OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2011 - March 2011 (1st Quarter)

NONCONFORMITY 681.102(16), F.S.. (2010)

Linzer v. Land Rover of North America, 2010-0299/FTL (Fla. NMVAB January 28, 2011)
The Consumer's 2010 Range Rover had a defective passenger air bag system. When the Consumer's wife was in the passenger seat, the passenger air bag warning light came on indicating that the air bag was disabled (meaning it would not deploy in a crash). The problem was intermittent and the Consumer was unable to predict when his wife would have air bag protection. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. Both Manufacturer witnesses testified that the passenger air bag system was not defective and was doing exactly what it was designed to do, which was to disable the air bag when a child or a low weight occupant was seated in order to protect the passenger from the air bag in the event of a crash. Although it is not published by the Manufacturer, the Manufacturer's witness testified that an adult weighing 110 or less pounds might disable the passenger air bag. Since the Consumer's wife weighed 115 pounds, the air bag system would disable depending on how she sat in the passenger seat. The Board concluded that the defective passenger side air bag system substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumer was awarded a replacement vehicle.

Robins v. Jaguar Cars, 2010-0252/FTL (Fla. NMVAB March 10, 2011)
Intermittently, even when someone over the threshold weight was sitting in the passenger seat, the passenger "airbag off" warning light illuminated, meaning that the passenger airbag would not deploy, in this 2009 Jaguar XFL. The Consumer testified that when she first purchased the vehicle she weighed 180 pounds and yet sometimes when she rode as a passenger in her vehicle the passenger "airbag off" light illuminated. She later weighed approximately 150 pounds and the light still illuminated intermittently. When she first brought the vehicle to the Manufacturer's authorized service agent complaining about this problem she was repeatedly told there was nothing wrong, but as the warning light continued to illuminate, she eventually became concerned for her safety and that of her passengers. The Manufacturer asserted that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness explained that the passenger airbag system operates on a "bladder" kit that has a sensor in the center of the passenger seat. The sensor measures the amount of weight put on the seat, and "talks" to the module under the seat; the module then "talks" to the center console, to know whether or not to activate the airbag in the event of a triggering occurrence. Jaguar Cars presets the threshold weight for this vehicle between 120 and 125 pounds. However, even if a passenger is over the threshold weight, the way in which they are sitting in the seat can affect the weight distribution in the seat. That is, if they are leaning to one side or have their arm resting on the

console, the weight sensor in the seat could read 10 or 15 pounds less than what the passenger actually weighs. In addition, if the seat is too far forward, regardless of weight, the passenger "airbag off" light will display, and the airbag will not deploy. The Board concluded that the intermittent illumination of the passenger "airbag off" light, warning that the passenger airbag was off even though the passenger met the threshold weight, substantially impaired the safety of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. Accordingly, the Consumer was awarded a refund.

Urrutia v. Chrysler Group LLC, 2011-0002/ORL (Fla. NMVAB March 1, 2011)
The Consumer complained of a loud wind noise emanating from the skyslider roof in his 2010 Jeep Liberty. The Consumer first heard the noise two days after purchasing the vehicle, when he first drove at highway speeds of between 55 through 70 miles per hour. The noise was most prominent on the passenger side of the vehicle and his wife was so annoyed that she was reluctant to ride in the vehicle. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. An air leak was detected on the right front door during a test drive with the aid of "chassis ears." The Manufacturer contended that the air leak and accompanying noise were corrected at the second repair attempt with the replacement of two moldings around the right front door, and that any noise the Consumer was hearing after that repair was merely the "normal road" noise of driving a soft top vehicle down the highway. The Board concluded that the noise from the skyslider roof was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. 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.

Grippi v. BMW of North America LLC, 2010-0291/JAX (Fla. NMVAB January 31, 2011)
The Consumer complained of a pull to the right in his 2011 BMW 325i. The Manufacturer stipulated that the pull to the right was a nonconformity, and was a "safety issue." However, the Manufacturer contended that the changes made to the vehicle at the final repair attempt corrected the nonconformity, and that the vehicle was repaired and operating correctly. The vehicle was presented to the Manufacturer's authorized service agent for repair of the pull to the right on July 15, 2010, at which time there was no work performed. The Manufacturer stipulated that there was no "fix" available for the pull to the right at that time. On August 27, 2010, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on September 3, 2010. On September 14-15, 2010, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle's suspension was tightened and its software updated to change the voltages at which the electronic steering would operate. The Manufacturer indicated that, because there was no "fix" for the Consumer's problem until the post-notice repair attempt, it agreed that, under the circumstances of this case, two repair attempts were sufficient to afford the Manufacturer a reasonable number of attempts to conform the subject vehicle to the

warranty as contemplated by the Lemon Law. The Board concluded that the pull to the right continued to exist; therefore, the vehicle was not conformed to the warranty within a reasonable number of attempts. Accordingly, the Consumer was awarded a replacement vehicle.

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

Krueger v. Toyota Motor Sales, USA, Inc., 2010-0314/WPB (Fla. NMVAB March 1, 2011)
On September 1, 2010, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair his 2010 Toyota Prius. The Manufacturer received the notification on September 7, 2010. By letter dated September 10, 2010, from a representative of Southeast Toyota Distributors on behalf of Toyota Motor Sales, the Manufacturer responded and advised that a Field Technical Specialist would be available to inspect the Consumer's vehicle at Earl Stewart Toyota on September 22, 2010. The Consumer contacted the Southeast Toyota representative and arranged to have the final attempt conducted at Toyota of Stuart on September 27, 2010. On that date, the Consumer delivered the vehicle at the appointed time and was told the Technical Specialist had not arrived and was advised to wait. The Consumer waited 45 minutes to an hour, then left his card with a dealer employee and left the dealership. He called the Southeast Toyota representative, but did not receive a return call until several days later, when he again agreed to bring the vehicle to Toyota of Stuart on October 21, 2010. On that date, the Consumer again arrived at the dealership at the appointed time and was again told the Technical Specialist had not yet arrived. He was again advised to wait, and was informed that a loaner car would be available "if needed." After waiting an hour, he left the dealership when he could not locate the Technical Specialist. He again called the Southeast Toyota representative, who phoned him back and asked why he had not picked up the loaner car and left his vehicle. At the hearing, the Consumer testified that he was not given a loaner vehicle when he arrived at the dealership on October 21st.

The Manufacturer asserted no statutory affirmative defenses to the claim, instead contending that the Consumer was not qualified for relief, because he did not afford the Manufacturer its statutory final repair attempt. In support of its contention, the Manufacturer's representative testified that he was the Field Technical Specialist who was supposed to be at the final repair attempt. According to the representative, typically, Toyota authorizes a loaner vehicle for a Consumer, because he does not meet with Consumers during final repair attempts. He had no firsthand knowledge regarding whether a loaner was authorized for the first scheduled final attempt, and he was not the representative who communicated with the Consumer to schedule the final attempt. The Board found that, after at least three unsuccessful repair attempts by the Manufacturer's authorized service agent, the Consumer sent the required written notification to the Manufacturer, to which the Manufacturer timely responded. Pursuant to instruction by the Manufacturer, the Consumer delivered the motor vehicle to the Manufacturer's designated repair facility for the final repair attempt on September 27, 2010. The Manufacturer failed to complete the repairs within the 10 days required by statute. While not required by statute to do so, the Consumer nevertheless gave the Manufacturer another opportunity and again delivered the vehicle to the designated repair facility pursuant to instruction by the Manufacturer. The Manufacturer again, essentially failed to perform any repair. Therefore, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Manufacturer

failed to correct the nonconformity after a reasonable number of attempts; 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.

Armada Development Corporation v. BMW of North America LLC, 2010-0295/FTM (Fla. NMVAB February 21, 2011)
The Consumer asserted that the speedometer in his 2008 BMW X3 was inaccurate, in that it displayed a higher speed than the speed at which the vehicle was actually traveling. The Consumer testified to one incident in which he thought he was driving 70 miles per hour, based on the speedometer display, but when he pulled into the left lane to pass another vehicle, he was forced off the road by a third vehicle, at which time his wife pointed out to him that their GPS displayed a vehicle speed of only 66 miles per hour. The Consumer found the accuracy of the vehicle's speedometer to be off by seven to eight percent. As a result, they parked the vehicle and did not use it unless they absolutely had to do so. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that he tested the Consumer's speedometer at the Manufacturer's final repair attempt using a one-mile course and a stop watch. Over ten tests, he averaged four and one-half percent error in the accuracy of the speedometer, which, according to him, was well within the BMW specifications for the vehicle; therefore, no repair or recalibration was necessary. Although there was no dispute that there was some inaccuracy in the speedometer, the Board found that the evidence failed to establish that this inaccuracy substantially impaired the use, value or safety of the vehicle so as to constitute a nonconformity as defined by the statute. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Grant v. Volvo Cars of North America, 2011-0007/JAX (Fla. NMVAB March 1, 2011)
The Consumers' 2010 Volvo XC60 was declared a "lemon" by the Board. The $687.34 monthly payment the Consumers made to the lienholder included payments made for credit life insurance and credit disability insurance, collateral charges which were financed at vehicle purchase. The Manufacturer's representative objected to the Consumers being reimbursed for the credit life and disability insurance, arguing that, since the insurance was optional, the Consumers should not be reimbursed. The Manufacturer's objection regarding the credit life and disability insurance was rejected by the Board. The financed insurance charges met the definition of collateral charges pursuant to Section 681.102(3), Florida Statutes, and were included in the amount awarded to the Consumers for the monthly loan payments.

Urrutia v. Chrysler Group LLC, 2011-0002/ORL (Fla. NMVAB March 1, 2011)
(See "Nonconformity" above)
The Consumer sought reimbursement of $80.00 for window tint as a collateral charge. The Consumer did not provide documentation to verify the charge for the window tint and the Manufacturer objected to the request for reimbursement as being "speculative." An inspection of the subject vehicle was performed by the Board in the presence of the parties where the window tint was observed on the vehicle. The Board awarded the Consumer $80.00 for window tint as a reasonable collateral charge.

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

Cates v. JH Global Services, Inc., 2010-0292/ORL (Fla. NMVAB February 18, 2011)
The Board declared the Consumers' 2010 Star 48-2 Low Speed Vehicle to be a "lemon" and awarded the Consumers a refund. The parties stipulated that there was no mileage on the odometer at the time of delivery or up to the date of the hearing, since the vehicle was not equipped with an odometer. The Manufacturer did not object to a determination of zero miles attributable to the Consumers. Consequently, the reasonable offset use was zero.

Grant v. Volvo Cars of North America, 2011-0007/JAX (Fla. NMVAB March 1, 2011)
(See "Collateral Charges" above)
For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the hearing date was 32,817. The Consumers argued that the mileage should have been calculated up to the first repair attempt for the nonconformity, because they were told to keep driving the car by the Manufacturer's authorized service agent and because they felt they did not get the full value of the vehicle during those additional miles. The Manufacturer objected and argued that the mileage on the vehicle up to the day of the hearing should be used for purposes of calculating the offset for use pursuant to Section 681.102(20), Florida Statutes. The Consumers' request that the offset be calculated based upon mileage at an earlier time was denied by the Board.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2011 - June 2011 (2nd Quarter)

NONCONFORMITY 681.102(16), F.S.. (2005)

Lichtenstein v. Toyota Motor Sales USA Inc., 2011-0073/FTL (Fla. NMVAB May 25, 2011)
The Consumer's 2009 Toyota Prius had a bad odor inside which got worse when the air conditioner was running. It was a "moldy" or "musty" smell. Although several replacement cabin filters were installed, several chemical sanitizer treatments were performed and the evaporator was replaced, all by the Manufacturer's authorized service agent, the odor was always present after the chemical/sanitizer odor went away. The Manufacturer raised the defense that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that the Consumer's vehicle was built with an updated evaporator core, which has an improved coating that helps it shed odor particles. He further explained that the Manufacturer does not recommend that sanitizer treatments be used because they can compromise the coating on the evaporator. The Manufacturer contended that the dealer took it upon themselves to perform those treatments. The Board concluded that the bad odor in the vehicle, which got worse when the air conditioner was running, substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Mansukhani v. American Honda Motor Company , 2011-0071/FTL (Fla. NMVAB June 17, 2011)
The Consumers complained that intermittently, the moonroof malfunctioned in auto mode in their 2009 Honda Acura TL. When the Consumer opened the moonroof and he pushed the auto touch button to close it, it would not close all the way. That is, it closed half way then opened back up; he then had to press the manual button in order for the moonroof to close completely. The Manufacturer argued that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that it should not matter whether the moonroof is opened all the way or part way, as the auto mode should always close the moonroof completely. According to the witness, all the moonroof parts had been replaced except the glass, and no code indicated there was a problem with any of the parts. He further testified the moonroof has a safety feature and will not close in the event someone's hand is in the way. The evidence established that the intermittent failure of the moonroof to operate properly in auto mode substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. Accordingly, the Consumers were 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.

Leigh v. Nissan Motor Corporation USA, 2011-0016/PEN (Fla. NMVAB April 15, 2011)
The Consumer asserted that the driver's side seat rubs against the door in her 2009 Nissan Versa. Ms. Leigh added that, as a result, a little bit of fabric had started to come off of the seat. The Manufacturer asserted the problem did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative inspected the vehicle at the final repair attempt and only noticed normal wear and tear on the seat. At the hearing, the representative opined that the seat may be wearing a little faster based on the way the Consumer turns in the seat while she is exiting the vehicle. The Board concluded that the evidence failed to establish that the seat problem complained of by the Consumer substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

Abella v. Volkswagen/Audi of America, Inc., 2011-0051/FTL (Fla. NMVAB May 20, 2011)
The Consumer asserted that his 2009 Volkswagen Jetta had a defective transmission. The Consumer testified that the gears of the manual transmission would grind and it was hard to shift from one gear to another, and after each repair the hard shifting recurred. The Consumer testified his son, who was not present at the hearing, was the primary driver of the vehicle. His son drove the vehicle about 80 percent of the time, and he drove the vehicle the other 20 percent. In support of the statutory affirmative defense that the alleged nonconformity was the result of abuse of the motor vehicle by persons other than the manufacturer or its authorized service agent, the Manufacturer's witness testified he first saw the vehicle on February 4, 2010. The first, third and fifth gears were not working and the shaft was bent. His opinion was that the damage was due to "speed shifting." He explained that speed shifting is when a driver aggressively shifts from one gear to another without using the clutch, which is a common practice when racing a vehicle. Notwithstanding his belief, the gear shift shaft was replaced at the February 4, 2010, repair. The next time he saw the vehicle the synchronizer hub was missing teeth and there were no synchronizer gears. According to the witness, this was not normal and was due to abusive driving habits as metal shaving debris could be seen throughout the transmission. The Board concluded that the greater weight of the evidence established that the hard shifting and stripped transmission gears were the result of abuse by persons other than the manufacturer or its authorized service agent. Therefore, the complained of defect did not constitute a "nonconformity" as defined by the statute and the case was dismissed.

REMEDIES §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Carey-Donlevy v. General Motors Company, 2011-0036/ORL (Fla. NMVAB April 7, 2011)
The Consumer's 2009 Saturn Vue had the following defect or condition that substantially impaired its use, value or safety: a transmission condition, which had manifested itself in several different ways: (a) the transmission hesitated before shifting gears and then "jumped" or "slammed" into gear, (b) the key got stuck and could not be removed from the ignition, and (c) there was a leak in the axle seal. The Consumer requested reimbursement of $308.06 for replacement tires that were purchased for the subject vehicle as an incidental charge. The Manufacturer objected to reimbursement for the tires, and argued that this charge was for a normal wear item associated with vehicle ownership. The Consumer's request for reimbursement of $308.06 for replacement tires was denied by the Board, because such cost was not directly caused by the nonconformity.

Marsh v. Ford Motor Company, 2011-0042/ORL (Fla. NMVAB May 16, 2011)
The Consumers' 2010 Ford Fusion was declared a "lemon" by the Board due to a transmission failure condition which caused three transmission replacements. The Consumers requested reimbursement of the following as incidental charges: $154.00 for towing fees to Crestview, Florida, on September 14, 2010, and $176.26 for alternative transportation from Alabama back to Crestview, and one night campground stay September 21, 2010, caused by the first transmission replacement; $118.19 for car rental on November 16, 2010, in New Mexico, caused by the second transmission replacement; $253.16 for car rental on November 18, 2010, caused by transmission failure while on a planned trip to Texas; $375.33 for U-Haul and towing package on November 22, 2010, to transport the vehicle back to Florida for transmission repair; and $25.67 for postage. The Manufacturer objected to all towing charges as unreasonable; specifically, the Texas charges, on the basis that the Consumers did not give Ford the opportunity to have the vehicle repaired in Texas. The Board awarded the Consumer all incidental charges requested.

Collateral Charges §681.102(3), F.S.

Marsh v. Ford Motor Company, 2011-0042/ORL (Fla. NMVAB May 16, 2011)
(See: **Incidental Charges** above)
The Consumers additionally requested reimbursement of $367.01 for base plate and electrical removal and $372.36 for auxiliary brake removal and installation in a new vehicle to be purchased in the future. The Manufacturer objected on the basis that the removal charges were not wholly incurred as a result of the acquisition of the lemon vehicle. The Consumers' request for $367.01 for base plate and electrical removal and $372.36 for auxiliary brake removal and installation in the future vehicle were denied by the Board.

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

Sepe v. BMW of North America, LLC, 2010-0315/MIA (Fla. NMVAB May 9, 2011)
The Consumers' 2008 BMW 325i was declared a "lemon" by the Board. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $59,320.00. Mileage attributable to the Consumers up to the date of the first scheduled New Motor Vehicle Arbitration Board hearing on February 22, 2011, was 42,455. Application of the statutory formula resulted in a reasonable offset for use of $20,986.92. At the hearing, the Manufacturer asserted the mileage up to the date of the later hearing should be used, rather than the mileage up to the date of the first scheduled arbitration hearing, which was cancelled as a condition of settlement with the Manufacturer. The Manufacturer's attorney argued that BMW did not reach a settlement agreement with the Consumers, and further argued it was the Consumers who postponed the hearing, not the Manufacturer. The Consumers produced a letter from the Manufacturer dated February 21, 2011, which stated, in pertinent part:

> This will confirm our telephone conversation of this date, wherein it was agreed that BMWNA will provide you with a replacement motor vehicle in exchange for the subject vehicle pursuant to the Florida Lemon Law Statute. This will also confirm that you have agreed to postpone tomorrow's arbitration hearing for 90 days pending final resolution of our settlement.

The Manufacturer's assertion that mileage up to the day of the later hearing be used to calculate the offset was rejected. Calculation of the reasonable offset for use is based in part upon, "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first." §681.102(20), Fla. Stat. In this case, there was a settlement agreement between the parties as evidenced by the letter prepared by the Manufacturer, which conditioned the settlement upon the Consumers cancelling the arbitration hearing which was scheduled for February 22nd. The Board concluded that, since both the settlement agreement and the first arbitration hearing date pre-dated the date of the actual hearing, calculation of the offset utilizing miles attributable to the Consumers up to February 22, 2011, was well within the statutory definition.

Ruggiero v. Volkswagen/Audi of America Inc., 2011-0028/FTL (Fla. NMVAB April 1, 2011)
The Consumer's 2010 Volkswagen Tiguan was declared a "lemon" by the Board. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $27,526.00. The Manufacturer argued the mileage used to calculate the offset should be the miles on the odometer at the time of the hearing on March 30, 2011. The Consumer argued that the offset amount should be $3,500.00, the amount designated in the Manufacturer's offer of settlement letter of November 2, 2010. Mileage attributable to the Consumer up to the date of the Better Business Bureau Autoline hearing was 18,330 miles, the number the Board used for calculating the offset for use. Application of the statutory formula resulted in a reasonable offset for use of $4,204.60. The Consumer's request that the offset be the amount quoted in the Manufacturer's November 2, 2010, offer letter was denied. The Manufacturer's request that the Board utilize the mileage on the vehicle's odometer as of the date of the Board's hearing was also denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Hansen v. BMW of North America, LLC, 2011-0068/TLH (Fla. NMVAB May 24, 2011)
At the beginning of the hearing, the Consumer made a motion to exclude all evidence submitted by the Manufacturer that was gathered at the prehearing inspection. Paragraph (15), *Hearings Before the Florida New Motor Vehicle Arbitration Board,* states that "***the consumer must be present during the vehicle inspection, unless he or she expressly waives the right to be present in writing***," and Paragraph (16) states:

> All information gathered as a result of the prehearing inspection will be provided to the consumer in writing as soon as it is available, but no later than ***7 business days*** before the date of the hearing. If the manufacturer fails to provide the information to the consumer as required, evidence or testimony related to the vehicle inspection may not be considered by the board at the hearing.

The Consumer testified that she was not present during the inspection and did not waive in writing her right to be present. Furthermore, she did not receive the results of the inspection until four business days before the hearing. The Manufacturer, through counsel, argued that, since the vehicle was already at the Manufacturer's authorized service agent, the Consumer did not have to be present during the inspection, and that, since no repairs were made or a test drive taken, there was "no harm" in the Consumer not being present. Based upon the plain meaning of the prehearing inspection rules described above, the evidence relating to the prehearing inspection was not considered by the Board.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2011 - September 2011 (3rd Quarter)

NONCONFORMITY 681.102(16), F.S.. (2010)

Fried v. Nissan Motor Corporation USA, 2011-0121/FTM (Fla. NMVAB August 16, 2011) The Consumers leased a 2010 Infiniti G37 and complained of a navigation system failure causing the navigation screen to display only lines and not "street names" in gated communities. The Consumers were both realtors who relied on the navigation screen to find homes within the numerous gated communities where they worked. The reason they purchased this particular vehicle was largely based on the features of this particular navigation system. According to both Consumers, it was very important that the system work while they were in one of the 476 gated communities in Collier County looking for a particular address. Prior to purchasing the vehicle, they took a test drive with the salesman to the gated community where they lived and drove past several others. At that time, the navigation system was working and clearly displayed the names of all the streets within the communities. Approximately six months after purchase however, when the navigation software was reprogrammed pursuant to an Infiniti "Voluntary Service Campaign," the screen displayed only solid lines with no names in the gated communities. The Manufacturer asserted that the way the navigation system operated did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that the system was "operating as designed." The navigation system software had not changed since 1998 and the "off the beaten path" streets never appeared on the navigation screen. The Board rejected as not credible the contention that the subject navigation screen never displayed the street names in gated communities and concluded that the malfunction was nonconformity. Accordingly, the Consumers were awarded a refund.

Glassman v. American Honda Motor Company, 2011-0047/FTL (Fla. NMVAB July 22, 2011) The Consumers complained that intermittently, the air conditioner froze up and blew hot air in their 2008 Honda Odyssey. The first time the air conditioner started blowing hot air was about a month after they purchased the vehicle. Every time the air conditioner started blowing hot air, Mr. Glassman opened the hood and saw that a line was frozen. The day after the Manufacturer's final repair attempt, the air conditioner again started blowing hot air, so he went back to the authorized service agent. Although the service department was closed, the Assistant Service Manager looked at the vehicle and documented the problem. The air conditioner freezing up and blowing hot air happened seven or eight times after the final repair attempt, with the most recent occurrence on the Monday before the hearing. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that the compressor clutch was replaced at the final repair attempt, not because it had failed, but "to try to keep the Customer happy by replacing

something." He stated that he attended the BBB/Autoline hearing, and he recalled the Consumer testified at the BBB hearing that he drove the vehicle with the windows down, and the air conditioner on full cold. In his view, this would cause the air conditioner to labor and it could freeze up. In addition, he testified that the Assistant Service Manager was also at the BBB hearing and contradicted what he had written on the November 3, 2010, repair order. He stated at the BBB hearing that he had not observed the frozen air conditioner line; rather, he simply wrote down "just exactly what the Customer asked him to write." The Board found that the evidence established that the air conditioner freezing up and blowing hot air substantially impaired the use and value of the vehicle, thereby constituting a nonconformity. The Manufacturer's assertion to the contrary was rejected and a refund was awarded to the Consumers.

Joffe v. Ford Motor Company, 2011-0096/FTL (Fla. NMVAB August 4, 2011)
The Consumer had a 2010 Ford Taurus and complained that it pulled to the right; that there was a clicking noise in the left front hub assembly; and that the trunk lid was misaligned, resulting in damage to the rear bumper. In addition, there was body damage caused by the authorized service agent while the vehicle was in for repair of the trunk. The Manufacturer argued that the alleged nonconformities were the result of an accident by persons other than the Manufacturer or its authorized service agent. The Sawgrass Ford Shop Foreman acknowledged that the Consumer's vehicle was damaged when a Sawgrass Ford employee ran into it with a golf cart while it was out of service for repair in December 2010. The Board concluded that the pull to the right, clicking noise in the left front hub assembly, the misaligned trunk lid and the body damage caused by the authorized service agent substantially impaired the use and safety of the vehicle, thereby constituting one or more nonconformities. The Manufacturer's assertion to the contrary was rejected and the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.:

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

George v. American Suzuki Motor Corporation, 2011-0136/PEN (Fla. NMVAB September 7, 2011)
The Manufacturer stipulated that the Consumers' 2009 Suzuki Grand Vitara had an engine overheating problem that substantially impaired the use, value or safety of the vehicle. The Manufacturer further stipulated that the vehicle was out of service by reason of repair of the engine overheating for a total of 34 cumulative days. In this case, all of the elements of the statutory days-out-service presumption were proven or stipulated to by the Manufacturer; however, the Manufacturer argued that it was reasonable for the repairs to take that long and that the nonconformity was corrected within a reasonable number of attempts. The Manufacturer's witness testified that the problem initially was thought to be the cylinder head and that was replaced; however, after the replacement, the Manufacturer discovered that there was a crack in the engine block, so the engine was rebuilt and the engine block was replaced. This repair alone took 24 of the 34 days, which, according to the Manufacturer, was reasonable. A majority of the

Board concluded that the Manufacturer did not produce sufficient evidence to overcome the statutory presumption. In fact, the repairs could have been completed faster if the Manufacturer had discovered the crack in the engine block before replacing the cylinder head. Accordingly, the Consumers were 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.

Elyakim v. BMW of North America LLC., 2011-0104/FTL (Fla. NMVAB August 25, 2011)
The Consumer complained of intermittent creaking noises from the doors of his 2011 BMW X6 when the vehicle was being driven. The Consumer testified that, when he went on a test drive with the Manufacturer's authorized service agent, the service agent did not hear any noise from the doors, but he heard the noise. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that he read all the repair orders and spoke with both individuals who inspected the vehicle at the Manufacturer's prehearing inspection. According to him, both individuals said when they moved position while sitting on the leather seats in the vehicle, they heard some noise from the seats, but they never heard any noise from any of the doors, even when the vehicle was driven over bumpy roads. The Board concluded that the intermittent creaking noise complained of by the Consumer did not substantially impair the use, value or safety of the vehicle; therefore, it did not constitute a nonconformity. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

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

Meana v. Ford Motor Company, 2011-0093/MIA (Fla. NMVAB August 24, 2011)
To purchase the vehicle, the Consumer contributed a down payment of $2,250.00, and traded in a used 2005 Ford F-350 encumbered by debt in the amount of $21,000.00, for which a gross allowance of $20,000.00 was assigned, resulting in a net trade-in allowance of ($1,000.00), according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. Pursuant to Section 681.102(19), Florida Statutes, the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. According to the NADA Guide, the trade-in vehicle had a base retail price of $23,425.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a total retail price of $30,550.00 ($23,425.00 plus $5,400.00 for a diesel engine, $575.00 for dual rear wheels, $300.00 for aluminum alloy wheels, $475.00 for leather seats, $250.00 for power seats, and $125.00 for a theft recovery system). Deduction of the debt resulted in a net trade-in allowance of $9,550.00. The Manufacturer specifically objected to the amounts included for aluminum alloy wheels,

leather seats, power seats, and the theft recovery system, arguing that those items were included in the "King Ranch" package. The vehicle invoice the Manufacturer submitted had an entry for "King Ranch" and underneath that entry were eight enumerated items, none of which were the four items to which the Manufacturer was objecting, so the objection was denied.

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

McDermott v. Ford Motor Company, 2011-0132/WPB (Fla. NMVAB September 6, 2011)
The Consumer's 2010 Ford Escape was declared a "lemon" by the Board. The purchase price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $25,300.00 ($27,300.00 reduced by a manufacturer rebate of $2,000.00). Mileage attributable to the Consumer up to the date of the Better Business Autoline hearing was 9,108 miles (9,450 odometer miles reduced by 190 miles at delivery, and 152 other miles not attributable to the Consumer). The Manufacturer objected to the Board subtracting 10 test drive miles for a September 2010, repair attempt, arguing the Consumer failed to submit a repair order for that date and therefore any miles for that date should not be subtracted. No repair order was submitted by the Manufacturer. The 10 miles was based on similar test drive miles reflected on other repair orders for the same defect. The Manufacturer's argument was rejected and application of the statutory formula resulted in a reasonable offset for use of $1,920.27.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2011 - December 2011 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Rogen v. Jaguar Cars, 2011-0090/FTL (Fla. NMVAB November 15, 2011)
The Consumer was residing in Florida at the time he called Heritage Jaguar, a New York automobile dealer from which he had previously leased or purchased other vehicles. According to the purchase order, his 2008 Jaguar XJ8L was ordered on May 15, 2009, and the Consumer picked up the vehicle at Heritage Jaguar on May 21, 2009, and started his summer vacation. He paid Florida sales tax, and the vehicle was issued a Florida registration on June 12, 2009. On the May 21, 2009, credit application he filled out to purchase the vehicle, the Consumer listed his address as 120 East 36 Street, New York, NY 10016. At hearing, the Manufacturer asserted the vehicle was not a "motor vehicle" as defined in Florida's Lemon Law (§681.102(14), FS), because it was not sold in Florida. The Board concluded the evidence established that the sale of the vehicle took place in the State of New York; therefore, the vehicle was not a "motor vehicle," and the Consumer's case was dismissed.

NONCONFORMITY 681.102(16), F.S.. (2005)

Bailey v. General Motors Company-Chevrolet Division, 2011-0231/TPA (Fla. NMVAB November 28, 2011)
The Consumers complained of an exhaust system odor in their 2009 Chevrolet Cobalt. The exhaust system emitted a sulfur or rotten egg odor which was evident from both inside and outside the vehicle. On one occasion, the Consumers were stopped by a Deputy Sheriff and told to do something about the exhaust odor. Every time the vehicle was brought in for repair, the Consumers were told that there were no repairs and that they should use a "better" brand of gasoline. The service department repeatedly told the Consumers they were not driving the vehicle far enough to get rid of the exhaust odor. The Consumers testified that they did drive the vehicle as far as New Port Richey and they had used the other brands of gasoline on occasion, but did not notice any difference in the odor. The owner's manual states the recommended fuel is 87 octane, and no instruction to use "better" fuel is provided. The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness verified the presence of a pungent odor. A GM Technical Service Bulletin (TSB) advised that the brand of gas be changed and the Consumers were so advised. There was nothing more the Manufacturer's service agent could do as "replacement of the catalytic converter is not an appropriate repair." The Board found the evidence sufficient to

establish that the exhaust system odor substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute. Accordingly, the Consumers were 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.

Shadimehr v. Toyota Motor Sales USA, Inc., 2011-0236/WPB (Fla. NMVAB December 12, 2011)
The Consumer's 2010 Toyota Tundra had defective paint on the entire vehicle that substantially impaired its use, value or safety. The Consumer testified that one year after he took delivery of the vehicle, he started seeing shadows on the hood and then defects in the paint became obvious on other parts of the vehicle as well. The Consumer acknowledged the Manufacturer offered to repaint the vehicle, but he did not permit the repaint because he believed a repainted vehicle would have a decreased value. The evidence established that the defective paint substantially impaired the value of the vehicle, thereby constituting a nonconformity as defined by the statute and the applicable rule. The Board found, however, that the Manufacturer did not have a reasonable number of attempts to correct the nonconformity, because the Consumer refused to allow the repaint. Accordingly, the Consumer's case was dismissed.

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.

M*endoza v. Chrysler Group LLC,* 2011-0175/WPB (Fla. NMVAB November 15, 2011)
The Consumers complained of a vibration when the brake pedal was released "a little" in their 2010 Chrysler 300. The Consumer testified she felt the vibration when she was at idle and she took her foot "slightly" off the brake pedal no matter whether the transmission gear was in drive, reverse, or neutral. The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The manufacturer's representative testified that what the Consumer described was a "normal characteristic" of the vehicle. He explained that in order to save fuel, when the brake was released a little and the vehicle started to move, the torque converter idled low, and because the RPMs were not high enough to have a seamless transition, a slight stutter occurred. According to the representative, the stutter feeling was normal for this vehicle and was not a defect. During the hearing, the Board inspected and test drove the vehicle. The vehicle was test driven for one mile with numerous stop and slow start maneuvers; the test drive was without incident. The Board found that the evidence failed to establish that the brake pedal vibration complained of by the Consumers substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Alarcon v. Volkswagen/Audi of America Inc., 2011-0198/MIA (Fla. NMVAB November 7, 2011)
The Consumer's 2010 Audi A4 was deemed a "lemon" by the Board. The Consumer requested reimbursement of $149.80 for the independent inspection conducted by Vertex Auto and $320.00 for the professional interpreter who translated at the hearing, as incidental charges. The Board granted both requests.

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

Aponte-Rosario v. Mercedes-Benz USA, Inc., 2011-0202/MIA (Fla. NMVAB November 14, 2011)
The Consumer's 2011 Mercedes-Benz ML350 was deemed a "lemon" by the Board. At the time of purchase, the Consumer paid $4,000.00 in cash and traded in a used 2010 Mercedes-Benz C350 motor vehicle encumbered by debt in the amount of $29,808.40, for which a gross allowance of $30,000.00 was assigned, resulting in a net trade-in allowance of $191.60, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer. Contrary to Section 681.102(19), Florida Statutes, the Manufacturer failed to produce the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. At the hearing, the Manufacturer's attorney stated the NADA was not provided, because the trade-in vehicle was not listed in the Guide for November 2010. The Consumer requested and obtained a valuation from the NADA. According to the NADA information, the trade-in vehicle had a base retail price of $37,675.00. Adjustment for mileage and accessories as testified to by the Consumer and/or reflected in the file documents, resulted in a total retail price of $38,800.00. Deduction of the debt resulted in a net trade-in allowance of $8,991.60. The Manufacturer objected and requested that the net trade-in allowance in the sales contract be applied to the refund calculation. The Manufacturer's objection was denied by the Board which used the NADA figures provided by the Consumer.