OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2008 - September 2008 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4) F.S.

Cottman and Grant v. Ford Motor Company, 2008-0243/JAX (Fla. NMVAB July 2, 2008)
The Consumers purchased a new 2006 Ford Expedition in Florida. At the hearing, the Consumers acknowledged that they did not have current possession of the vehicle and that it was repossessed by Ford Motor Credit Company. The Manufacturer argued that the case should be dismissed, because the Consumers did not have possession of the vehicle and were no longer entitled to enforce the terms of the warranty. The Consumers argued that, since Ford Motor Credit Company was a division of Ford Motor Company, the Manufacturer already had clear title to the vehicle in the event the Consumers were awarded a refund. The Board found that since the Consumers no longer had possession of the vehicle, they no longer met any of the three elements of the statutory definition of "consumer." The issue of who repossessed the vehicle was immaterial. Accordingly, the case was dismissed.

Motor Vehicle §681.102(15), F.S.

Torres v. Chrysler LLC, 2008-0331/MIA (Fla. NMVAB August 21, 2008)
The Consumer purchased a new 2007 Dodge 3500 pickup truck in Florida. The Manufacturer argued that the Board did not have jurisdiction to hear the case, because the vehicle's gross weight exceeded 10,000 pounds and therefore it was not a "motor vehicle" as defined by the statute. The Manufacturer presented the vehicle's registration which showed the gross weight to be 10,500 pounds. In addition, the Manufacturer acknowledged that the window sticker on the vehicle showed the weight as 7,655 pounds. However, the Manufacturer argued that the Board should consider the vehicle's 35 gallon diesel tank, five-person seating capacity and the fact that the Consumer had a concrete business. The Consumer testified that the vehicle was for personal use and that he normally only transported his wife and child. The Board found that the gross vehicle weight of the Consumer's truck did not exceed 10,000 pounds; therefore, it was a "motor vehicle" as defined by the statute.

NONCONFORMITY 681.102(16), F.S.

Grossman v. Volkswagen/Audi of America, Inc., 2008-0283/FTL (Fla. NMVAB August 4, 2008)
The Consumers complained of a foul odor coming from the air conditioner vents in their 2006 Audi A6. The foul odor did not dissipate and remained in the vehicle, making the Consumer and

his wife feel nauseated. The Consumer bought a mold testing kit from Home Depot and performed a mold test. He sent the result of the mold test to Advanced Scientific Laboratories which processed the test and issued a report. The report found the presence of fungal spores and hyphae at the location sampled by the Consumer. The report also indicated that the presence of fungal spores and hyphae suggested that the organism identified as *Penicillium* was viable and possessed the capacity for active growth. The Consumer further presented evidence that *Penicillium* had been associated with infections and produced a mycotoxin, ochratoxin A, which was nephrotoxic and carcinogenic. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer’s witness testified that she did not experience any foul odor coming from the air conditioner vents during her inspection of the vehicle. She did notice several large red stains on the floor carpet of the vehicle which she speculated might have attributed to the musty smell the Consumers complained of. She further testified that Audi did not perform any scientific test in the air conditioner vents to determine whether there was any mold or fungi. The Board found the problem to be a defect or condition that substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Dominguez v. Nissan North America, Inc., 2008-0287/MIA (Fla. NMVAB July 25, 2008)
The Consumer complained of receiving poor gas mileage in his 2006 Nissan Sentra. The Consumer testified that the documents affixed to the vehicle at the time of purchase represented that the average gas mileage would be 28 miles per gallon for city driving and 34 miles per gallon for highway driving. The Consumer was informed as to how to calculate gas mileage and determined that his vehicle was receiving 14 miles per gallon in the city and 16 miles per gallon on the highway. The Consumer produced gas receipts to corroborate his testimony. The Manufacturer contended that the one time the gas mileage was measured by the Manufacturer, which was at the time of the final repair attempt, it showed an average of 24 miles per gallon; therefore, there was no nonconformity. The Board found the problem to be a defect or condition that substantially impaired the use and value of the vehicle and awarded the Consumer a refund.

Yonkin v. BMW of North America, Inc., 2008-0275/ORL (Fla. NMVAB July 8, 2008)
The Consumers complained of a defective fuel system in their 2007 BMW 335i. The Manufacturer contended that any problem with the fuel system was the result of accident or neglect by persons other than the Manufacturer or its authorized service agent. More specifically, the Manufacturer’s witness asserted that bad gas was inadvertently pumped into the Consumers' vehicle, resulting in damage to the fuel system. The Consumers were reimbursed by their insurance company for the damage. The Manufacturer’s witness added that this diagnosis was made by the Manufacturer during the second repair attempt; however, the gas in the vehicle was never tested for water or other contaminants on any subsequent repair attempt. The Board concluded that the defective fuel system substantially impaired the use, value and safety of the vehicle and rejected the Manufacturer's argument that it was the result of accident or neglect. Accordingly, the Consumers were rewarded 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.

Lambeth v. American Suzuki Motor Corporation, 2008-0304/PEN (Fla. NMVAB July 7, 2008)
The Consumers' 2007 Suzuki Forenza had a defective cigarette lighter and accessory plug that immediately blew a fuse when used. The Board found this to be a nonconformity. The vehicle was presented to the Manufacturer's authorized service agent for repair on a total of two occasions, one of which was after the Manufacturer received written notification. During one repair attempt, the Consumers were advised not to use the cigarette lighter and accessory outlet. Under the circumstances in this case, the Board found that two repair attempts were sufficient to afford the Manufacturer a reasonable number. Accordingly, the Consumers were awarded a refund.

Dominguez v. Nissan North America, Inc., 2008-0287/MIA (Fla. NMVAB July 25, 2008)
The Manufacturer took the position that the Consumer's complaint of poor gas mileage was not a defect. The Board found it to be a nonconformity. The evidence established that the Manufacturer was given a total of three opportunities to repair the nonconformity, with one such attempt occurring after written notification, yet the nonconformity was not repaired. The Board found that, upon consideration of the evidence and the Manufacturer's position that there was no defect, the Manufacturer had a reasonable number of attempts to correct the nonconformity, but failed to do so. Accordingly, the Consumer was awarded a refund.

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

Thornton v. Chrysler LLC, 2008-0317/TLH (Fla. NMVAB July 30. 2008)
The Consumer purchased a new 2007 Dodge Avenger in Florida. In May of 2008, the Consumer sent a Motor Vehicle Defect Notification form to the Manufacturer, to serve as written notification providing the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on May 19, 2008. On May 27, 2008, the Manufacturer called the telephone number the Consumer provided on her Motor Vehicle Defect Notification form to schedule a final repair attempt for June 11, 2008. The Manufacturer provided this information to the person who answered the telephone, who identified herself as the Consumer's daughter. The Manufacturer also mailed a letter to the Consumer's address on that same date, setting up the time, date and location for the final repair attempt. On June 5, 2008, the Manufacturer called the Consumer's telephone number again, and at that time left a message requesting the Consumer to call and confirm the scheduled final repair attempt. The Manufacturer made an additional call to the Consumer on June 10, 2008, but was not successful in contacting her. The Consumer did not appear at the final repair attempt on June 11, 2008. That same day, the Manufacturer sent another letter to the Consumer, via certified mail, requesting that she contact them to schedule the final repair attempt. That letter was received by the Consumer on or about June 20, 2008, after she had filed her Request for Arbitration. The Board concluded that the Manufacturer responded to the Consumer's written notification in a timely manner and attempted to schedule a final repair attempt; however, the Consumer failed to

make the vehicle available at the scheduled time and place. Consequently, the Manufacturer was not given a final attempt to correct any alleged nonconformities, and the Consumer’s case was dismissed.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair §681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

Baldwin v. BMW of North America, Inc., 2008-0284/TLH (Fla. NMVAB July 7, 2008)
An intermittent ticking noise in the engine of the Consumers' 2007 BMW X3 was found to be a nonconformity. The vehicle was out of service for repair of the nonconformity for a total of 26 cumulative calendar days. The issue at the hearing was whether the Manufacturer had a reasonable number of attempts to repair the nonconformity. The Board concluded that under the circumstances in this case, 26 days was not a sufficient amount of time to afford the Manufacturer a reasonable number of repair attempts. Accordingly, the Consumers' case was dismissed.

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

Torres v. Chrysler LLC, 2008-0331/MIA (Fla. NMVAB August 21, 2008)
The Consumer’s 2007 Dodge 3500 pickup truck had an engine nonconformity which caused the engine light to illuminate and affected the performance of the vehicle. After more than three repair attempts for this defect, the Consumer sent a letter expressing his dissatisfaction with his vehicle to Chrysler Financial and to Eddie Accardi Dodge, the selling dealer. The Consumer never sent notification to Chrysler, LLC. At the hearing, the Manufacturer asserted that it was not given notice and a final repair attempt. The Board concluded that the Consumer did not provide written notification as required by the statute. Accordingly, the Consumer's case was dismissed.

Barnwell v. Chrysler LLC, 2008-0353/FTL (Fla. NMVAB August 27, 2008, 2008)
The Consumer purchased a new 2006 Dodge Ram in Florida. The Consumer sent written notification to “Daimler-Chrysler Motors Company, LLC, Attn: Service Contracts, PO Box 2700, Troy, MI 48007-2700.” Pursuant to the Manufacturer's warranty book, the notification should have been sent to “Daimler-Chrysler Motors Company, LLC, Customer Center, P.O. Box 21-8004, Auburn Hills, MI 48321-8004.” At the hearing, the Manufacturer argued that it did not receive notice as required by statute and therefore, the case should be dismissed. The Board concluded that the notification sent by the Consumer was not sent to the Manufacturer at the address for Florida designated in the Manufacturer's written warranty or owner's manual and was not received by the Manufacturer. Consequently, the Consumer's case was dismissed

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

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

White v. Mazda Motor of America Inc., 2008-0315/STP (Fla. NMVAB August 4, 2008)
The Consumers complained that the transmission would intermittently pop out of gear in their 2006 Mazda 3. This condition caused the clutch to be replaced. The Manufacturer contended that that any vehicle defects were the result of abuse by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer asserted that the problem described by the Consumers was the result of driving habits. The Manufacturer's witness testified that excessive clutch wear comes from either riding the clutch or releasing it at high RPMs, and that forcefully shoving the gear shift into third gear can result in damage to third gear. The Board concluded that the transmission/clutch problem was the result of abuse of the vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the case was dismissed.

MISCELLANEOUS PROCEDURAL ISSUES:

Puente v. Ford Motor Company, 2008-0255/MIA (Fla. NMVAB July 24, 2008)
The Consumers purchased a new 2006 Ford Focus in Florida on January 8, 2006. At the hearing, the Consumers complained of four problems with their vehicle. However, the Consumers first reported these problems to the Manufacturer on February 21, 2008, which was more than 24 months after the delivery of the vehicle and therefore outside the Lemon Law Rights period as defined in Section 681.102(10), F.S. The Board found that the Consumers failed to first report any problem within the time required by the statute. Accordingly, the Consumers' case was dismissed.