OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2004 - March 2004 (1st Quarter)

NONCONFORMITY §681.102(16), F.S.

Degance v. DaimlerChrysler Motors Corp., 2003-1082/FTL (Fla. NMVAB February 4, 2004). The Consumer complained of a mold odor in the vehicle that grew stronger the longer the vehicle was driven. The Manufacturer's witness testified that the odor was caused by an evaporator leak that allowed a portion of the refrigerant to escape. The Manufacturer contended that the replacement of the evaporator cured the problem, and that the odor remaining was caused by "after market" floor mats and golf shoes left in the Consumer's vehicle. The Manufacturer's witness also testified that the Consumer was advised against using the re-circulation setting on the air conditioner for prolonged periods of time, because it could produce an odor. The Board rejected the Manufacturer's contentions, finding the mold odor to be a nonconformity that substantially impaired the vehicle's use and value. Accordingly, the Consumer was awarded a refund.

Siegel v. Nissan Motor Corp., 2004-0010/WPB (Fla. NMVAB February 22, 2004). The Consumer complained that the car alarm activated at all hours of the night without provocation. The alarm woke him in the middle of the night, about three times a week. The Consumer contended that the sleep disruptions were hurting his health, and his neighbors were complaining about the annoyance. The issue even became the target of a petition signed by residents of the Consumer's retirement community and he had earned the nickname, "Mr. Hornblower." The Manufacturer contended that the erratic alarm was not a nonconformity, because it did not impact the safety of the vehicle and the vehicle had never left the Consumer stranded. The Board found the defective car alarm substantially impaired the use, value and safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Herlth v. Ford Motor Co., 2004-0095/FTL (Fla. NMVAB March 11, 2004). The Consumer complained of a creased and frayed head-liner. The Board inspected the vehicle and found that the rear portion of the passenger side of the head-liner was noticeably creased with a slight amount of fraying. The Board also found that the driver's side of the head-liner did not exhibit a similar pattern of creasing and fraying. The Board ruled that the head-liner problem substantially impaired the value of the vehicle. Accordingly, the Consumer was awarded a refund.

Lazlo v. Ford Motor Company, 2004-0009/ORL (Fla. NMVAB March 18, 2004). The Consumer complained of a grinding noise that occurred intermittently. The grinding noise lasted a couple of seconds and occurred upon deceleration or acceleration. On occasion, a

transmission "slipping" sensation was also experienced in association with the grinding noise. During the Manufacturer's final repair attempt, the vehicle was road tested for 129 miles. No repairs were performed during the final repair attempt. The Manufacturer, through counsel, argued that the alleged defect did not substantially impair use, value or safety. The Manufacturer's witness observed the problem complained of by the Consumer, but he did not know what was causing it. He speculated that the grinding noise could be "chatter" from the rear differential or could be emanating from the anti-lock braking system. The witness characterized the noise as "abnormal," but because the noise was not duplicated again and the transmission fluid was not burned, the transmission pan was not dropped and no work was performed on the transmission. The Board ruled that the intermittent transmission grinding problem was a defect that substantially impaired the value of the vehicle. The Consumer was ultimately awarded a replacement vehicle.

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.

Dougherty v. Ford Motor Co., 2003-1165/ORL (Fla. NMVAB March 19, 2004).
The Manufacturer, through counsel, argued that it was not afforded a final opportunity to conform the vehicle to the warranty because the Consumers failed to send written notification to the Manufacturer as required by the Lemon Law. The Consumers sent a letter to the Manufacturer ostensibly to provide the Manufacturer with a final opportunity to repair the vehicle. The letter was addressed "To Whom It May Concern." The letter did not contain any information to identify the intended recipient. The Consumers did not know to what address they had sent the letter, and they could not provide proof of delivery of the letter. The Board ruled that the Consumers failed to send the required written notification to the Manufacturer. Accordingly, the Consumers' case was dismissed.

Bustamante v. BMW of North America, LLC, 2004-0070/MIA (Fla. NMVAB March 5, 2004).
The Manufacturer contended that the Consumer failed to provide the statutory notice. The Manufacturer also contended that it was not afforded the opportunity to inspect the vehicle or perform a final repair attempt, because of the Consumer's failure to provide the statutory notice. The Consumer sent seven letters to the Manufacturer complaining about the problems the Consumer was having with the vehicle. The letters did not specify that the problems had been the subject of three repair attempts or that the vehicle had been out of service for repair for 15 or more days. Some of the letters contained requests for repurchase relief, but none of the letters referred to the Lemon Law or offered to provide a final repair attempt or opportunity to inspect the vehicle. The Consumer mailed a Motor Vehicle Defect Notification form to the Department of Legal Affairs, but he did not mail a copy of the form to the Manufacturer. The Board ruled that the Consumer failed to provide written notification. Accordingly, the Consumer's case was dismissed.

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

Holzer v. Mercedes-Benz, USA, Inc., 2004-0022/WPB (Fla. NMVAB February 25, 2004). The Manufacturer was provided two opportunities to correct a door latch problem, and after receipt of the Consumer's defect notification, the Manufacturer conducted a final repair attempt. The door latch problem continued to exist after the final repair attempt, albeit, with a different door on the vehicle. The Consumer claimed the door latch problem substantially impaired the vehicle's safety and use; however, the Consumer admitted driving the vehicle from Florida to New York while the problem existed. The Board ruled that under the circumstances the Manufacturer was not provided a reasonable number of attempts to repair the vehicle. Accordingly, the Board dismissed the Consumer's case.

Casas v. Mazda Motor of America, Inc., 2004-0015/MIA (Fla. NMVAB February 9, 2004). The Consumer complained of a windshield condensation problem. He presented the vehicle for repair of the problem on two occasions prior to sending written notification to the Manufacturer. Thereafter, the Manufacturer conducted a final repair attempt, but the problem continued to exist. The Manufacturer's witnesses testified at the hearing that no further repairs would be undertaken to correct the problem, because windshield condensation is a "normal characteristic" that can be remedied by adjusting the air conditioner or defrost settings. Under these circumstances, the Board found a reasonable number of attempts and ultimately awarded the Consumer a refund.

Arain v. Mercedes-Benz USA, Inc., 2004-0021/WPB (Fla. NMVAB March 23, 2004). The Consumer complained of a rough-running engine and the intermittent illumination of the "check engine" warning light. After two repair attempts for the problem, the Consumer sent written notification to the Manufacturer. Thereafter, the Manufacturer conducted a final repair attempt, but the problem continued to exist after the final repair attempt, so the vehicle was again presented to the Manufacturer's authorized service agent for a fourth repair attempt. The Board found that under the circumstances the Manufacturer was provided a reasonable number of repair attempts. Ultimately, the Consumer was awarded a refund.

Whether recurring nonconformity corrected within a reasonable number of attempts §681.104(2)(a); 681.104(3)(a)

Glenn v. Ford Motor Company, 2003-1201/FTM (Fla. NMVAB March 18, 2004). The Consumers complained that the cladding on the doors expanded when exposed to heat. In the past the cladding expansion caused the doors to rub and bind when opened and caused paint on the doors to chip. On the final repair attempt, new cladding was installed on the doors. The new cladding was three millimeters shorter than the original cladding. The shorter cladding resolved the binding problem but the Consumers contended that the shorter cladding impaired the appearance, and consequently the value, of the vehicle. They also contended that the problem was not solved by the shorter cladding, asserting that when the cladding was exposed to the summer heat, the new cladding would expand and interfere with the opening of the doors.

The Board found that the cladding problem was a nonconformity, but that the installation of the shorter cladding corrected the problem on the final repair attempt. The Board characterized the Consumer's assertion that the problem would return in the summer as being speculation. 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.

David v. American Honda Motor Company, 2003-1200/JAX (Fla. NMVAB March 15, 2004). The Consumer complained that his Honda Civic hybrid did not achieve the fuel economy set forth in the EPA estimates. The EPA estimates for fuel economy for the vehicle were 48 miles per gallon for city driving and 47 miles per gallon for highway driving, as indicated on the Monroney label (window sticker) attached to the vehicle. The Monroney label also warned that the actual fuel economy would vary according to driving conditions, driving habits, vehicle options, and vehicle condition. The Consumer presented a mileage log as evidence of the vehicle's fuel economy. The mileage log indicated a range of miles per gallon from a low of 32 mpg to a high of 42 mpg, for driving that was characterized as city and highway from August 2002 to March 11, 2003. However, from December 2002 through the date of the hearing the primary driver of the vehicle was the Consumer's daughter, who used the vehicle to commute to college in Tampa. The Manufacturer contended that fuel economy was not a defect in the vehicle. The Manufacturer's Field Service Engineer test drove the vehicle 134 miles, under various driving conditions. He also tested the fuel management system with a hand-held scanner to detect any defects in the system. The Field Service Engineer found no defects in the fuel management system, and he found the fuel consumption to be within an "acceptable range." Based upon the evidence presented, the Board ruled that the Consumer's complaint did not amount to a nonconformity, noting that there was no evidence of any mechanical failure or other defect. The Board recognized that it was apparent that the vehicle failed to meet the Consumer's expectations with regard to fuel economy; however, such a failure in and of itself did not constitute a nonconformity under the statute. Accordingly, the Consumer's case was dismissed.

Bridges v. Hyundai Motor America, 2003-1019/FTM (Fla. NMVAB March 16, 2004). The Consumer complained that the vehicle's seat warmer did not continuously heat the seats. The seat warmer operated only when the temperature inside the vehicle was below a certain level, and it automatically shut off when the inside temperature rose above a certain level. The Consumer suffered from arthritis and decided to purchase an upgraded version of the vehicle in order to have the added feature of heated seats. The Manufacturer contended that the feature was designed to make the vehicle's leather seats more comfortable in cold weather. The Owner's Manual stated, "The seat warmer will not operate if ambient temperature is higher than 82.4 degrees Fahrenheit." The Manufacturer's witness explained that the thermometer which controls the operation of the seat warmer measures the temperature of the seat cushion rather than the ambient temperature. Acknowledging that the vehicle's heated seat feature had not met the Consumer's expectation, the Board rule that the operation of the seat feature was not a

nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

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

Canoy v. Ford Motor Co., 2003-1144/TPA (Fla. NMVAB February 10, 2004).
The Consumers complained about a vibration or wobble in the vehicle which could be felt when it was driven at any speed. After the tires were rotated, the vibration moved from the front to the rear of the vehicle. Thereafter, the Manufacturer's service agent advised the Consumers that both rear tires were excessively cupped and needed to be replaced; however, the Consumers declined to pay for the replacement tires. The Board ruled that the vibration problem was the result of neglect by persons other than the Manufacturer or its authorized service agent. Ultimately, the Consumers' case was dismissed.

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

Ploeger v. Ford Motor Co., 2004-0017/TPA (Fla. NMVAB March 11, 2004).
The Consumer's Lemon Law rights period expired on October 29, 2003, which was 24 months after the date of delivery of the vehicle to the Consumer. The Consumer filed his Request for Arbitration on Monday, December 29, 2003, seeking a refund. The Manufacturer, through counsel, argued at the hearing that the Consumer's Request for Arbitration was untimely filed, because the last day for the Consumer to timely file his Request was December 28, 2003, which was a Sunday. It was the Manufacturer's contention that the Consumer should have filed his Request for Arbitration on the Friday prior to Sunday, December 28, 2003. The Board ruled that the Request for Arbitration was timely filed, finding that (1) State Offices are closed on Sundays, and (2) the Consumer would be deprived of his full filing time provided by statute if the Board required him to file on the Friday prior to December 28, 2003. Nevertheless, the Consumer's case was ultimately dismissed on other grounds.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Aiello v. General Motors Corp., Chevrolet Motor Div., 2003-1051/TPA (Fla. NMVAB January 15, 2004).
The Consumers paid the lienholder periodic payments and a lump sum payment of $17,532.00. The lump sum payment was paid by the Consumers from their home equity credit line. The Consumers did not have readily available the amount of the finance charges paid in connection with the $17,532.00 lump sum payment, so the Board did not consider those charges in calculating the Consumers' refund.

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

Goldenberg v. Mercedes-Benz USA, Inc., 2003-1045/MIA (Fla. NMVAB January 16, 2004).
The Manufacturer's representative asserted at the hearing that one of the repair orders contained

a typographical error in that the repair order indicated that a test drive of 987 miles was taken. The Manufacturer's representative argued that the 987 miles should be included in the mileage attributable to the Consumer, for purposes of calculating the reasonable offset for use. The Board disagreed with the Manufacturer and ruled to exclude the 987 miles from mileage attributable to the Consumer.

PROCEDURAL ISSUES

Harwell v. Toyota Motor Sales, U.S.A., Lexus Division, 2003-1196/ORL (Fla. NMVAB March 5, 2004).
At the hearing, the Manufacturer's representative sought to assert affirmative defenses that were not raised in the Manufacturer's Answer, any attachments to the Answer, or in any amendments to the Answer. The Manufacturer also sought to present testimony of witnesses who were not identified in writing to the Consumer and the Board at least five days prior to the hearing. Consequently, the Manufacturer's representative was not permitted to present the un-noticed witnesses or raise the un-noticed affirmative defenses. The Manufacturer's representative was, however, permitted to cross-examine the Consumer and present a closing argument. Similarly, the Consumer sought to introduce the testimony of her husband who was not identified in writing to the Manufacturer and the Board at least five days prior to the hearing. As the Consumer's husband was not an owner of the vehicle and was not listed as a Consumer on the Request for Arbitration, or on any amendment thereto, the Board did not permit the Consumer's husband to testify during the hearing. Ultimately, the Board awarded a replacement vehicle to the Consumer, after she proved her case.

Grillo v. Jaguar Cars, 2003-1197/STP (Fla. NMVAB February 20, 2004).
The Consumer listed as a witness on his Prehearing Information Sheet the attorney for Jaguar Cars, William Bromagen. At the hearing, Mr. Bromagen objected to being called as a witness, contending that he had no personal knowledge of the Consumer's vehicle. The Consumer stated that he sought Mr. Bromagen's testimony in order to elicit information about Jaguar's affirmative defenses asserted in the Manufacturer's Answer. The Manufacturer's Answer was signed by Mr. Bromagen. The Board denied the Consumer's request to call Mr. Bromagen as a witness.

Erickson v. Ford Motor Co., 2003-0957/ORL (Fla. NMVAB January 8, 2004).
The Consumer indicated on his Prehearing Information Sheet that he would be bringing an interpreter to the hearing. However, at the hearing, the Consumer informed the Board that he wanted the interpreter to speak on the Consumer's behalf and represent him at the hearing. The interpreter was not a lawyer and was not otherwise authorized to practice law in the State of Florida. Accordingly, the Board did not allow the interpreter to represent the Consumer.

MISCELLANEOUS ISSUES

Additional Arbitration for the same vehicle - *Hearings Before the Florida New Motor*

***Vehicle Arbitration Board,* ¶(71)**

Smith v. Toyota Motor Sales, U.S.A., Lexus Division, 2003-1027/MIA (Fla. NMVAB January 15, 2004).

The Consumer, whose prior arbitration request was dismissed after a hearing, alleged that there had been a significant change in circumstances since that hearing and requested an additional arbitration, which was approved. The Board adopted the Findings of Fact of the previous Decision, in which the Board found a nonconformity but found that it had been cured within a reasonable number of repair attempts. In the second arbitration, the Board found that the problem had recurred after the first arbitration hearing and after the final repair attempt. Accordingly, it was presumed that the Manufacturer failed to conform the vehicle to the warranty within a reasonable number of repair attempts. The Consumer was awarded a refund.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2004 - June 2004 (2nd Quarter)

JURISDICTION:

Prior Resort to a State-certified, Manufacturer-sponsored Program §681.108(1), F.S.; §681.103(3), F.S.

Perkins v. Isuzu Motors America, Inc., 2004-0305/TPA (Fla. NMVAB May 26, 2004).
The Manufacturer contended that the Consumer did not satisfy the Lemon Law's requirement of resort to a Manufacturer's state-certified informal dispute settlement procedure, prior to requesting Arbitration before the Board. However, at the time of purchase, the Consumer was not provided with any written materials such as a warranty manual or an owner's guide for the vehicle, and he was not provided with any written instructions for filing a claim with the Manufacturer's state-certified informal dispute settlement procedure. The Consumer repeatedly asked for the owner's guide and warranty manual, but he did not receive them until after the first repair attempt. The Consumer filed a claim with the Manufacturer's state-certified informal dispute settlement procedure, but he withdrew his claim prior to the completion of the program's review process. The Board found the evidence established that the Consumer was not informed in writing at the time of his acquisition of the vehicle how and where to file a claim with the Manufacturer-sponsored dispute settlement procedure; consequently, the prior resort requirement did not apply to the Consumer. The Consumer's case was ultimately dismissed on other grounds.

Motor Vehicle §681.102(15), F.S.

Rosenberg v. BMW of North American, LLC, 2004-0049/WPB (Fla. NMVAB May 17, 2004).
The Manufacturer argued that the subject vehicle was not a "motor vehicle" under the terms of the statute, because it was not new when the Consumer purchased it. An employee of the Manufacturer had used the vehicle prior to the Consumer's purchase, and at the time of the Consumer's purchase, the odometer registered 11,465 miles. The Board found that the vehicle had not been transferred to an "ultimate purchaser" before the Consumer purchased it, and therefore, the vehicle was a "motor vehicle" as defined by the Lemon Law. Ultimately, the Consumer was awarded a refund.

H.S.W. Financial Group, Inc. v. DaimlerChrysler Motors Corp., 2004-0196/TPA (Fla. NMVAB April 22, 2004).
The Manufacturer contended that the Consumer's vehicle was not a motor vehicle as defined by the Lemon Law, because it was a truck with a gross vehicle weight greater than 10,000 pounds.

The Consumer presented the Certificate of Registration for the vehicle, identifying the vehicle's gross vehicle weight as 11,000 pounds and the actual weight of the vehicle as 6,116 pounds. No other evidence was presented as to the vehicle's gross vehicle weight. Noting that the only evidence presented on the weight issue indicated that the vehicle's gross vehicle weight was more than 10,000 pounds, the Board ruled that the vehicle was not a "motor vehicle" under the terms of the statute**.** Accordingly, the Consumer's case was dismissed.

Warranty §681.102(23), F.S.

Lafferty v. Nissan Motor Corp., U.S.A., 2004-0237/WPB (Fla. NMVAB May 14, 2004). The Manufacturer contended that the steering wheel vibration problem was caused by the vehicle's tires, which were not covered by the Manufacturer's written limited warranty. However, the Manufacturer did not install new tires on the vehicle during the course of repairs. The Board found that the Manufacturer failed to prove its defense that the problem was caused by the tires. The Board noted that the Manufacturer could have easily proven its defense by installing new tires on the vehicle during the course of repairs. Ultimately, the Consumer was awarded a refund.

NONCONFORMITY §681.102(16), F.S.

Roebuck v. Toyota Motor Sales, U.S.A., 2004-0149/FTM (Fla. NMVAB April 15, 2004). The Consumers complained of a pronounced, pulsing engine sensation and an engine surge. The Manufacturer contended that the pulsing sensation was "normal" and did not constitute a nonconformity. The Manufacturer's witness testified that the pulsing sensation was caused by the normal operation of the vehicle's exhaust gas re-circulation valve. The operation of the valve could not be altered without violating the federal emissions standards. In finding the problem to be a nonconformity, the Board noted that the issue was not whether the Manufacturer thought the problem to be "normal." The issue was whether the pulsing engine sensation and the engine surge were so pronounced and significant as to substantially impair the use and value of the vehicle. Ultimately, the Consumers were awarded a refund.

Statutory definition of "nonconformity" vs. written warranty coverage terms

Dzidzovic v. Nissan Motor Corp., U.S.A., 2004-0167/ORL (Fla. NMVAB May 5, 2004). The Consumers complained of excessive corrosion on the vehicle's body and undercarriage. The Manufacturer's representative argued that the problem was not covered by the Manufacturer's written, limited warranty, because the warranty covered corrosion only when it was attributable to a manufacturing defect. The Manufacturer's representative contended that the corrosion on the Consumers' vehicle was caused by abuse or neglect. The Consumers' vehicle had a rust spot on the inside of the door jam and a rust spot on a fender. During one repair attempt, the authorized service agent noted the presence of an extraordinary amount of corrosion on all non-coated metal parts under the hood and on the undercarriage. The BBB/AUTOLINE independent inspector's report claimed the excessive corrosion was caused by

long-term exposure to excessive amounts of moisture or salt. The Board rejected the Manufacturer's contention that excessive corrosion must be a manufacturing defect to be covered by the Lemon Law, noting that the statutory definition of "nonconformity" is controlling over the terms of the written, limited warranty. The statutory definition of "nonconformity" does not limit coverage to "manufacturing defects." The Board ultimately found the excessive corrosion to be a defect or condition that substantially impaired the value of the vehicle. Accordingly, the Consumers were awarded a refund.

Florida Administrative Code Rule 2-30.001(2)(a), Definition of "Condition"

Wallace v. General Motors Corp., Chevrolet Motor Div., 2004-0371/TLH (Fla. NMVAB June 25, 2004).
The Consumers complained about a thumping noise that seemed to emanate from the front-end area of the vehicle. The Consumers initially thought the noise was caused by a problem with the brakes. The Manufacturer's authorized service agent attempted to repair the problem by replacing the rear and front rotors on a number of occasions; however, those repairs did not correct the noise. The noise remained relatively consistent from the day the Consumers first heard the noise, (at less than 1,000 odometer miles) to the date of the hearing. The Manufacturer contended that the problem was caused by a "scalloped" tire. A test drive and inspection was performed by the Board during the hearing. The tires did not exhibit any unusual tire wear, and some scalloping was observed on the left front tire. The Board heard a thumping noise coming from the front-end area of the vehicle as it was driven, but the noise did not appear to be related to the application of the brakes. Upon these facts, the Board determined that the thumping noise was a condition of unknown origin that substantially impaired the use, value and safety of the vehicle. Ultimately, the Consumer was awarded a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Collins v. Ford Motor Co., 2004-0257/ORL (Fla. NMVAB June 1, 2004).
The Manufacturer contended that the Consumer did not provide written notification of the defect. The Consumer mailed a letter to the Manufacturer and to one of the Manufacturer's authorized service agents, Greenway Ford. The letter outlined the problems the Consumer was having with his vehicle and advised that the vehicle would be delivered to Sun State Ford for repairs. The letter further requested repurchase or replacement relief, and warned that the Consumer intended to pursue his rights under the Lemon Law. The Manufacturer responded to the Consumer and asked him to deliver the vehicle to Greenway Ford for the final repair attempt. However, the Consumer declined to deliver the vehicle to Greenway Ford as requested, because he contended that the repair at Sun State Ford was the Manufacturer's final repair attempt. The Board ruled that the Consumer's letter was sufficient to provide written notification under the terms of the statute. However, the Board ultimately dismissed the Consumer's case on the ground that the Consumer failed to provide the Manufacturer a final opportunity to repair the

vehicle. The Board reasoned that the Sun State Ford repair attempt was not the Manufacturer's final repair attempt, because the Manufacturer had designated Greenway Ford, and not Sun State Ford, as the facility for the final repair attempt.

Williams v. Ford Motor Co., 2004-0218/FTM (Fla. NMVAB April 26, 2004).
The Manufacturer contended that it was not provided the statutory written notification, because the letter that the Consumers sent to the Manufacturer did not request a final repair attempt. The Consumers sent a letter to Ford Motor Company in Detroit, Michigan. The letter bore the heading, "Letter of Notification of Defect to Manufacturer," and it contained the vehicle's identification number, the dates of three repair attempts, and requested the Manufacturer replace or repurchase the vehicle pursuant to the Lemon Law. The Manufacturer responded by letter indicating that someone would contact the Consumers within seven days. The Consumers also received a telephone call from the Manufacturer's authorized service agent directing the Consumers to present the vehicle at a place certain for the final repair attempt. The Consumers complied with the service agent's instruction and a final repair attempt was conducted. Upon this evidence, the Board found the Consumers' letter provided the statutory notice to the Manufacturer. Ultimately, the Consumer was awarded a refund.

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

Schroeder v. Ford Motor Co., 2004-0056/STP (Fla. NMVAB April 6, 2004).
The Consumer complained of a steering wheel vibration and shudder that occurred during slow left turns. On two repair attempts, the Manufacturer's authorized service agent performed no repairs. Thereafter, the Consumer sent written notification of the defect to the Manufacturer and provided the Manufacturer with the opportunity for a final repair attempt. During that repair attempt, the Manufacturer again performed no repairs, contending that the steering vibration and shudder were "normal" for the Lincoln Aviator. During the Manufacturer's pre-hearing inspection of the vehicle, the Manufacturer's Field Service Engineer authorized the replacement of the vehicle's steering gear and rack and pinion. The repair reduced the severity and frequency of the steering problem but did not completely eliminate it. Upon these facts, the Board found the Manufacturer had been afforded a reasonable number of attempts to cure the problem. The Board noted that a Consumer is not required to meet the three-plus-one statutory presumption in order to establish a reasonable number of attempts. The Board found that it would be unreasonable to require the Consumer to continue to seek repair where the Manufacturer had consistently elected not to undertake repairs. Accordingly, the Consumer was awarded a replacement vehicle.

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

Carbono v. Ford Motor Co., 2003-1183/ORL (Fla. NMVAB April 12, 2004).
The Manufacturer contended that the Consumer failed to provide a final opportunity to repair the vehicle. The Manufacturer mailed to the Consumer a post card that directed the Consumer to present the vehicle to the Manufacturer's authorized service agent for the final repair attempt.

The post card was mailed one day after the Manufacturer received the Consumer's written defect notification. The Manufacturer also attempted to contact the Consumer by telephone but was unsuccessful. The Manufacturer's representative left a message on the Consumer's cellular number asking the Consumer to return his phone call to schedule a final repair attempt. The Consumer did not receive the message, because his cell phone was inoperable at the time. The Manufacturer's representative also attempted to contact the Consumer at the Consumer's home telephone, but there was no answer and no means to leave a message. In addition to the Manufacturer's direct attempts to contact the Consumer, the Manufacturer's authorized service agent also attempted to contact the Consumer. The Consumer did not present the vehicle at the repair facility as directed by the post card and did not respond to the numerous telephone calls; consequently, the Manufacturer did not conduct a final repair attempt. Under these circumstances, the Board found that the Consumer failed to provide a final repair attempt. Accordingly, the Consumer's case was dismissed.

Shaw v. Ford Motor Co., 2004-0068/TPA (Fla. NMVAB April 14, 2004).
The Consumer failed to send written notification to the Manufacturer at the address indicated in the warranty book for receipt of such notifications, and as a consequence, the Manufacturer's response was delayed. An unknown recipient of the letter forwarded it to the correct address, and when the Manufacturer received the notification at the correct address, the Consumer was promptly contacted to arrange a final repair attempt. However, the Consumer contended that the Manufacturer's response was untimely and refused to present the vehicle for a final repair attempt. The Consumer's postal return receipt contained a receipt date that corresponded to the date that the written notification was received at the incorrect address. The Manufacturer contended that it responded to the Consumer's written notification within 10 days of receipt <u>at the correct address</u>. The Manufacturer's warranty, which the Consumer received at the time of purchase, provided the correct address for receipt of such notification. Upon these facts, the Board ruled that the Manufacturer's receipt date was the date the Manufacturer received the forwarded defect notification at the correct address. Thus, the Manufacturer's response to the defect notification was timely, and the Manufacturer was entitled to a final repair attempt. The Board dismissed the Consumer's case for failure to provide the Manufacturer with a final opportunity to repair the vehicle.

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

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

Harris v. Toyota Motor Sales, U.S.A., 2004-0277/ORL (Fla. NMVAB June 1, 2004). The Manufacturer contended that the stalling problem was caused by accident, abuse, or neglect by persons other than the Manufacturer or its authorized service agent. In support of the defense the Manufacturer's witness testified that a fuel sample from the vehicle's fuel tank was examined and found to be off-color and to have an uncharacteristic odor. In addition, the spark plugs were contaminated and the diagnostic computer showed a misfire, which were indicators of contaminated fuel. Upon these facts, the Board found the stalling problem to be the result of accident, abuse, or neglect by persons other than the Manufacturer or its authorized service agent. The Board noted that there was no evidence presented that would support finding that the fuel contamination was caused by the Manufacturer or its authorized service agent. Accordingly, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

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

Thompson v. Toyota Motor Sales, U.S.A., Inc., 2004-0431/STP (Fla. NMVAB June 24, 2004). The zero net trade-in allowance reflected in the lease agreement was not acceptable to the Manufacturer. The Manufacturer provided a copy of a NADA Official Used Car Guide (Southeastern Edition) for February 2004, which was not the guide in effect on the date of the trade-in (July 19, 2003). The Consumer's trade-in vehicle, a 2003 Toyota Tacoma, was not listed in the July 2003 NADA Guide. The February 2004 NADA Guide was the first NADA Guide to list the trade-in vehicle. The Manufacturer's representative argued that the Consumer's net trade-in allowance was "inflated," because the actual purchase price of the leased vehicle was higher than the Manufacturer's Suggested Retail Price. The Manufacturer's representative asked the Board to subtract the Manufacturer's Suggested Retail Price from the purchase price to arrive at the amount of the so-called "over allowance." He contended that the Board should reduce the Consumer's net trade-in allowance by the amount of the "over allowance," which would result in a negative net trade-in allowance. The Board declined the Manufacturer's request as being beyond the plain meaning of s. 681.102(19), F.S. To calculate the Consumer's refund, the Board used the zero net trade-in allowance as reflected in the lease agreement.

Gottlieb v. Mercedes-Benz USA, Inc., 2003-1066/WPB (Fla. NMVAB May 7, 2004). The Consumer was not satisfied with the net trade-in allowance reflected on the lease agreement and opted for the NADA retail value. The Manufacturer objected to the Board using the NADA Guide to calculate the net trade-in allowance, on the ground that the trade-in vehicle was itself a leased vehicle. The lease agreement reflected that the Consumer received a negative net trade-in allowance of $4,589.80. The negative net trade-in allowance was identical to the charge incurred by the Consumer for terminating the lease early on the traded-in vehicle. The

Manufacturer's counsel argued at the hearing that the leased vehicle should not be treated as a trade-in vehicle, because lessees have no equity in such vehicles. The Board disagreed with the Manufacturer, noting that the statutory definition of net trade-in allowance is determinative of the issue. The Board calculated the net trade-in allowance by subtracting from the NADA retail value the residual value of the trade-in vehicle and the early termination charge.

PROCEDURAL ISSUES

Sports Development, Inc. v. General Motors Corp., Cadillac Div., 2004-0212/FTL (Fla. NMVAB April 29, 2004).
At the hearing, the Manufacturer sought to raise the affirmative defense that the engine malfunction was the result of an accident. Specifically, the Manufacturer sought to show that the vehicle was driven through a large puddle of water that caused the malfunction. However, the Manufacturer failed to raise that affirmative defense in its Answer or in a timely filed Amended Answer. Therefore, the Board did not permit the Manufacturer to raise the defense. Ultimately, the Consumer was awarded a refund.

Fontaine v. Mercedes-Benz USA, Inc., 2004-0072/ORL (Fla. NMVAB April 7, 2004).
At the hearing, the Manufacturer's counsel sought to present the testimony of a witness who was not listed on the Manufacturer's Prehearing Information Sheet or otherwise identified in writing five days before the hearing, as required by the Board's procedures. The Consumer objected to the witness being permitted to testify. The Manufacturer's counsel argued that the witness should be permitted to testify, because he was present at the hearing to take the place of a listed witness who was on vacation. The Board noted that the Prehearing Information Sheet makes clear that any witness not included on the form, or otherwise identified in writing within the required time, would not be allowed to testify. The Manufacturer was free to amend the Prehearing Information Sheet in a timely fashion prior to the hearing, but failed to do so. Upon consideration of the Consumer's objection and having heard no sufficient explanation for the Manufacturer's failure to comply with the prehearing notice requirements, the Board ruled that the witness could not testify at the hearing.

Davis v. Ford Motor Co., 2004-0379/TPA (Fla. NMVAB June 15, 2004).
The Consumer's husband appeared at the hearing intending to represent his wife's interests. The Consumer did not personally appear, and her husband presented a faxed letter from the Consumer that purportedly authorized the Consumer's husband to speak on her behalf at the hearing. The Request for Arbitration was not filed jointly by the Consumer and her husband, and the husband had no ownership interests in the subject vehicle. The Manufacturer objected to the husband's request to represent the interests of his wife in this case. The Consumer's husband requested that the hearing be rescheduled so that the Consumer could appear, to which the Manufacturer's representative objected, citing the expense incurred by counsel in traveling to the hearing, and further citing to the fact that the Consumer had not requested a continuance or shown an unforeseeable circumstance or good cause to support a continuance. The Board denied the Consumer's husband's request to reschedule the hearing and denied his request to represent

the interests of the Consumer. Accordingly, the Board dismissed the Consumer's case for failure to appear at the hearing.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2004 - September 2004 (3rd Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Heitmann v. Ford Motor Company, 2004-0466/FTM (Fla. NMVAB July 28, 2004).
The Manufacturer contended that the party appearing at the hearing was not a "consumer" under the terms of the statute, because she was not the titled owner of the vehicle and did not sign the Request for Arbitration. Mrs. Heitmann appeared at the hearing, but her husband, Mr. Heitmann, did not appear. Mr. Heitmann was the only owner on the title to the vehicle and his signature was the only signature on the Request for Arbitration. Mr. Heitmann purchased the vehicle to be used by his wife, for her personal use and for transporting their three children. Mrs. Heitmann's name was on the bank account from which the periodic payments to the lienholder were drawn, and during the course of repairs, Mrs. Heitmann was able to enforce the Manufacturer's warranty. Mrs. Heitmann was the primary driver of the vehicle. The Board ruled that the Consumer's wife is a "consumer" under the terms of the statute. Ultimately, the Consumers were awarded a refund.

NONCONFORMITY §681.102(16), F.S.

Conover v. Mercedes-Benz USA, Inc., 2004-0435/JAX (Fla. NMVAB July 30, 2004).
The Consumers complained that the vehicle's acceleration felt "notchy" or "sticky." On each of the three repair attempts, prior to the Manufacturer's receipt of the Consumers' defect notification form, the Manufacturer's authorized service agent replaced the vehicle's accelerator cable. After each replacement of the accelerator cable, the vehicle's acceleration improved, but the problem always returned within a few months. The Manufacturer contended that the "notchy" acceleration was a design characteristic of the vehicle, akin to the notchy feel of some radio control dials, and as such, it was not a defect. The Board ruled that the "notchy" acceleration was a defect or condition that substantially impaired the use of the vehicle. Ultimately, the Consumers were awarded a refund.

Stubbs v. General Motors Corporation, Chevrolet Motor Division, 2004-0479/ORL (Fla. NMVAB September 22, 2004).
The Consumer complained of a pronounced clunking sound coming from the transmission when it was shifting between second and third gear. The Manufacturer's Representative argued at the hearing that the transmission clunk was a normal operating condition for the vehicle, that the

Manufacturer was aware of the clunking condition, and that the condition was worse in four-wheel drive vehicles such as the Consumer's vehicle. The Board noted that a prospective purchaser would likely either decline to purchase the Consumer's vehicle in favor of one which does not exhibit the clunking condition or would pay substantially less for the Consumer's "clunker." Upon these facts, the Board found that the transmission clunking condition substantially impaired the value of the vehicle. The Board further ruled that the Manufacturer's defense of "normal operation" was irrelevant to the issue of whether the defect or condition substantially impaired the vehicle.

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.

Roach v. Kia Motors America, 2004-0590/ORL (Fla. NMVAB September 23, 2004).
The Manufacturer contended that the Consumers failed to provide the Manufacturer with written notification pursuant to the terms of the statute, because the Consumers' defect notification form did not correctly describe the problem they were having with the vehicle. The Consumers complained of an intermittent stalling problem with the vehicle. On the defect notification form, however, they listed as a continuing defect, "blown fuse[,] wiring and fuse box harness, and ECM harness." The Consumers based their description of the problem upon wording in the repair orders. The Board noted that the statute does not require that a consumer be a diagnostician of their vehicle, nor does it require that each and every defect be identified on the written defect notification form. The Board also made note that the printed instructions on the defect notification form direct the Manufacturer to ascertain all appropriate information. Accordingly, the Board ruled that the Manufacturer received written notification pursuant to the requirements of the statute. Ultimately, the Board awarded the Consumers a refund.

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

Hankins v. Ford Motor Company, 2004-0501/ORL (Fla. NMVAB August 25, 2004).
The Manufacturer contended that it was not afforded a reasonable number of repair attempts, because there were only two repair attempts on the transmission problem prior to the Manufacturer's receipt of the Consumer's written defect notification. The Consumer complained of a transmission slipping problem and presented the vehicle to the Manufacturer's authorized service agent on two occasions. On each repair attempt, the Manufacturer's service agent test drove the vehicle and performed electronic diagnostic testing. The service agent found no indication of a transmission slipping problem, and consequently, performed no repairs. After two unsuccessful attempts to have the problem corrected, the Consumer sent written notification to the Manufacturer and thereafter provided the Manufacturer with a final repair attempt. As with the two previous repair attempts, however, the Manufacturer's authorized service agent test

drove the vehicle and performed electronic diagnostic testing. Finding no indication of a transmission slipping problem, the service agent again performed no repairs. Upon these facts, the Board found that the Manufacturer was provided a reasonable number of attempts to correct the transmission slipping problem. Ultimately, 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.

Bustamante v. BMW of North America, LLC, 2004-0450/MIA (Fla. NMVAB August 9, 2004). The vehicle was equipped with a Spanish version of a Global Positioning System (GPS). The Spanish translation was poor, and at times, it caused the GPS software to fail. The GPS erroneously interpreted "yes" answers to questions to be "no" answers, which would prompt the software to shut itself down. In order for the Consumer to avoid the shut-down problem, the Consumer had to answer "no" whenever she meant "yes." The Board acknowledged that the GPS problem was an annoyance, but nevertheless, found that it did not substantially impair use, value, or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Newby v. Mercedes-Benz USA, Inc., 2004-0447/STP (Fla. NMVAB August 30, 2004). The Manufacturer contended that the Consumers' case should be dismissed, because their Request for Arbitration was filed more than 60 days after the expiration of the Consumers' Lemon Law rights period. The Request for Arbitration was filed on May 3, 2004. The purchase documents were dated March 1, 2004. However, the Consumers' indicated on their Request for Arbitration that they took delivery of the vehicle on March 4, 2004. At the hearing, the Consumers testified that the vehicle was not ready for delivery on March 1, 2004, and that it was subsequently delivered to one of the Consumers at her place of business on March 4, 2004. No documentary evidence was presented to substantiate the Consumers' claim that they took delivery on March 4, 2004. Upon these facts, the Board ruled that the Consumers' Request for Arbitration was untimely filed.

MULTIPLE MANUFACTURERS

Xenos v. Ford Motor Company and *Roush Performance Products*, 2004-0306/TPA (Fla. NMVAB August 18, 2004).
Roush Performance contended that it was not a "manufacturer" under the terms of the Lemon Law statute. Prior to the Consumer's purchase, the vehicle was extensively modified by Roush. The modifications performed by Roush included the addition of a Roush supercharger and related engine cooling system to the vehicle's engine, recalibration of the transmission and power train, installation of a new braking system, and the replacement of the Ford suspension and exhaust systems with Roush systems. The Ford suggested retail price of approximately $25,000 was increased by approximately $24,000 as a result of the manufacturing performed by Roush. The Consumer was provided with a written express limited warranty from Ford and a written limited warranty from Roush Performance Products. Ford Motor Company contended that Roush Performance was a manufacturer under the terms of the Lemon Law statute because of the extensive modifications Roush made to the vehicle. Upon these facts, the Board ruled that Roush Performance was a manufacturer of the vehicle in question. Ultimately, however, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

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

Thomas v. General Motors Corporation, Chevrolet Motor Division, 2004-0437/STP (Fla. NMVAB July 1, 2004).
The Consumer requested the Board utilize the NADA retail price for his two trade-in vehicles. One of the vehicles was included in the NADA Used Car Guide (Southeastern Edition) in effect at the time of the transaction, but the other vehicle, a conversion van, was not included in that edition of the NADA Used Car Guide. That NADA Used Car Guide contained a reference to and incorporation of the NADA Van Conversion Guide for conversion vans. Therefore, the Board utilized the NADA Van Conversion Guide that was in effect at the time of the transaction to derive a net trade-in allowance for the conversion van.

MISCELLANEOUS ISSUES

Boutwell v. Kia Motors America, 2004-0509/ORL (Fla. NMVAB September 1, 2004).
The Consumer sought to prohibit the Manufacturer from raising any affirmative defenses at the hearing, arguing that the Manufacturer's Answer was untimely filed. The Manufacturer received the Notice of Arbitration on June 25, 2004. The date 15 days after the Manufacturer's receipt was July 10, 2004, which was a Saturday. Counsel for the Consumer argued that the Manufacturer's Answer was untimely because it was filed on Monday, July 12, 2004. The Board ruled that the Manufacturer's Answer was timely filed. Accordingly, the Manufacturer was allowed to raise the affirmative defenses specified on its Answer.

Bates v. Ford Motor Company, 2004-0482/WPB (Fla. NMVAB August 11, 2004).
At the hearing, the Manufacturer's counsel requested leave to raise an affirmative defense that was not timely raised in the Manufacturer's Answer or in a timely filed amendment. Counsel for the Manufacturer asserted that the affirmative defense indicated on the Manufacturer's Answer was the result of a scrivener's error. As there was sufficient time prior to the hearing in which the Manufacturer could have corrected the alleged error in its Answer, the Board denied the Manufacturer's request. The Board also denied the Manufacturer's in-hearing request for a continuance.

Dougherty v. Ford Motor Company, 2004-0453/ORL (Fla. NMVAB July 28, 2004).
The Consumers did not receive the Manufacturer's Third Prehearing Information Sheet, which added a Manufacturer witness. Therefore, the witness was not properly noticed, and the Board did not allow the witness to testify.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2004 - December 2004 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Shaffer v. Ford Motor Company, 2004-0858/TLH (Fla. NMVAB December 14, 2004).
The Manufacturer's representative argued at the hearing that the Consumers are not "consumers" under the terms of the statute, because they purchased and used the vehicle for business purposes. The Consumers purchased the vehicle with a trailer tow package, so that they could use the vehicle in their landscaping business. The Board rejected the Manufacturer's assertion. The Board noted that the statute defines "consumer" as "any other person entitled by the terms of the warranty to enforce the obligations of the warranty." There was no dispute that, at the time of purchase and during the course of repairs, the Consumers were entitled by the terms of the Manufacturer's warranty to enforce the obligations of the warranty.

Motor Vehicle §681.102(15), F.S.

Hopkins v. DaimlerChrysler Motors Corporation, 2004-0781/TLH (Fla. NMVAB November 19, 2004).
The Manufacturer contended that the gross vehicle weight of the Consumer's truck was more than 10,000 pounds, and as such, the vehicle was not a "motor vehicle" under the terms of the statute. The Consumer purchased the truck chassis and had a bed and a water tank installed on it, in order to use the vehicle for his portable toilet business. The Consumer had the truck weighed. He submitted into evidence the Certified Automated Truck scale ticket, which indicated that the truck weighed 8,720 pounds. The water tank was empty when the truck was weighed. The water tank could hold 400 gallons of water, but it was the Consumer's habit to empty the tank before it was filled to three-quarters of the tank's capacity. The Consumer testified that water weighs eight pounds per gallon. Given these undisputed facts, the Board estimated the gross vehicle weight of the vehicle to be 10,320 pounds: the weight of the truck with an empty water tank (8,720 pounds) plus the weight of the contents of the water tank when the tank is filled to one-half of its capacity (200 gallons at 8 pounds per gallon = 1,600 pounds). Finding that the vehicle's gross vehicle weight was not less than 10,000 pounds, as the statute requires, the Board ruled that the vehicle was not a "motor vehicle" for purposes of the lemon law. Accordingly, the Consumer's case was dismissed.

Warranty §681.102(23), F.S.

Baldizzi v. Toyota Motor Sales, U.S.A., Inc., 2004-0733/STP (Fla. NMVAB December 10, 2004).
The Consumer relied upon a representation made in the owner's manual in deciding to purchase the vehicle. The Consumer sought to purchase a vehicle that was equipped with certain features, one being that the interior lights would turn-off automatically when a door was left ajar. The owner's manual for the Consumer's vehicle indicated that it was equipped with such a feature, but after purchasing the vehicle, the Consumer learned that the vehicle in fact did not have the feature. On seven occasions, the vehicle's battery was drained after sitting all night with the interior lights on. The Manufacturer contended that there was no defect in the vehicle and that the owner's manual contained a misprint. The Board ruled that the representation in the owner's manual was a warranty. Ultimately, the Consumer was awarded a refund.

NONCONFORMITY § 681.102(16), F.S.

Kelly v. Ford Motor Company, 2004-0748/JAX (Fla. NMVAB November 10, 2004).
The Consumer complained that the steering wheel in his F-150 pick-up truck vibrated. The steering wheel vibration could be felt by the driver and visually observed by passengers in the vehicle. The Manufacturer denied there was a defect in the vehicle, contending that the 2004 model year F-150s were equipped with rack-and-pinion steering, which allegedly transmitted more "road feel" than the previous steering systems utilized on the F-150s. The new steering system allegedly made the F-150 pick-up trucks steer more like corvettes than like trucks. The Board was not persuaded. The Board found the steering wheel vibration to be a defect that substantially impaired the use of the vehicle. Ultimately, the Board awarded the Consumer a refund.

Sius American, Inc. v. Mercedes-Benz USA, Inc., 2004-0714/MIA (Fla. NMVAB December 1, 2004).
The Consumer complained of a very strong and unpleasant odor that emanated from the air conditioner. The Manufacturer contended that the odor did not substantially impair the use, value, or safety of the vehicle. The Board inspected the vehicle during the hearing. A very strong musty, rubbery odor, reminiscent of a locker room, was evident upon entering the vehicle. The odor got stronger when the air conditioner was turned on and did not begin to diminish for at least three or four minutes. The Board ruled that the odor substantially impaired the use and value of the vehicle. Accordingly, the Consumer was awarded a refund.

Wacha v. Volkswagen/Audi of America, Inc., 2004-0825/JAX (Fla. NMVAB December 14, 2004).
The Manufacturer contended that the defect did not substantially impair the use, value, or safety of the vehicle, because the Manufacturer's authorized service agent had never been able to duplicate the problem. The problem complained of by the Consumer was a transmission hesitation and jerk. The transmission would intermittently hesitate and jerk while being shifted between gears. The hesitation and jerk were so severe that it physically jolted passengers inside

the vehicle. During the course of repairs, the Manufacturer's authorized service agent attempted no repairs, contending that the problem was not duplicated. The Manufacturer's Representative testified that it is the Manufacturer's policy to make no repairs where, as here, the service agent is unable to duplicate the problem. The Representative argued that it was unreasonable to expect the Manufacturer to "throw parts at a car" where a problem could not be duplicated. Upon these facts, the Board found that the problem substantially impaired the use, value, and safety of the vehicle. Ultimately, the Board awarded the Consumer 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.

Yezek v. Ford Motor Company, 2004-0725/WPB (Fla. NMVAB November 5, 2004).
The Consumer complained that the vehicle runs rough, surges forward upon acceleration, and surges forward upon a cold engine start. The surging and rough running engine problem was addressed on three repair attempts plus a final repair attempt. On the second repair attempt for the surging and rough running engine problem, the Manufacturer's authorized service agent deactivated one of the fuel injectors in an attempt to correct the problem. The deactivation of the fuel injector caused the vehicle to sound like a "noisy old dump truck." The Consumer was upset over the noisy running engine and claimed that the service agent's "fix" changed the most important selling feature of the vehicle. The Consumer presented the vehicle for repair of the noisy running engine on two occasions plus a repair attempt after written notification. The Manufacturer's witness contended at the hearing that the second repair attempt cured the surging and rough running engine problem, but he admitted that the repair increased the noise level of the engine. He testified that nothing could be done about the noisy engine. Upon these facts, the Board found that the rough running engine and the noisy engine were both nonconformities. In addition to finding that there was a presumption of reasonable number of repair attempts on the rough running engine problem, the Board also found that there was a reasonable number of attempts on the noisy engine problem. Accordingly, 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.

Whitacre v. DaimlerChrysler Motors Corporation & Elk Automotive, 2004-0735/FTM (Fla. NMVAB November 16, 2004)
The subject vehicle was a conversion van, manufactured by DaimlerChrysler and Elk Automotive. Elk Automotive claimed it was not afforded a "final repair attempt," because the Consumers declined to allow the vehicle to be taken to the manufacturer's factory in Indiana. The Consumers purchased the van in Florida, from Sunset Dodge, an authorized service agent for both DaimlerChrysler and Elk Automotive. Pursuant to the terms of Elk Automotive's warranty, the Consumers reported all problems to the selling dealer, Sunset Dodge. Sunset Dodge received authorization from Elk Automotive for all of the repairs. After the vehicle was

out of service for repair for more than 15 days, the Consumers sent written notification to both manufacturers. Following the manufacturers' receipt of the notification, the vehicle was subjected to inspection by Sunset Dodge. The Board concluded that Elk Automotive was not denied a "final repair attempt," because the applicable statutory provision, Section 681.104(1)(b) only requires an "opportunity to inspect or repair" by the Manufacturer or its authorized service agent following receipt of the written notification. Since the vehicle was inspected by Elk Automotive's authorized service agent, the terms of the statute were met. Finding that the vehicle was out of service for repairs of nonconformities for 34 days, the Board awarded the Consumers a refund.

Tews v. Toyota Motor Sales, U.S.A., 2004-0772/MIA (Fla. NMVAB December 13, 2004).
The Consumer presented the vehicle for repair of a defective moonroof on June 29, 2004. The replacement of the moonroof also involved the replacement of the vehicle headliner, but the Manufacturer's service agent delayed ordering the headliner, causing a delay in the completion of the work. Although the Manufacturer's authorized service agent could have directed the Consumer to pick up the vehicle pending the delivery of the new headliner, the service agent chose to keep the vehicle. Upon these facts, the Board ruled that the vehicle was out of service for 36 days (the entire time that the vehicle remained at the service agent's facility) for repair of a nonconformity. Ultimately, 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.

Bergeron v. General Motors Corporation, Chevrolet Motor Division, 2004-0835/ORL (Fla. NMVAB December 16, 2004).
The Consumer complained of a groaning noise in the front of the vehicle that occurred every time she stopped the car. The noise was heard after she stopped the vehicle and took her foot off the brake pedal. The Consumer testified that, during the course of repairs, at several different dealerships, she was given a variety of reasons for the noise, but it was never corrected. The Manufacturer contended that the noise was not a defect or condition that substantially impaired use, value, or safety. Manufacturer witnesses testified that they had removed the wheels and tires to inspect the vehicle's brakes. They found no evidence of a defect. The witnesses also test drove the Consumer's vehicle but were unable to verify the noise that the Consumer described. During the hearing, the Board test drove the vehicle. A low-pitched groan noise was heard as the vehicle started moving after being stopped. The Board ruled that the noise 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.

Assing v. American Suzuki Motor Corporation, 2004-0718/ORL (Fla. NMVAB October 28, 2004).
The Manufacturer contended that the blown engine was the result of accident, abuse, neglect, or unauthorized modification. The Consumers drove the vehicle to New York. Prior to departure, the Consumers took the vehicle to a friend to "check it out" for the trip. After arriving in New York, the Consumers loaned the vehicle to a relative. While the Consumers' relative was using the vehicle, the engine started smoking. The Consumers' relative stopped the vehicle and attempted to add oil, but the oil drained through the vehicle and onto the pavement. The vehicle was towed to a Manufacturer's authorized service agent in New York, where it was inspected. The New York service agent determined that the oil filter was missing. He concluded that the missing oil filter caused the oil leak. The Manufacturer's witness averred that an aftermarket oil filter not designed to Suzuki's specifications might not fit the threads correctly, which could lead to the filter falling off the engine while it is in motion. He examined the vehicle and found that the engine oil pan plug bore wrench marks, indicating that it had been removed and replaced at some point prior to the inspection. He averred that there was no other indication of an engine oil leak. Upon these facts, the Board ruled that the blown engine was the result of accident, abuse, neglect, or unauthorized modification by persons other than the Manufacturer or its authorized service agents. Accordingly, the Consumers' case was dismissed.

Tavarez v. Mazda Motor of America, Inc., 2004-0777/FTL (Fla. NMVAB December 9, 2004).
The Consumer complained that the engine hesitated and "bucked" upon deceleration. The Manufacturer contended that the defect was caused by unauthorized modification of the vehicle. The Consumer acknowledged that after he purchased the vehicle, he added a "turbo timer," an air and fuel mixture gauge, and a boost gauge to the vehicle. The Consumer also installed an "air cone" under the hood which bypassed the air box. The parts were not installed by the Manufacturer or its authorized service agent. The Manufacturer's witness testified that the engine "buck" was caused by the after-market parts. He explained that he removed the after-market parts, and the engine performed properly. Upon these facts, the Board found that the problem was caused by unauthorized modification of the vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the Consumer's case was dismissed.

MULTIPLE MANUFACTURERS

Whitacre v. DaimlerChrysler Motors Corporation & Elk Automotive, 2004-0735/FTM (Fla. NMVAB November 16, 2004)
The Consumers required a van that was converted to accommodate persons with disabilities. Prior to their purchase, they researched van converters and decided to purchase a Dodge van converted by Elk Automotive. A representative for Elk Automotive assured the Consumers that Elk Automotive could perform the adaptive equipment conversion necessary to meet their needs. A similar assurance was also contained on Elk Automotive's web site. The Consumers agreed to purchase a 2003 Dodge Ram conversion van from Sunset Dodge, an authorized service agent for

DaimlerChrysler and Elk Automotive. Elk Automotive contracted with a company called Alternative Mobility to install the adaptive equipment prior to the Consumers' purchase of the vehicle. Subsequent to their purchase, it was discovered that the mobility adaptations were installed incorrectly, and in addition, the vehicle failed to start and the rear differential emitted a whining noise. The vehicle was out of service for repair of these defects for 34 cumulative days. At the hearing, DaimlerChrysler asserted that, because it had corrected the two defects for which it claimed responsibility under its warranty, and the "preponderance" of the defects were covered by Elk Automotive's warranty, the Consumers' claim should be dismissed as to DaimlerChrysler. Elk Automotive claimed it should not be liable, because the mobility adaptation defects were not substantial and it was denied a "final repair attempt." (See, previous discussion of this issue in this Summary). The Board found all of the claimed defects to be nonconformities and awarded the Consumers a refund as against both Manufacturers, jointly.

MISCELLANEOUS ISSUES

Morales v. Mercedes-Benz USA, Inc., 2004-0807/FTL (Fla. NMVAB December 10, 2004). Counsel for the Manufacturer requested permission to appear by telephone at the arbitration hearing. His request was submitted via facsimile at 5:15 pm on the day prior to the scheduled hearing. The Board found the request to be untimely and therefore denied it. Counsel for the Manufacturer did not appear at the hearing; instead, an employee of the Manufacturer appeared on behalf of the Manufacturer.

Central Florida Foot & Ankle Center, LLC, v. Mercedes-Benz USA, Inc., 2004-0811/TPA (Fla. NMVAB November 24, 2004).
The Manufacturer filed its Answer more than 15 days after the date of the Manufacturer's receipt of the Notice of Arbitration. Finding the Manufacturer's filing to be untimely, the Board did not permit the Manufacturer to raise any affirmative defenses at the hearing and did not permit the Manufacturer's witness to testify. Counsel for the Manufacturer was allowed to cross-examine the Consumer's witnesses and to give a closing argument.