board found that the Consumers received an advance of \$250.00 from the Manufacturer’s authorized representative to allow them to place insurance on the vehicle. A lien of \$4,365.26 existed on the trade-in vehicle; both the lien and advance were consolidated with the lease of the subject vehicle. The Manufacturer contended that the refund should be reduced by the amount of the lien and dealer advance, plus 5.18 percent interest on those monies, since that was the interest rate used to calculate the lease payments. The Board awarded a refund of the lease payments less the trade-in lien and dealer advance, and reduced by the statutory offset, but rejected the Manufacturer’s request for the interest as not contemplated by the Lemon Law. The Consumers were also awarded collateral charges for an alarm system.

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

*Wenguer v. General Motors Corporation, Chevrolet Motor Division and Centurion Vehicles, Inc.*, 1998-0812/FTL (Fla. NMVAB September 22, 1998)

The Consumer sought reimbursement of the amount he paid for a bed liner and trailer hitch for a prior vehicle that he transferred to the subject vehicle. The Board concluded that the vehicle was a “Lemon” because of a vibration and awarded the Consumer a refund; however, the Board denied the request for reimbursement of the bed liner and trailer hitch, because the cost was not incurred as a result of the acquisition of the subject vehicle.

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

*Altman v. Mercedes-Benz of North America, Inc.*, 1998-0604/FTM (Fla. NMVAB August 14, 1998)

The Board determined that the pull to the right problem was a nonconformity, and that the intermittent fuel odor problem substantially impaired the safety of the vehicle. At the final repair attempt, the Manufacturer's authorized agent checked the alignment and found it to be "within specifications." No problems were detected with the fuel system. According to the Consumers, the problems continued to exist after the final repair attempt, necessitating funds spent on an alignment at another Manufacturer's authorized agent. Thereafter, while the Consumers were traveling, the vehicle shut down and could not be restarted. The fuel injection control module was replaced, but the fuel odor was not completely eliminated. The Board awarded the Consumers, as incidental charges, their express mail expense for mailing the vehicle defect notice; cost of repairs for alignment; and hotel and food costs associated with the repair while traveling. The Consumers also requested reimbursement for clerical services in the amount of \$181.06. The Manufacturer contended this was not an appropriate incidental charge. The Board awarded reimbursement for \$124.46, which was attributable to correspondence and matters related to the arbitration process.

*Williams v. D.M. Conversions of Florida, Inc. & Ford Motor Company*, 1998-0670/STP (Fla. NMVAB September 2, 1998)

The Board dismissed D.M. Conversion as a party Manufacturer because the intermittent stalling problem was not covered under the conversion warranty. As to Ford, the Board found that the problem complained of was a nonconformity not corrected after a reasonable number of attempts. The Board concluded the vehicle was a "Lemon" and awarded the Consumers a refund, which included \$177.00 for registration fees and \$821.00 for a sealant and detail package as collateral charges; and \$288.90 for a running board repair, necessitated by an accident because of the nonconformity, and \$192.29 for a rental vehicle used during the repair, as incidental charges.

*Ayan v. Ford Motor Company*, 1998-0673/FTL (Fla. NMVAB August 24, 1998)

The Consumer sought, as an incidental charge under the statute, reimbursement of \$75.00 for a rental car that he used while his vehicle was undergoing repairs for a problem other than the problem of which he complained. The Board denied this request on the basis that the rental charge was not incurred as a direct result of the nonconformity. The Consumer was granted a refund for an intermittent transmission nonconformity.

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

*Reed v. Mitsubishi Motor Sales of America, Inc.*, 1998-0601/ORL (Fla. NMVAB August 5, 1998)

The Manufacturer stipulated that the “transmission slips and slams into gear” problem was a nonconformity. The sole issue in dispute was the amount of trade-in allowance which should be refunded to the Consumer. The Consumer executed a “customer order” that reflected a cash price of \$34,321.00 and a net trade-in of \$5,549.00; subsequent thereto, she signed a retail installment contract showing a cash price of \$29,007.65 and a net trade-in allowance of negative \$451.00. Both documents reflected a cash down payment of \$814.03. The Board agreed with the Manufacturer’s contention that the retail installment contract is a more accurate reflection of the purchase transaction, and found that the Consumer contributed a down payment of \$814.03 which was reduced by the negative net trade-in allowance of \$451.00, resulting in a net down payment of \$363.03. The refund was for the net down payment and monthly payments minus the offset.

**MISCELLANEOUS PROCEDURAL ISSUES:**

*Mayes v. Ford Motor Company*, 1998-0643/TLH (Fla. NMVAB August 11, 1998)

The Manufacturer did not appear at the hearing and was declared in default. The Board heard the Consumer’s case and found the vehicle to be a “Lemon” because the significant water leaking at the driver and passenger doors onto the floor of the vehicle substantially impaired the value of the vehicle; consequently, a refund was awarded.

*Young v. American Isuzu Motors*, 1998-0581/WPB (Fla. NMVAB September 4, 1998)

The Manufacturer failed to timely file its Answer and was therefore precluded from raising any affirmative defenses. The Manufacturer also failed to timely notify the Board and the Consumer in writing of the witnesses that it intended to present at the hearing and therefore the two witnesses that attended the hearing were not permitted to testify. The Consumer prevailed on brake and clutch nonconformities.