OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2003 - March 2003 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Tuckish v. DaimlerChrysler, 2002-1186/FTL (Fla. NMVAB February 13, 2003).
The Manufacturer's representative argued that the vehicle did not meet the definition of a "motor vehicle" under Chapter 681, Florida Statutes, because it was not a "new" vehicle when the Consumer purchased it. The sales contract listed the vehicle as "used," but the Consumer testified that the sales personnel told him that the vehicle was actually new and was only designated as "used" because of the odometer mileage. (The mileage at the time of delivery was 102 miles.) However, prior to the Consumer's purchase, the subject vehicle had already been sold and titled to a different consumer. Apparently, the first consumer sold the vehicle to an automobile dealer, who then sold the vehicle to the Consumer involved in this case. The Board concluded that the vehicle was not "new" when the Consumer purchased it on the ground that the vehicle had been previously sold to an ultimate purchaser. Accordingly, the Board dismissed the Consumer's case.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Herber v. BMW of North America, LLC, 2002-1158/ORL (Fla. NMVAB February 7, 2003).
The Consumers complained of a water leak and damage to the vehicle's interior, which was caused by the water leak. The vehicle was allegedly out of service for repair of nonconformities for 30 or more days. However, some of the days that the Consumer claimed were out-of-service days were attributable to the Consumers' refusal to pick up the vehicle after the final repair attempt was completed. They refused to pick up their vehicle because they insisted that the service agent replace the dash, carpet, seats, and door panels which were damaged by the water leak. The Board ruled that the time attributable to the Consumers' refusal to pick up the vehicle, after being notified that the repair was completed, did not constitute out-of-service days. Therefore, the vehicle was out of service for a total of 21 days, rather than the alleged 30 or more. Accordingly, the Board dismissed the Consumers' case.

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

Ali v. Nissan Motor Corporation USA, 2003-0046/WPB (Fla. NMVAB March 20, 2003).
The Manufacturer contended that the Consumer picked up the vehicle before the Manufacturer's service agent had completed the Manufacturer's final repair attempt. The repair had not been completed because the service agent was waiting for a necessary part to be delivered. However, by the time that the Consumer picked up the vehicle, it had been at the service center for twenty days. The Board ruled that the requirement that the Manufacturer be given a final repair attempt to cure the nonconformity did not apply because the Manufacturer did not complete the final repair within ten days, as required by the Statute. Accordingly, the Consumer was awarded a refund.

Beckman v. DaimlerChrysler Motors Corporation, 2002-1071/TPA (Fla. NMVAB February 10, 2003).
The Manufacturer had not completed its final repair attempt when the Consumer requested Arbitration. The Manufacturer's representative argued that a reading of Chapter 681 in its entirety shows that the legislature intended for a logical progression to be followed whereby the consumer would complete all repair attempts and determine whether a problem still existed before requesting arbitration. The Board disagreed, ruling that the statute does not impose such a requirement and that the Consumer had complied with the filing requirements for lemon law relief. However, the Consumer's claim was ultimately dismissed on other grounds.

DEFINITION OF NONCONFORMITY §681.102(16), F.S.

Rule 2-30.001(2)(a), F.A.C., Definition of "Condition"

Hidalgo-Gato v. Jaguar Cars, 2003-0115/MIA (Fla. NMVAB March 24, 2003).
The Consumer complained of brake vibration and noise. The Board conducted a test drive and found only a slight vibration. Nevertheless, the Board ruled that the brake vibration and noise substantially impaired the use, value, and safety of the vehicle, citing to the vehicle's repair history, especially the fact that the brake rotors became warped and required replacement on three occasions. The Board also cited to the lack of evidence that the Manufacturer or its service agent ever diagnosed or cured the underlying problem. Accordingly, the Consumer was awarded a refund.

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

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Ortiz v. Ford Motor Company, 2002-1167/TLH (Fla. NMVAB February 28, 2003).
The Consumer complained that the head rests in his Mustang did not lock or stay in place and would move up or down with only minimal pressure. The Consumer was concerned that the defective head rests would aggravate his pre-existing neck injuries, in the event of an accident. The Board inspected the vehicle and found that the head rest did not fall down when minimal pressure was applied. The Board ruled that the head-rest problem was not a nonconformity. Accordingly, the Consumer's claim was dismissed.

Lenoci v. General Motors Corporation, Pontiac/GMC Division, 2002-1094/ORL (Fla. NMVAB January 28, 2003).
The Consumer complained that the vehicle would intermittently hesitate upon acceleration and then slam into gear. Although the Manufacturer's service agents made every effort to duplicate the problem during the final repair attempt, the problem was not duplicated, so no repairs were made. The Consumer testified that the problem continued after the final repair attempt. The Board found that the defect was a nonconformity and that it continued to exist after the final repair attempt. Accordingly, the Board awarded the Consumer a refund.

Miller v. Ford Motor Company, 2002-1263/JAX (Fla. NMVAB March 6, 2003).
The Consumers complained that their vehicle would run out of gas when the fuel gauge indicated one-quarter tank of fuel. They also complained that the fuel gauge would fail to indicate a full tank after the tank was filled up. The defect was the subject of four repair attempts. On the fourth attempt, the Consumers were told that the problem was a "normal characteristic" of Cougars and that no repairs were available. At the hearing, the Manufacturer's witness testified that the Consumers' fuel gauge was working within specifications. The Board ruled that the faulty fuel gauge was a nonconformity that substantially impaired the use and safety of the vehicle. Accordingly, the Consumers were awarded a refund.

Guzman v. General Motors Corporation, Chevrolet Motor Division, 2002-1201/JAX (Fla. NMVAB January 24, 2003).
The Consumer complained that the vehicle consumed excessive amounts of oil. In the beginning, the vehicle burned a quart of oil for every 400-500 miles that the vehicle was driven. However, oil consumption declined to three quarts per 8,000 miles that the vehicle was driven after the Manufacturer replaced the pistons. The Manufacturer contended that the level of oil consumption was normal for a high-performance sports car, such as the vehicle involved in this case. The Board ruled that the evidence presented did not establish that the rate of oil consumption was excessive for a high-performance sports car so as to constitute a nonconformity under the statute. Accordingly, the Board dismissed the Consumer's case.

Young v. Mazda Motor of America, Inc., 2002-1136/JAX (Fla. NMVAB January 23, 2003). The Consumer complained that the vehicle's engine unpredictably and intermittently shut off when the vehicle was traveling at speeds of 60 miles per hour or more. The Manufacturer could not duplicate the problem and contended that the problem was not a nonconformity. The Board ruled, "[T]he unpredictable, intermittent engine shut-off when the vehicle was being driven at speeds of 60 miles per hour or more is a defect that, without a doubt, substantially impairs the safety of the vehicle." The Board noted that the Manufacturer had made every effort to attempt to correct the problem, but ultimately the Board concluded that the Consumer should not have to continue to risk her safety to give any further opportunities for repair. Accordingly, the Board awarded the consumer a refund.

Vitolo v. Mercedes-Benz USA, Inc., 2003-0096/FTL (Fla. March 17, 2003). The Consumer complained of musty mildew odor, which only occurred after the initial blowing of air from the air conditioning unit after the vehicle sat idle at least overnight or for a few days. The Consumer asserted that she developed conjunctivitis in her eyes as well as other health problems as a result of the odor. The Board inspected the vehicle and found only a slight odor from the air conditioning unit. The Board noted that the defect must be viewed from the standpoint of a reasonable person in the Consumer's circumstances. The Board found that the Consumer's physical reaction was abnormal. Accordingly, the Consumer's claim was dismissed.

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

Duplissey v. BMW of North America, LLC, 2003-0071/STP (Fla. NMVAB March 26, 2003). The Manufacturer's counsel moved that the Consumer's case be dismissed because it was untimely filed. In support of the motion, counsel argued that the Consumer's Request for Arbitration was initially deemed ineligible on December 3, 2002, because her application was deficient. The Consumer was required to cure the deficiency in her Request no later than 30 days from the date she received notification of ineligibility. The Consumer returned her amended Request on January 16, 2003, which exceeded the 30-day period she was permitted to cure the deficiency in her Request. The Consumer testified that she did not receive the December 3, 2002, notification of ineligibility. The Consumer further testified that when she failed to receive information concerning her Request, she made telephone contact with the Division of Consumer Services to inquire of the status of her case. The Consumer was verbally given an extension within which to return her Request, and she returned the Request and supporting documents to the Division within the extended time. The Board ruled that the greater weight of the evidence supported a conclusion that the Consumer was given an extension within which to return her completed Request form. Accordingly, the Manufacturer's motion to dismiss was denied.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Hillier v. DaimlerChrysler Motors Corporation, 2002-0953/TPA (Fla. NMVAB January 16, 2003).
By the day of the arbitration hearing, the Consumer had missed paying the lienholder several monthly payments. The Manufacturer requested to be relieved of payment to the lienholder for the past-due payments and any late fees or additional interest attributable to the Consumer's nonpayment. The Board denied the Manufacturer's request to be relieved of the past-due payments; however, the Board did relieve the Manufacturer from any responsibility for accrued late fees that resulted from the Consumer's failure to make timely monthly payments.

Incidental Charges §681.102(8), F.S.

Ulsh v. Toyota Motor Sales, U.S.A., 2002-1234/JAX (Fla. NMVAB February 3, 2002).
The Consumer requested $200 as reimbursement for a lost day of work. The Consumer contended that the Manufacturer's representative directed him to take the vehicle to a repair facility that was such a distance away from the Consumer's home that he was forced to miss a day of work. The Board's award included $200 for reimbursement of lost wages.

Rivernider v. General Motors Corporation, Cadillac Motor Division, 2002-0839/ORL (Fla. NMVAB January 27, 2003).
The Consumer requested reimbursement for expert witness fees in the amount of $2,200. The Consumer's expert witness inspected the vehicle, prepared for the hearing, consulted with the Consumer's attorney, and testified at the hearing. The Board awarded the Consumer reimbursement for his expert witness fee, but only in the amount of $500, rather than $2,200 as the Consumer requested.

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

Senker v. Mercedes-Benz USA, Inc., 2002-0850/TPA (Fla. NMVAB January 3, 2003).
The Consumers traded in a 2001 Mercedes automobile for which they received a zero net trade-in allowance. The trade-in allowance was not acceptable to the Consumers. However, the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the transaction did not list the Consumers' trade-in vehicle because it was a current model. Consequently, the Board ruled that the zero net trade-in allowance as reflected in the purchase document would govern.

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

Sutter v. BMW of North America, LLC, 2002-1278/FTM (Fla. NMVAB February 28, 2003). The Consumer requested that the mileage offset exclude 200 miles which the Consumer attributed to driving to and from the repair facility. The Manufacturer objected, but the Board agreed with the Consumer, ruling that 200 miles should not be counted as consumer miles.

MISCELLANEOUS ISSUES

Neves v. Ford Motor Company, 2002-1138/FTM (Fla. NMVAB January 16, 2003). The Consumer complained of a hesitation and surge of the engine when the vehicle was driven between 30 and 45 miles per hour. The Manufacturer defended by contending that the hesitation was normal and that the vehicle was operating as designed. The Board noted that the Lemon Law does not exclude from the definition of "nonconformity" defects which are the result of design or which the Manufacturer deems are "normal" for the subject vehicle. The Board ultimately found the problems amounted to a nonconformity. Accordingly, the Consumer was awarded a refund.

Weingartner v. American Isuzu Motors, Inc., 2002-0972/ORL (Fla. NMVAB February 4, 2003). The Consumer complained of a front-end vibration that occurred at all driving speeds and a pulsation when the brakes were applied. The problems were the subject of five repair attempts plus a final repair attempt. The Manufacturer argued that the problems were cured before or at the final repair attempt, citing as evidence the fact that the Consumer waited more than a year after the final repair attempt to file a request for arbitration. The Board agreed with the Manufacturer. Accordingly, the Consumer's case was dismissed.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2003 - June 2003 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Morris v. Ford Motor Company, 2003-0236/JAX (Fla. NMVAB June 3, 2003).
The Consumer contended that her vehicle was a demonstrator vehicle, but mileage at the time of delivery was more than 20,000 miles, and both the retail purchase agreement and the application for certificate of title, issued to the lien holder, identified the vehicle as used. The Consumer testified that the selling dealer told her the vehicle was new. The Manufacturer's witness testified that the vehicle was leased as new to someone prior to Ms. Morris' purchase and that the original lessee had turned-in the vehicle with over 20,000 miles on it. Because the Lemon Law only applies to "new motor vehicles" but does not otherwise define the phrase, the Board looked to other sections of Florida's Statutes for guidance. The Board looked to section 320.60(10), Fla. Stat. (2002), defining "motor vehicle," and section 320.60(13), Fla. Stat. (2002), defining "used motor vehicle." Both sections define a new vehicle to be a vehicle that has never been sold or otherwise transferred to an "ultimate purchaser." The Board ruled that the previous lease was a transfer to an "ultimate purchaser" and, therefore, the vehicle in question was not a new vehicle when Ms. Morris purchased it. Accordingly, the Consumer's case was dismissed.

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.

Seitz v. Toyota Motor Sales, U.S.A., 2003-0335/ORL (Fla. NMVAB June 3, 2003).
The Manufacturer contended that it did not receive written notification pursuant to the statute's requirements. The Consumer made numerous telephone calls and sent many e-mails to Toyota's Customer Assistance Center in which she complained about the problems with the vehicle. In one e-mail, she wrote that the "car is a lemon," but the e-mail did not state that it constituted written notice pursuant to the Lemon Law or that the Consumer was attempting to pursue Lemon Law relief. Upon these facts, the Board ruled that the Consumer failed to provide the statutorily required written notification. Accordingly, the case was dismissed.

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

Harris v. American Suzuki Motor Corporation, 2003-0278/TLH (Fla. NMVAB May 13, 2003). The Manufacturer stipulated that the vehicle was at a manufacturer's authorized repair facility for at least 30 days for repair of a nonconformity. However, the Manufacturer contended that the days were not "out-of-service" days, because the nonconformity was not covered under the Manufacturer's limited warranty. The Manufacturer argued that the vehicle was "out of warranty" when the Consumer first reported the nonconformity to an authorized service agent, because it had approximately 39,362 miles on its odometer at the time. Since the nonconformity first arose outside the time period covered by the Manufacturer's written, limited warranty, the manufacturer contended that the days attributable to repair were not "out of service" days under the statute. Rule 2-30.001(2)(c) provides that an "out-of-service day" is any day that a vehicle is left for repair of defects which are covered by the manufacturer's warranty. The Board found that the nonconformity was first reported during the "Lemon Law rights period," which, in this case, was longer than the term of the limited warranty. The Manufacturer's statutory duty to repair arises if the defect is first reported during the Lemon Law rights period, irrespective of whether the warranty has expired. The Board noted that expiration of a written warranty does not operate to exclude a vehicle from lemon law coverage or to relieve a manufacturer of its duty to repair the vehicle; rather, the expiration of a written warranty simply means that the Consumer may be charged for the cost of the repair. The Board found the days to be "out of service days" and ultimately awarded the Consumer a refund.

What Constitutes a Reasonable Number of Attempts §681.104(2), F.S.; §681.1095(8), F.S.

Guso v. Jaguar Cars, 2003-0364/MIA (Fla. NMVAB June 6, 2003).
The Manufacturer contended that the nonconformity was cured at the final repair attempt; whereas, the Consumer claimed that the problem was mitigated by the final repair attempt, but continued to occur intermittently, especially when the vehicle was driven in the morning hours after having been parked over night. The entire fuel delivery system was replaced at the final repair attempt, and subsequent testing revealed no "fault" codes stored in the on-board computer or illumination of warning lights. A witness for the Manufacturer testified that he test drove the vehicle at the Manufacturer's pre-hearing inspection and was unable to detect any abnormalities. He admitted, however, that no attempt had been made to replicate the problem by driving the vehicle when the engine was cold and the vehicle was parked all night. The Board found the Consumer's firsthand testimony more persuasive that the nonconformity continued after the final repair attempt and concluded that it was not corrected within a reasonable number of attempts. The Consumer was awarded a refund.

Molina v. BMW of North America, LLC, 2003-0064/MIA (Fla. NMVAB June 11, 2003).
The Consumer complained of an intermittent illumination of the brake warning light and the "service engine soon" light. The Manufacturer contended that the defect was corrected before the final repair attempt, because the service agent was unable to duplicate the problem or find electronic evidence of it

at the final repair attempt. The Consumer testified that the problem had recurred since the final repair attempt. However, during the pre-hearing inspection, the Manufacturer's agent did not find electronic evidence that the warning lights had illuminated. The Manufacturer's representative argued that there would be electronic evidence if the warning lights had in fact illuminated since the final repair attempt. The Board found that the defect continued to exist after the final repair attempt. Accordingly, the Consumer was awarded a refund.

Cabrera v. Ford Motor Company, 2003-0306/MIA (Fla. NMVAB June 20, 2003).
The Manufacturer argued that it had not been afforded a reasonable number of repair attempts, because the Consumer had rejected a repair. The Consumer complained that black smoke intermittently emitted from the vehicle's exhaust pipe and had left a black soot stain surrounding the exhaust pipe. The Manufacturer contended that the Consumer refused the service agent's offer to install an extended exhaust pipe. The Consumer testified that he refused the repair because he did not consider the extended exhaust pipe to be an acceptable fix for the problem. The Board found that the intermittent emission of black smoke was a defect that substantially impaired the use, value and safety of the vehicle, that was not corrected within a reasonable number of attempts. The Board found no merit in the Manufacturer's claim that the Consumer rejected a repair. Accordingly, the Consumer was awarded a refund.

Dumas v. Nissan Motor Corporation USA, 2003-0377/JAX (Fla. NMVAB June 20, 2003).
The Consumer complained of a water leak on the front passenger side of the vehicle when it was driven in heavy rain. The Manufacturer contended that the defect was cured at the final repair attempt. On the final repair attempt, the Manufacturer's service agent attempted to duplicate the problem, driving the vehicle for a total of 21 miles and driving it during a rain storm; however, he could not duplicate the problem, so no repairs were performed. The Consumer continued to experience the passenger side water leak after the final repair attempt and eventually took the vehicle to a different manufacturer service agent. The new service agent was able to duplicate the leak and ultimately cured the problem. The Consumer testified that she had not experienced the leak since that repair. The Board ruled that it was irrelevant that the nonconformity may have been cured after the final repair attempt, except to confirm the continuance of the nonconformity. The nonconformity was not corrected within a reasonable number of attempts and the Consumer was awarded a refund.

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

Leoni v. Land Rover of North America, 2003-0300/TLH (Fla. NMVAB June 19, 2003).
The Manufacturer argued that some of the 32 days that the vehicle was out of service were not "out-of-service" days, because the Consumer delivered the vehicle to Jacksonville Land Rover, despite being informed beforehand that the dealership would not be able to perform the repairs. The Manufacturer's witness testified that he informed the Consumer that another dealership was in the process of taking over as the service agent in Jacksonville and only small repairs would be preformed

by Jacksonville Land Rover in the meantime. The witness testified that he suggested the Consumer take the vehicle to the Tampa or Orlando Land Rover service agent. The Consumer testified that he had a scheduled repair appointment and would not have traveled from Tallahassee to Jacksonville without an appointment. Jacksonville Land Rover opened a repair order and provided the Consumer with alternative transportation while the vehicle was being repaired. The Board ruled that it was unreasonable to expect a Consumer to drive from Tallahassee to Orlando or Tampa when there was at all times an authorized service agent in Jacksonville. The Board concluded that the vehicle was out of service for repair of a nonconformity for 32 days. The Consumer was awarded a refund.

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

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Leoni v. Land Rover of North America, 2003-0300/TLH (Fla. NMVAB June 19, 2003).
The Consumer complained of a loud noise emanating from the dash area of the front passenger compartment of the vehicle. The Manufacturer contended that the defect did not substantially impair the use, value or safety of the vehicle. The noise was characterized as a constant and ear-piercing vibration noise. The Consumer claimed that the noise impeded his ability to concentrate on driving and as a result he did not drive the vehicle as much as he would like. The Manufacturer did not test drive the vehicle while it was out of service for repair, and none of the Manufacturer's witnesses could confirm whether the repair technician drove the vehicle or heard the noise of which the Consumer complained. Noting that the only credible evidence concerning the defect was presented by the Consumer, the Board found that the noise was a defect or condition that substantially impaired the use, value and safety of the vehicle. The Consumer was awarded a refund.

Sparks v. Nissan Motor Corporation USA, 2003-0060/JAX (Fla. NMVAB April 24, 2003).
The Consumer complained that trim tape over the driver's side door was bubbled and crimped despite the service agent's numerous attempts to repair the tape. The Consumer testified that the defective trim tape substantially impaired the value of the vehicle. She was also concerned that she would have to continue to replace the tape at her own expense after the Manufacturer's warranty expired, because the service agent had been unable to permanently correct the problem. The problem with the tape did not affect the operation of the door. The Board inspected the vehicle during the hearing and found the tape was rippled and uneven, but ruled that the crinkled tape did not substantially impair the use, value or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Carslake v. Ford Motor Company, 2003-0033/FTM (Fla. NMVAB April 24, 2003).
The vehicle was towed to an authorized service agent for failure to start. The Manufacturer's service agent informed the Consumer that the problem was the result of the vehicle having been submerged in

salt water, which caused corrosion of the wires and connectors. The Consumer was advised to report the damage to his insurance company. Neither the Consumer nor his insurance company authorized repairs, and the vehicle remained at the authorized service agent. Eight months later, the Consumer filed a Request for Arbitration. At the hearing, a manufacturer's witness testified that he inspected the vehicle and observed that there was "no communication" with the power control module due to corrosion of the wires and connectors, the driver's side shock and frame suffered from rust and corrosion, the driver's door had a residue line where salt water had intruded under the door, sand was found under the carpet and insulation in the rear cargo area, and there was extensive rust in the gas cap area. The Board concluded that the failure to start problem was the result of abuse or neglect of the vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Verger v. Mitsubishi Motor Sales of America, Inc., 2003-0260/FTL (Fla. NMVAB May 26, 2003). The Consumer requested reimbursement for rental car expenses incurred when the Consumer's mother, who is also the co-owner of the vehicle, visited on Mother's Day. The Consumer testified that the vehicle was too hot to use with her elderly mother because of the air conditioning nonconformity. The Board included in its award, reimbursement to the Consumer for the rental car expenses.

Shorb v. DaimlerChrysler Motors Corporation, 2003-0329/JAX (Fla. NMVAB June 5, 2003). The Consumer requested reimbursement for repair costs the Manufacturer's service agent charged him directly. The repair expenses stemmed from a "throttle body service" that was performed when the Consumer presented the vehicle for repair of the nonconformity, an engine ping. The service agent charged the Consumer $122.40 for the throttle body service. A witness for the Manufacturer admitted that the throttle body service was not a service required by normal maintenance and that the service was performed when the vehicle failed the minimum air-flow test. The witness testified that a failed air-flow test is indicative of carbon build-up in the engine, that could cause the engine noise. The Board found the expense to be directly caused by the nonconformity and included it in the award as an incidental charge.

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

Richmond v. BMW of North America, LLC, 2003-0085/FTL (Fla. NMVAB June 3, 2003). After stipulating that the vehicle was a "lemon," the Manufacturer argued that the Consumer's refund should not include an amount for a net trade-in allowance. The Lemon vehicle was leased and in leasing the vehicle the Consumer traded in a vehicle that was itself a leased vehicle. On the lease agreement for the vehicle that the Board determined to be a "lemon," the net allowance for the trade-in

was specified as"N.A." The trade-in allowance specified on the lease agreement was not acceptable to the Consumer, and the Consumer opted for the NADA retail value instead. In calculating the Consumer's refund, the Board applied the NADA Southeast edition retail value of $39,825.00, deducted the payoff amount for the lease of the trade-in of $37,000.00, and awarded the difference, $2,325.00, as the net trade-in allowance to the Consumer.

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

Umphress v. Ford Motor Company, 2003-0428/JAX (Fla. NMVAB June 20, 2003).
Prior to requesting an arbitration before the Florida New Motor Vehicle Arbitration Board (state-run Board), the Consumer submitted to an arbitration hearing by Ford's informal dispute resolution procedure (Ford Dispute Settlement Board), which is not certified by the State of Florida. At the subsequent hearing before the state-run Board, the Manufacturer stipulated that the vehicle was a "lemon" under the statute, but objected to the Board's use of the mileage attributable to the Consumer as of the date of the Ford DSB arbitration hearing to calculate the reasonable offset for use, on the grounds that there was no settlement reached between the parties at the time of the DSB proceeding. The Board rejected the Manufacturer's argument, noting that the statute's reference to an "arbitration hearing" does not specify that it be a hearing before a state-certified procedure or before this Board. The Board, therefore, found that the mileage attributable to the Consumer was that mileage as of the date of the Ford DSB arbitration hearing for purposes of calculating the reasonable offset for use.

PROCEDURAL ISSUES

Riley v. Mazda Motor of America, Inc., 2003-0346/ORL (Fla. NMVAB June 6, 2003).
At the hearing, the Manufacturer sought to assert the statutory affirmative defense that the alleged transmission problems were the result of abuse by persons other than the Manufacturer or its authorized service agent. Contrary to the Board's rules of procedure, the affirmative defense was not raised in the Answer or any amendments thereto filed prior to the hearing. Furthermore, prior to the hearing, counsel for the Consumer requested that the Manufacturer produce all documents it intended to use at the hearing; however, the Manufacturer failed to comply with the discovery request. Notwithstanding such failure, the Manufacturer sought to have its witnesses testify using documents that were not provided to the Consumer or the Board prior to the hearing. The Board noted that the Consumer had no opportunity to prepare for the Manufacturer's affirmative defense because of the Manufacturer's failure to timely assert the defense or provide the requested documents. Consequently, the Board did not permit the Manufacturer to assert the untimely raised affirmative defense at the hearing. In addition, testimony from the Manufacturer's witnesses based upon documents that were not provided to the Consumer prior to the hearing was not permitted.

Classic Construction of Central Florida, Inc. v. BMW of North America, LLC, 2003-0264/TPA (Fla. NMVAB May 16, 2003).

The Consumer contended that the same defect was the subject of four separate repair attempts. However, the authorized service agent failed to provide repair orders for the last two repair attempts, and the Manufacturer argued that the Consumer failed to meet its burden to prove the Manufacturer had been provided a reasonable number of attempts to cure the nonconformity. The Manufacturer argued that, because the Consumer has the burden of proof, it should have propounded a request to produce the repair orders or served a subpoena on the Manufacturer's authorized service agent. The Manufacturer contended that it is the service agent's, rather than the manufacturer's, obligation to provide repair orders to consumers. The Board disagreed, noting that section 681.103(4) places the duty to provide repair orders to consumers upon the manufacturer. The Board reasoned that the Manufacturer would like to ignore its duty to provide written repair orders to the Consumer and then use the Consumer's inability to obtain the repair orders as a defense in a lemon law claim by arguing that the Consumer cannot prove a sufficient number of repair attempts. Finding the Consumer's testimony convincing, the Board ruled that the Manufacturer was provided three repair attempts plus a final repair attempt, pursuant to the requirements of the Statute, and failed to correct the nonconformity. The Consumer was awarded a refund.

Manufacturer's Pre-arbitration Vehicle Inspection ¶¶(9)-(14), ***Hearings Before the Florida New Motor Vehicle Arbitration Board.***

Byrd v. DaimlerChrysler Motors Corporation, 2003-0145/ORL (Fla. NMVAB April 8, 2003). The Consumers requested that the Board not consider evidence that was gathered during the Manufacturer's pre-hearing inspection, because the Manufacturer failed to provide the information to the Consumer seven business before the hearing as required by the Board's rules. The Manufacturer contended that there was no prejudice to the consumer, because the repairs did not change the vehicle. The Board ruled that the Manufacturer was prohibited from testifying about the pre-hearing inspection during the hearing, because the Manufacturer failed to provide the information gathered to the consumer within the time mandated by the applicable rule.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2003 - September 2003 (3rd Quarter)

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.

Schaaff v. Mitsubishi Motors North America, Inc., 2003-0619/FTM (Fla. NMVAB September 26, 2003).
The Consumer's counsel sent a letter to the Manufacturer, but the Manufacturer contended that the letter did not constitute written notice pursuant to the statute. Counsel for the Manufacturer argued that the letter was not mailed to the address provided in the vehicle's warranty manual and the content of the letter was contradictory. The letter totaled two and one-half pages, and the majority of the letter discussed revocation of acceptance, attorney's fees, and loss of confidence in the vehicle. The second paragraph of the letter provided that the Consumer was providing a final opportunity to cure the defects pursuant to the Florida Lemon Law and that the Manufacturer should contact the Consumer's counsel within ten days of receipt of the letter. Counsel for the Manufacturer further argued that the obvious purpose of the letter was to advise the Manufacturer's legal department about a claim for revocation, rather than to request a final repair attempt under the Lemon Law. However, the Board disagreed, a majority finding that the letter put the Manufacturer on notice pursuant to section 681.104, Florida Statutes (2002). The Consumer was ultimately awarded a refund.

What Constitutes a Repair Attempt

Stonelake v. Ford Motor Company, 2003-0615/STP (Fla. NMVAB August 27, 2003).
Counsel for the Manufacturer contended that the vehicle had not been subjected to a reasonable number of repair attempts, arguing that one of the three repair attempts occurred while the Consumer's father owned the vehicle. Initially the subject vehicle was purchased by the Consumer's father, in July 2001, for his own personal, family, or household uses. However, in September 2002, the Consumer's father transferred ownership of the vehicle to the Consumer as a gift, and the Consumer used the vehicle for personal, family or household purposes. Noting that it is the nonconformity and not the consumer that is the subject of the repair attempts, the Board found that the electrical problem was subjected to repair by the Manufacturer's authorized service agent on at least three occasions prior to the Manufacturer receiving written notification and a final repair attempt. Accordingly, the Consumer was awarded a refund.

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

Johnson-Wolthuis v. Toyota Motor Sales, U.S.A., 2003-0554/ORL (Fla. NMVAB August 21, 2003).
The Consumer complained of an improperly fitted driver's side window and door seal that resulted in wind noise and water intrusion. The defect resulted from a repair attempt by the authorized service agent. When the Consumer presented the vehicle for repair, complaining of a clicking noise in the driver's side window, the Manufacturer's authorized service agent replaced the window regulator motor assembly. Thereafter, the Consumer experienced a wind noise when driving the vehicle and water intrusion when the vehicle was washed. The vehicle was subsequently presented for repair of the poorly fitted window and door seal on two occasions, plus a final repair attempt. However, the problem continued to exist after the final repair attempt. The Manufacturer contended that the window motor assembly repair was not related to the poorly fitted window and door seal, and therefore, the window and door seal problem had not been the subject of three repair attempts, plus the final. The Board disagreed, finding that there were a reasonable number of attempts to conform the vehicle to the warranty. Ultimately, the Consumer was awarded a refund.

Caporaletti v. Ford Motor Company, 2003-0577/ORL (Fla. NMVAB September 2, 2003).
Although it was provided only two repair attempts, plus a final attempt after receiving the Consumer's written notification, the Manufacturer stipulated that it was provided a reasonable opportunity to conform the vehicle. The Consumer complained of excessive corrosion on the undercarriage parts of the vehicle. After two repair attempts, the Consumer sent the statutory written notice to the Manufacturer and provided the Manufacturer with a final repair attempt. However, no repairs were attempted on the final repair attempt, and the corrosion continued to exist afterwards. The Manufacturer claimed the affirmative defense that the alleged defect did not substantially impair the use, value, or safety of the vehicle. A witness for the Manufacturer contended that the corrosion was simply "surface rust" that was not detrimental to the vehicle. The Board found the corrosion to be a nonconformity, and noting that the Manufacturer stipulated to being provided a reasonable opportunity to cure, the Board ruled that the Consumer was entitled to a refund.

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

Pruitt v. Ford Motor Company, 2003-0420/TPA (Fla. NMVAB August 4, 2003).
The Manufacturer contended that the nonconformity was cured within a reasonable number of attempts, because it was cured on the "final repair attempt." However, the vehicle was out of service for repair of a nonconformity for 73 cumulative days. The Manufacturer argued that it had an unlimited amount of time to make the vehicle "right" under the days-out-of-service provision of the statute and the precedent established by the court in *BMW v. Singh*. The Manufacturer contended that the "final repair attempt" may last an unlimited amount of time

because, unlike the "3-plus-1 presumption," the days-out-of-service presumption does not require the Manufacturer complete the "final repair attempt" within 10 days. The Board rejected the Manufacturer's argument, noting that neither the plain wording of the statute nor dicta in *BMW v. Singh* supported the proposition that the Manufacturer has an unlimited amount of time to make the vehicle "right" after receipt of the Consumer's written notification of time out of service. Ultimately, the Board awarded the Consumer a refund.

Lauzan v. BMW of North America, LLC, 2003-0682/MIA (Fla. NMVAB September 18, 2003). The Manufacturer contended that it was not provided a "final opportunity" to repair the vehicle. The Manufacturer responded to the Consumer's written notification of time out of service by letter. The letter directed the Consumer to present her vehicle to Braman BMW on May 28, 2003 at 10:00 am for the "final repair attempt." Joe Garcia, Field Service Engineer for BMW, testified that he went to the Braman BMW dealership at the appointed time, but the Consumer was not there. Mr. Garcia then left the premises, unaware that the subject vehicle was indeed present at the dealership and undergoing repair. On June 6, 2003, a Manufacturer's representative telephoned the Consumer, and the Consumer informed him that the subject vehicle was still at Braman BMW. Nevertheless, the Manufacturer did nothing further. The Board noted that the statute does not provide for a Manufacturer-only opportunity to inspect or repair; rather, the statute provides that the Consumer shall send written notice to the Manufacturer to give the Manufacturer or its authorized service agent an opportunity to inspect or repair the vehicle. In addition, the Board noted that the Manufacturer was provided more than one opportunity to inspect or repair, because the vehicle was at the Manufacturer's authorized service agent's facility from May14, 2003 through June 23, 2003. The Manufacturer's failure to perform an inspection or repair was the result of poor communication with its authorized service agent; but, the Board ruled, it was not the result of the Consumer's refusal to allow a repair. Ultimately, the Consumer was awarded a refund.

DEFINITION OF NONCONFORMITY §681.102(16), F.S.

Digby v. Land Rover of North America, 2003-0686/FTM (Fla. NMVAB September 12, 2003). The Consumer complained that her vehicle surged when the cruise control was used. The surge was felt approximately every 12 seconds when the vehicle was driven on a flat road with the cruise control engaged. The surge created the feeling that the throttle pressure was being applied and released. The Consumer traveled extensively in connection with her business, so the cruise control was very important to her. As a result of the defect with the cruise control, the Consumer stopped using the vehicle and purchased a new one. The Manufacturer's witness testified that the vehicle was operating within specifications, in that the vehicle maintained the set speed within two miles per hour. However, the Board noted that "operating within specifications" is not a defense to whether such operation substantially impairs the vehicle's use. The Board ultimately found the surge to be a nonconformity and awarded the Consumer a refund.

Rule 2-30.001(2)(a), F.A.C., Definition of "Condition"

Helms v. BMW of North America, LLC, 2003-0427/FTL (Fla. NMVAB August 1, 2003). The Consumer complained of a computer software problem and a rattling noise in the dash board. The software problem intermittently caused the "I-Drive" screen to go blank, which would variously cause the radio to go off, blast loudly, or make a static noise. At times, the software problem also caused the vehicle's navigational system to fail and the cellular phone to become inoperable if it was plugged into the vehicle. During the first repair attempt, the dash board was removed and replaced to repair the computer. After that repair, a rattling noise appeared in the dash board, that sounded like a marble rolling around. The vehicle was subsequently subjected to two more repair attempts, plus a final attempt after the Manufacturer received written notification. The problems continued after the final repair attempt. The Manufacturer contended that it was not provided a reasonable number of repair attempts. The Board ruled that the problems with the computer software and the rattle were sufficiently related to constitute a "condition" within the meaning and intent of the Lemon Law, because the dash board rattle was caused by an attempt to repair the computer software malfunction. The Board found that the condition was a nonconformity that was the subject of three repair attempts, plus a final repair after the Manufacturer received written notification. Accordingly, the Consumer was awarded a refund.

Kowalik v. Volkswagen United States, Inc., 2003-0646/FTM (Fla. NMVAB August 27, 2003). The Consumer complained that intermittently various windows in the vehicle did not open or close properly. The Manufacturer contended that it was not afforded a reasonable opportunity to correct the problem, because it was not provided three repair attempts to any one window. The Board found the window problem to be a "condition" that was the subject of three repair attempts, plus a final repair attempt after the Manufacturer received written notice. Accordingly, the Consumer was awarded a refund.

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

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Jefferson v. Toyota Motor Sales, U.S.A., 2003-0523/TPA (Fla. NMVAB August 6, 2003). The Consumer complained that the vehicle vibrated when it was cold and driven at a speed of 60 miles per hour. Initially, the vibration was constant when the vehicle was driven at speeds of 50 to 60 miles per hour. After the service agent replaced the vehicle's tires, the vibration would appear at 60 miles per hour, but it would disappear after the tires warmed up, usually within 10 minutes of driving. Noting that the vibration problems occurred under limited circumstances and went away after a few minutes of driving, the Board ruled that the problem complained of did not substantially impair the use, value, or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Meister v. General Motors Corporation, Pontiac-GMC Division, 2003-0620/STP (Fla. NMVAB August 28,2003).
The Consumer complained that the rear end of the vehicle hopped when was driven at speeds of 40 to 50 miles per hour. The Manufacturer contended that the problem was the result of unauthorized modification, as the Consumer had installed oversized tires on the vehicle that exceeded the Manufacturer's specifications. On each repair attempt, the Consumer was advised that the oversized tires were outside of the Manufacturer's specifications. On the final repair attempt, the Manufacturer's authorized service agent replaced the oversized tires with tires from a stock vehicle. With the stock tires, the vehicle did not present the hopping problem. The Board found the problem was the result of the Consumer's installation of oversized tires, which were not placed on the vehicle by the Manufacturer or its authorized service agent. Accordingly, the Consumer's case was dismissed.

Clayton v. Ford Motor Company, 2003-0475/ORL (Fla. NMVAB July 29, 2003).
The Consumer contracted with an unauthorized agent to perform modifications to the vehicle. The Manufacturer contended that the defects were the result of unauthorized modifications or alterations to the vehicle by persons other than the Manufacturer or its authorized service agent. The vehicle was towed in for the Manufacturer's pre-hearing inspection, because it was not driveable. The Manufacturer found the following issues with the vehicle at the pre-hearing inspection: the aftermarket shifter was loose; the inner fender wells had been removed, exposing the two control modules and fresh air intake to the elements; the air filter was almost completely stopped up with dirt; the air intake tube was not secure; the vehicle was equipped with oversized tires which rubbed against the inner fender; the rims showed evidence of the racing technique of "burn outs" having been performed in the vehicle; the wiring harness had been damaged; and the vehicle had the overall appearance of having been "beaten up." The Consumer first presented the vehicle to the Manufacturer's authorized service agent for repair of an engine misfire and knocking noise. The repair lasted 24 days. Subsequently, the Consumer experienced a myriad of problems with the vehicle, including clutch failure, low coolant, a cracked intake manifold, and a second engine replacement. The Board found the first engine problem was a defect that substantially impaired the use of the vehicle. However, the Board found that the problems that arose thereafter were the result of accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. The Board further found that the initial engine problem was cured within a reasonable number of attempts. Accordingly, the Consumer's case was dismissed.

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

Fountain v. General Motors Corporation, Pontiac-GMC Division, 2003-0680/TPA (Fla. NMVAB September 19, 2003).
The Manufacturer asserted the affirmative defense that the Consumer's Request for Arbitration was untimely filed, because it was filed more than 30 days after the final action of the

BBB/AUTOLINE. According to the Manufacturer's argument, final action by the BBB occurred on June 9, 2003, when the BBB transmitted its decision along with an Acceptance/Rejection Form to the Consumers. The form stated that the Consumers had 14 days to accept or reject the program's decision or it would be deemed rejected. The Consumers did not accept the decision, and on July 23, 2003, they filed a Request for Arbitration with the Division. The Board ruled that the final action of the BBB occurred when the 14 day acceptance period expired, on June 23, 2003, rather than the date that the BBB transmitted its decision and acceptance form to the Consumer. Therefore, the Board ruled, the Consumers had until July 23, 2003 (30 days after the final action of the BBB/AUTOLINE) to file their Request for Arbitration with the Board. A majority of the Board concluded that the Consumers timely filed their Request. However, the Board ultimately dismissed the Consumers' case on other grounds.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Rodhouse v. Toyota Motor Sales, U.S.A., 2003-0631/STP (Fla. NMVAB September 9, 2003). After finding the Consumer's vehicle to be a "Lemon," the Board awarded the Consumer a replacement vehicle. The Board also awarded the Consumer reimbursement for interest that he was required to pay to the motor vehicle lienholder up to the date the Manufacturer provides the Consumer with a replacement vehicle.

Incidental Charges §681.102(8), F.S.

Ferrell v. Mazda Motor of America, Inc., 2003-0470/STP (Fla. NMVAB July 25, 2003). The Board found the intermittent illumination of the "check engine" warning light and rough running engine to be a nonconformity. The Consumer contended that he purchased the vehicle to make out-of-town trips, but he had quit driving the vehicle on long-distance trips because he no longer trusted it. He requested reimbursement for vehicle rental charges for his long-distance travel. The Board ruled that he was entitled to reimbursement for the rental car charges, because they were incurred as a direct result of the nonconformity.

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

Roth v. Toyota Motor Sales, U.S.A., 2003-0611/TPA (Fla. NMVAB September 15, 2003). For purposes of calculating the reasonable offset for the Consumer's use, the Board calculated the "purchase price" by deducting the trade-in allowance ($3,502.74) from the cash price ($27,751.41) listed on the purchase order. The Board reasoned that the trade-in allowance should be deducted in order to provide due consideration to the Consumer for the trade-in allowance, and because, to do so was consistent with the definition of "purchase price" at §681.102(19), F.S.

Dattore v. DaimlerChrysler Motors Corporation, 2003-0499/ORL (Fla. NMVAB August 8, 2003).
The Consumer received a net trade-in allowance that was greater than the purchase price of the vehicle that the Consumer sought to purchase. The Consumer received $37,401.00 as a net trade-in allowance. From the trade-in allowance, the selling dealer deducted the purchase price, taxes and fees associated with the purchase and gave the Consumer $4,785.98 cash back. The buyer's order further reflected an additional down payment of $147.36. The Board found the purchase price of the vehicle to be $32,789.38 ($37,401.00 trade-in allowance less the $4,758.98 cash the Consumer received back from the dealer, plus $147.36 additional down payment).

MISCELLANEOUS ISSUES

Chive v. Volkswagen United States, Inc., 2003-0565/ORL (Fla. NMVAB August 25, 2003).
At the hearing, a consultant employee of the National Center for Dispute Settlement appeared on behalf of the Manufacturer for the purpose of representing the Manufacturer. The consultant employee was neither legal counsel for the Manufacturer nor an employee of the Manufacturer. Paragraph 1 of *Hearings Before the Florida New Motor Vehicle Arbitration Board* provides that parties to the proceedings before the Board consist of consumers and manufacturers. It further provides that parties may be represented by attorneys. The Board concluded that the employee of the National Center for Dispute Settlement could not represent the Manufacturer at the hearing, because he was neither a party to the proceeding nor an attorney for one of the parties. Ultimately, the Board awarded the Consumer a refund.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

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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 and 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.