OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2019 - March 2019 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(14), F.S.

Patel v. Volkswagen/Audi of America, Inc., 2018-0419/WPB (Fla. NMVAB January 10, 2019)

The Manufacturer asserted that the Consumer was not qualified for repurchase relief under the Lemon Law because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. The Manufacturer's representative argued that the Consumer leased the vehicle from a dealership in New Jersey and traveled to Boston, Massachusetts to sign the lease, which was drafted in accordance with New Jersey law. The representative asserted that the lease did not reflect that Florida's Lemon Law fee was assessed on the transaction and did not reflect payment of any sales tax to the State of Florida. As such, the Manufacturer urged the Board to find that the motor vehicle at issue in the case was not "sold in this state," and was therefore not a "motor vehicle" under the Florida Lemon Law.

The Consumer asserted that the vehicle was sold in this state, and that his vehicle was therefore a "motor vehicle" under the Lemon Law. The Consumer testified that he performed an online search and located the subject vehicle at Audi Toms River in Toms River, New Jersey. He acknowledged that in mid May 2017, he traveled to Boston, Massachusetts and met with a representative from the dealership to sign the lease. He said that when he returned to Florida, he signed and faxed an updated lease correcting a scrivener's error regarding the value of his trade-in vehicle to the dealership, and subsequently wired the $5,000 due at lease signing. He claimed that a representative from the dealership in New Jersey informed him that all fees assessed in the lease agreement were based on Florida law. He alleged that the dealership in New Jersey paid for the cost to ship the vehicle from New Jersey to Florida, and assumed all liability for the vehicle during the transport to Florida.

Upon consideration of the totality of the evidence presented, including that (1) the Consumer traveled outside Florida to sign the lease in Boston, Massachusetts; (2) there was no evidence presented that the Consumer paid the Florida Lemon Law fee; (3) there was no evidence presented of any sales tax offset remitted to the state of Florida; (4) there was no evidence presented that the Consumer paid *any* taxes or fees to the state of Florida; and (5) there was no evidence presented that the Consumer took delivery of the vehicle in Florida, as he failed to provide documentation that the dealership paid for the cost to ship the vehicle from New Jersey to Florida, and failed to provide documentation that the dealership assumed liability for damage during the vehicle's transport to Florida, the Board found that the motor vehicle was not "sold in

this state" and therefore did not constitute a "motor vehicle" under the statute. The Consumer was therefore not qualified for the relief requested and the case was dismissed.

NONCONFORMITY 681.102(15), F.S.

Gonzalez and Padilla v. Toyota Motor Sales, USA, Inc., 2018-0391/FTL (Fla. NMVAB January 23, 2019)

The Consumers complained of defective brakes in their 2017 Toyota Yaris IA. One Consumer testified that beginning in January 2018, when driving between 25-40 miles per hour, he would hear a "big noise" upon applying pressure to the brake pedal. He informed the authorized service agent that when he applied the brake, the vehicle made a high-pitched squeak and grinding noise. He stated that the noise happened every time he pressed the brake pedal and last occurred on his way to the arbitration hearing. He added that he no longer felt safe when driving the vehicle. The other Consumer testified that she heard the noise every time she drove the vehicle and specifically pointed out that she heard the noise upon stopping at a light. She added that she felt unsafe in the vehicle and did not feel comfortable driving long distances.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative acknowledged that he had never inspected the vehicle but did review the repair orders. He said that the first repair order indicated that the only repair performed was for out-of-round front rotors, which would not have caused a brake noise. He also acknowledged that none of the repairs performed at the first three repair attempts would have addressed the Consumers' brake noise complaint. After reviewing the repair order from the final repair attempt, he noted that, according to the document, the brake noise had been duplicated for the Field Technical Specialist (FTS) while in the dealership's parking lot, and that upon inspection of the brakes at that time, the FTS found an accumulation of foreign debris in the brake system. He acknowledged that he had never spoken to the FTS who performed the final repair attempt and was not able to provide any further detail about what type of foreign debris was observed. He explained that according to the repair order, the foreign material was embedded in the brake pads and/or shoes, and was rubbing against the drum and/or rotors. He further explained that the FTS observed score marks directly lined up with the foreign debris in the brake shoes and drums, which could be caused by a foreign material such as a rock. He said that at the final repair attempt, the FTS replaced the brake pads and rotors in an attempt to eliminate the brake noise, but acknowledged that the FTS did not replace the brake shims, which can also be a source of brake noise. He also acknowledged that at the time the Consumers first reported the brake noise and at the subsequent two repairs, the technicians did not find any foreign debris in the brake system. Additionally, he stated that the FTS observed the Consumer applying the emergency brake upon exiting the vehicle after the test drive. He noted that driving with the emergency brake engaged could also cause a problem with the brakes; however, he acknowledged that the condition of the Consumers' brake pads was not consistent with a vehicle that was driven long distances with the emergency brake engaged. He also acknowledged that the technicians never explored any other potential cause of a brake noise and specifically, never looked for a mechanical problem in the brake or drive system that could be causing the noise. He speculated that new debris in the brake system may have caused the brake noise that the

Consumers continued to experience, but conceded that it was possible that the brake noise was coming from an area of the vehicle other than the brake system.

During the hearing, the Board inspected and test drove the vehicle. During an inspection, two Board members checked the front rotors, but did not observe any abnormalities in the rotors. Upon looking under the wheels and tires, one Board member did not see any abnormal dust or debris, and also found the rear drums to be in normal condition. The Board members then applied the brakes after slowly accelerating and reversing the vehicle in the parking lot, and noticed a slight squealing noise when the emergency brake was partially engaged.

The Board found that the evidence established that the defective brakes substantially impaired the use, value and safety 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.

Kassam v. Nissan Motor Corporation, USA, 2018-0499/STP (Fla. NMVAB February 22, 2019)

The Consumers complained of a noise condition characterized by various rattling, ticking, fluttering and clicking noises emanating from the air conditioner vents, dashboard, and front doors in their 2017 Nissan Murano. The Consumers testified that they first began hearing abnormal noises in August 2017 as they were driving back from an out-of-state trip. At that time, the Consumers heard a fluttering-type noise from the left side of the dashboard and a ticking noise from the right side of the dashboard, as well as a fluttering noise from the air conditioner vents. In addition to those noises, the Consumers subsequently began hearing noises from both of the front doors. According to them, the noises usually occurred when the weather was hot and the vehicle has been parked for a while in an unshaded area. Although the authorized service agent made some repairs, the Consumers asserted that the problem continued to occur.

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 he was not able to duplicate the noises during the test drive that he took at the final repair attempt. He acknowledged that he was not present for any of the repair attempts before the final repair attempt and offered no evidence to dispute that the authorized service agent was able to duplicate the Consumers' complaints at several of the repair visits, as reflected in the written repair orders, merely noting that "noises are very subjective," and stating that the "dealership did its best to deal with the noises for 'customer satisfaction.'"

The Board concluded that the evidence established that the noise condition characterized by various rattling, ticking, fluttering and clicking noises intermittently emanating from the air conditioner vents, dashboard, and front doors substantially impairs the 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 replacement vehicle.

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

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

Lechowska v. Toyota Motor Sales U.S.A., Inc., 2018-0483/TPA (Fla. NMVAB February 28, 2019)

The Consumer complained that the passenger-side airbags deployed while driving her 2017 Lexus NX 200t. The Consumer testified that while she was driving to lunch on April 20, 2018, with her six-week old baby in a car seat installed on the rear passenger-side, the front and rear passenger-side curtain airbags malfunctioned and deployed "out of nowhere." According to her, when the airbags deployed, she was driving between 35 and 45 miles per hour in the left lane with two lanes of traffic to her right, approaching a traffic light. She testified that she "did not hit anything" in the road, stating that it was a sunny day, traffic was light, the road was "smooth," and there was no construction in the area. She explained that, immediately after the airbags deployed, she pulled over to the median on the left-side of the road and was contacted by the vehicle's SOS call system. She stated the operator from the SOS call system inquired as to whether she was just involved in an accident and she told the operator that she was not involved in an accident but that the airbags had just deployed on their own. She said the operator called the police to the scene and an ambulance for the baby because she was concerned about her baby's hearing since the airbags deploying created a very loud noise. She said she left to ride in the ambulance with her baby to the hospital while the police remained at the scene with the vehicle. She said later that day the authorized service agent called her to tell her that the vehicle had been towed to the authorized service agent for inspection.

The Manufacturer asserted that, based upon forces encountered by the vehicle, the supplemental restraint system deployed the airbags for occupant safety; and that the alleged nonconformity was the result of an accident of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's representative testified that he analyzed the Event Data Recorder (EDR) information retrieved from the vehicle concerning the April 20, 2018 incident, including the pre-crash data showing the vehicle's activity during the five seconds before the airbags deployed, and he also inspected the vehicle on July 24, 2018. He testified that both the EDR information and his inspection findings support that the right front tire struck a curb, a significant pothole, or other object causing the airbags to deploy. He explained that a side impact crash typically occurs in 30 milliseconds, about a tenth of the time it takes to blink an eye; therefore, the airbag system was a "predictive system" and must decide whether to deploy the airbags in a matter of milliseconds. He stated the system's sensors were constantly scanning the vehicle for predictors and using algorithms to measure the "rate of change of acceleration." He explained that when the rate of change of acceleration measurements registered by the sensors do not match any normal driving pattern, the system will command the airbags to deploy. He stated two airbags deployed in the case: the passenger-side curtain shield airbag that was one continuous airbag running along the passenger-side; and the front torso airbag in the front passenger seat. He testified that the airbags were "properly commanded to deploy" because two independent sensors located in different locations within the vehicle, and electrically separate from each other, both registered the same "side impact." He described the two sensors involved in this case: a front side impact sensor located within the front passenger door; and a "safing

sensor" on the floor that acted as double check for the side impact sensor. He noted that if one of the sensors had failed there would have been evidence of a diagnostic trouble code, but no codes were present.

He further explained that the pre-crash data from the EDR evidenced that, approximately 1.5 seconds before the airbags were triggered to deploy, the Consumer was driving 49.1 miles per hour and took her foot off the gas pedal, as the accelerator pedal percentage measurement changed from 23.0 to 0.0. Then, at 0.5 seconds before deployment, the Consumer lightly applied the brakes because the service brake came on and the longitudinal acceleration measurement was -1.005, which signified slowed down and corresponded with the braking occurring. However, according to him, when the airbags were triggered to deploy, the speed of the vehicle was 47.2 miles per hour and the longitudinal acceleration measurement jumped from -1.005 to -3.661, a significant slowdown of the vehicle, evidencing that the Consumer "struck something that impeded her forward motion" He explained that the vehicle had a "discontinuity in its acceleration" because the significant deceleration that the vehicle experienced did not match the braking occurring. He also explained that the lateral, or side-to-side, acceleration measurements registered by the two sensors, as shown in the EDR, evidenced a side impact of "more than 86 g's," or 80 times the force of gravity, first up 30 g's to the left side at five milliseconds prior to deployment of the airbags and then down 50 g's to the right side when the airbags deployed. According to him, when the sensors registered "more than 86 g's" that was about "100 times what the vehicle can experience under normal driving" conditions. He testified that since both sensors separately registered these accelerations that were equivalent to the "same force or g wave" as if the vehicle struck another vehicle, the airbags were then commanded to deploy. He testified that the airbag system operated as designed and made the determination to deploy the airbags within five milliseconds of striking the object. He explained that when the Consumer struck the object the airbags were in essence being deployed at the same time, so the deployment may have occurred before the Consumer even knew that she hit something. He also testified that he observed, during his inspection on July 24, 2018, and the photographs admitted into evidence portray, damage to the right front suspension because the front stabilizer bar had been moved slightly and a rubber piece on the bar had separated, indicating that the right front tire was struck and the right front suspension absorbed the impact. He explained, using photographs admitted into evidence to depict, that he measured the gaps in front of and behind each tire and calculated that the right front wheel had moved backwards one quarter of an inch and the bottom of the right front wheel had moved outwards, supporting that the right front tire was struck. Additionally, he testified that the alignment report also evidenced that the right front tire was struck because the right front caster angle was reduced and not measuring within the Manufacturer's specifications, and the right front camber was measuring "negative" meaning that the top of the right front tire was tilting inward and not sitting straight up and down; however, the left front caster angle measured within specifications and the left front camber was not measuring negative and sitting straight up and down.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>but does not include a defect or condition that results from an accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent</u>." §681.102(15), Fla. Stat. Upon consideration of the evidence presented, a majority of the Board concluded that the greater weight of the evidence

supported the Manufacturer's affirmative defense that deployment of the passenger-side airbags while driving was the result of an accident of the motor vehicle by persons other than the Manufacturer or its authorized service agent, specifically the right front tire striking an object and causing the deployment of the airbags. Accordingly, the complained-of defect did not constitute a "nonconformity" as defined by the statute, and the Consumer was therefore not qualified for repurchase relief under the Lemon Law.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Brodsky v. Volvo Cars of North America, 2018-0466/WPB (Fla. NMVAB February 14, 2019)

The Consumer's 2016 Volvo XC90 was declared a "Lemon" by the Board due to a hesitation upon acceleration. The Consumer requested, as an incidental charge, reimbursement of $1,850.00 for 70 hours of "driver for hire" expense that the Consumer incurred when, due to her low vision, she had to hire a driver for the loaner vehicle because her teenage children were not eligible to transport her in the loaner vehicle and occasionally, the driver had to use his own vehicle when a loaner vehicle was not available for him to drive. The Manufacturer objected to 50 of the 70 hours of "driver for hire" expense. A majority of the Board awarded the Consumer the entire $1,850.00 for 70 hours of "driver for hire" expense that the Consumer incurred as an incidental charge. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Tiller v. Mercedes-Benz USA, LLC., 2018-0415/ORL (Fla. NMVAB January 14, 2019)

The Consumer's 2018 Mercedes-Benz E63s was declared a "Lemon" by the Board. In order to purchase the vehicle, the Consumer paid $146,244.34 in cash. The Consumer obtained a personal loan in the principal amount of $150,000.00 from First Bank & Trust Company to purchase the vehicle (hereinafter referred to as the "Personal Loan"). At the hearing, the Consumer sought reimbursement of $7,441.60, which was the interest paid by the Consumer, through November 13, 2018, on the Personal Loan; in addition, the Consumer also sought reimbursement of $998.02, which was the accrued unpaid interest on the Personal Loan, through the January 8, 2019 hearing date (hereinafter collectively referred to as the "Interest Amounts"). The Manufacturer's representative objected to the payment of the Interest Amounts, arguing that there was no lienholder of record; the vehicle was purchased with cash, so the Manufacturer was treating the transaction as a "cash purchase buyback"; the Personal Loan was obtained prior to the purchase of the vehicle; and the vehicle was not utilized as security for the Personal Loan.

With respect to the Consumer's request for reimbursement of the Interest Amounts, the Board concluded that the Interest Amounts satisfy the definition of "collateral charges" under the Lemon Law. The Manufacturer's assertions to the contrary were rejected. "Collateral charges" are defined as "those additional charges to a consumer wholly incurred as a result of the acquisition of the motor vehicle. For the purposes of this chapter, collateral charges include, but

are not limited to, manufacturer-installed or agent-installed items or service charges, earned finance charges, sales taxes, and title charges." §681.102(3), Fla. Stat. The Board found, and the evidence otherwise established, that the principal amount of the Personal Loan obtained by the Consumer was utilized by the Consumer for the acquisition of the vehicle. Therefore, the Board concluded that the award shall include reimbursement of $7,441.60 for the interest paid by the Consumer, through November 13, 2018, on the Personal Loan; and $998.02 for the accrued unpaid interest on the Personal Loan, through the January 8, 2019 hearing date, as reasonable collateral charges.

Net Trade-in Allowance §681.102(18), F.S.

Gorin v. Rolls-Royce Motor Cars NA, LLC., 2018-0203/MIA (Fla. NMVAB January 4, 2019)

The Consumer's 2017 Rolls-Royce Wraith was declared a "Lemon" by the Board. In order to lease the vehicle, the Consumer traded in a used 2017 Audi R8 encumbered by debt in the amount of $165,407.04. The lease agreement reflected a trade-in allowance of $150,000.00, but did not reflect a trade-in deficit or negative net trade in allowance, resulting in a net trade-in allowance reflected in the lease agreement of $0.00. The Manufacturer argued that the net trade-in allowance used by the Board must reflect the pay-off of the debt in its entirety, regardless of the amounts reflected in the lease agreement.

The net trade-in allowance reflected in the lease agreement was not acceptable to the Consumer. Pursuant to Section 681.102(18), 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, there was no sales data available for the trade-in, leaving the Board to utilize, pursuant to 681.102(18), Florida Statutes, "the net trade-in allowance as reflected in the … lease agreement" in calculating of the Consumer's refund. Accordingly, the Consumer was entitled to a refund of $0.00 for the net trade-in allowance as reflected in the lease agreement.

Reasonable Offset for Use §681.102(19), F.S.

Torres v. Toyota Motor Sales U.S.A., Inc., 2018-0505/TPA (Fla. NMVAB March 5, 2019)

The Consumer's 2018 Toyota Camry was declared a "Lemon" by the Board. For the purpose of calculating the statutory reasonable offset for use, the Buyer's Order reflected that the vehicle had 11 miles on the odometer at the time of purchase; however, the Consumer testified that the vehicle actually had 90 miles on the odometer at the time he took delivery and requested that the Board utilize that mileage for calculating the reasonable offset for use. The Manufacturer objected and noted that two different documents in the file, the Buyer's Order and Odometer Disclosure Statement, reflected that the vehicle had 11 miles on it at delivery, and requested that the Board only subtract 11 miles to reflect mileage at delivery when calculating the offset. The Board subtracted 90 miles as reflected in the Consumer's testimony, and the Manufacturer's objection was denied.

MISCELLANEOUS PROCEDURAL ISSUES:

Stewart v. Mercedes-Benz USA, LLC., 2018-0291/MIA (Fla. NMVAB February 5, 2019)

At the commencement of the hearing, the Manufacturer asserted that MBM Repair LLC, a third-party repair shop, should have been joined to the proceedings. The Manufacturer argued that MBM Repair LLC performed modifications to the vehicle, and the Consumer's alleged complaints were all related to the modifications made by MBM Repair LLC. The Manufacturer requested that the hearing be continued so that MBM Repair LLC could be joined to the proceedings. The Consumer stated that when he purchased the vehicle from Mercedes-Benz of Cutler Bay, most of the conversion work had already been completed, and the Consumer had not been provided with any information about the conversion company. He also stated that he never took the vehicle to MBM Repair LLC or any other third-party shop for repairs. Upon consideration of the Manufacturer's request, the Board ruled that the hearing should proceed and ultimately, the Consumer was awarded a refund.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2019 - June 2019 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.

Palov v. Hyundai Motor America, 2018-0532/FTL (Fla. NMVAB April 4, 2019)

The Consumer complained of an intermittent inability to fill the fuel tank in her 2017 Hyundai Santa Fe. The Consumer testified that the first time she noticed the inability to fill her vehicle's fuel tank was in January 2018, when she had received a late-night telephone call informing her that her son was being taken to the hospital in Gainesville. She rushed out the door to drive to Gainesville to be with her son. She realized that she needed gasoline and stopped at a turnpike service station to attempt to fill her vehicle with fuel. She was only able to put a gallon or two in the tank before the pump clicked off. After trying multiple times, she moved her vehicle to a different pump but was still unable to fill her fuel tank. She had found that when the problem occurred, it did not make a difference if she held the handle of the pump herself or if she used the self-filling mechanism found at many pumps; the pump clicks off as though the tank was already full after generally only a gallon or two of gasoline had been pumped, although she noted that, on occasion, she had been able to put up to four gallons of fuel in the tank before the pump clicks off. She explained that because the problem was intermittent, she never knew when the problem would occur and didn't feel safe in the vehicle. Due to the intermittent inability to fill her fuel tank she now kept her gas tank between a half and a quarter of a tank as she was afraid that she would run out of gas and be unable to fill the tank. She stated that as a result of the problem she will not take her vehicle on long road trips. As an example of the severity of the problem, she recounted that on November 16, 2018, she went to six different gas stations and attempted to put fuel in her tank but was unable to fill the gas tank. The inability to fill her fuel tank went away for several months after the first repair attempt, but it returned in July 2018 and continued to the hearing day.

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 he was involved in the final repair attempt in October and that he had no difficulty putting fuel in the vehicle. He also explained that he scanned the vehicle for codes at that time but did not find any codes. He advised that the vehicle's fuel tank held approximately 14 gallons, and he acknowledged that the tank should be full before causing the pump to shut off. On cross-examination, he admitted that he did not attempt to fully fill the fuel tank during the final repair attempt, but that he pumped gasoline into the vehicle on two separate occasions for a total of 6.4 gallons. He opined that if the inability to fill the fuel tank existed at the time, it was not a substantial defect or condition as it was intermittent.

The Board found that the evidence established that the intermittent inability to fill the fuel tank substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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.

Mohyuddin v. American Honda Motor Company, 2018-0557/TLH (Fla. NMVAB May 28, 2019)

The Consumer complained that the rear sliding doors intermittently reopened after failing to fully close in his 2018 Honda Odyssey. The Consumer testified that the vehicle was purchased for his wife. He explained that initially the left rear sliding doors were reopening before fully closing. However, after the first two repair attempts, the right rear sliding doors also began to exhibit the same malfunction. He testified that the reopening of the rear sliding doors before fully closing occurs both when using the remote and when pushing the button inside the vehicle. The Consumer's wife explained that at times she has had to turn off the rear sliding doors' automatic function and close the doors manually to get the rear sliding doors to stay closed. Both the Consumer and his wife explained that they have two young grandchildren who often ride in the rear of the vehicle and that the rear sliding doors malfunction causes them concern for the safety of their grandchildren.

The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent reopening of the rear sliding doors after failing to fully close on the following dates: April 30, 2018, when the vehicle was found to be operating at factory specifications; July 10, 2018, when dirt in a rear sliding door track was removed; August 7, 2018, when the Consumer complained of the rear sliding doors malfunctioning, but no work was performed; August 13, 2018, when the left side pinch sensor was found to be deformed and was replaced; August 23, 2018, when the rear sliding doors were found to be operating per design and no repairs were performed; September 12, 2018 when the left side power sliding door motor was replaced; and, October 1, 2018, when the right side power sliding door motor was replaced, which corrected the problem. The vehicle was presented to the Manufacturer's authorized service agent for repair of the malfunction of the of the power locking system for the vehicle's two front doors on August 23, 2018, when both front door lock actuators were replaced, which corrected the problem.

On December 6, 2018, 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 December 11, 2018. The Manufacturer stipulated that on January 24, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, no problem was found, and no repairs were performed for the intermittent reopening of the rear sliding doors.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle, and any nonconformities were repaired within a reasonable number of repair attempts. In support of the Manufacturer's defense, the Manufacturer's representative testified that he inspected the Consumer's vehicle on April 2, 2019, at which time he verified that all the features of the rear sliding doors were operating correctly. He further explained that if the rear sliding doors failed to latch correctly, or opened while driving, an error code would be recorded and that he did not find any error codes. He stated that in his opinion, the vehicle was repaired at the October 1, 2018 repair attempt.

The Board found that the evidence established that the intermittent reopening of the rear sliding doors after failing to fully close substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The evidence established that the nonconformity was subjected to repair by the Manufacturer's authorized service agent a total of seven times prior to notice to the Manufacturer. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The Board found that the evidence established that the nonconformity appears to have been corrected at the seventh repair attempt for the problem on October 1, 2018, when the right side power sliding door motor was replaced, which was prior to the Consumer sending written notification to the Manufacturer, and prior to the Manufacturer's final opportunity to repair the vehicle on January 24, 2019. However, based on the repair history, the Board concludes that the Manufacturer, through its authorized service agent, failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law. The Consumer was therefore qualified for the requested relief and was awarded a replacement vehicle.

Rodriguez v. Volkswagen/Audi of America, Inc., 2018-0409/MIA (Fla. NMVAB June 10, 2019)

The Consumers complained of condition in which the front assistance and lane assistance features did not work properly in their 2018 Volkswagen Atlas. The vehicle was presented to the Manufacturer's authorized service agent for repair of the nonconformity on May 19-21, 2018, when no repairs were performed. On June 23, 2018, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification. On July 16, 2018, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the technician took a test drive but did not perform any repairs to the vehicle. The condition in which the front assistance and lane assistance features did not work properly continued to exist after the final repair attempt.

A majority of the Board found that complaint substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity. The issue remaining was whether a reasonable number of attempts were undertaken to correct the nonconformity. The evidence established that the nonconformity was presented for repair on only *one* occasion, on May 19, 2018, prior to sending written notification to the Manufacturer. As such, the condition in which the front assistance and lane assistance features did not work properly had not been subject to a

reasonable number of repair attempts, and did not entitle the Consumers to the requested relief under the Lemon Law at the time.

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

Block v. American Honda Motor Company, 2018-0556/WPB (Fla. NMVAB April 12, 2019)

The Consumer complained of a defective fuel tank and brake light, as evidenced by a recall, an oil leak, and a wind noise in his 2017 Acura NSX. The Board found the complaints to be nonconformities that were out of service by reason of repair for a total of 32 cumulative out-of-service days. On November 30, 2018, the Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification on December 5, 2018. On December 13, 2018, the Consumer was put on notice that the Manufacturer requested to perform a post-notice inspection or repair of his vehicle on December 20, 2018. The Consumer testified that he was unable to do the inspection on that date because of his work schedule. As a result, he attempted to contact the Manufacturer's representative that requested the inspection. According to the Consumer, he attempted to contact the representative through numerous telephone calls for which he had to leave voice mails, as well as through a written letter sent prior to the scheduled date by certified mail and fax, to try and reschedule the inspection. He testified that he never heard back from the representative until he received a letter from her dated December 28, 2018, informing him that he had missed the inspection appointment and that they assumed the matter had been resolved.

The Manufacturer asserted that they were not afforded a post-notice inspection or repair. The Manufacturer's representative acknowledged that the Manufacturer received the motor vehicle defect notification form from the Consumer on December 5, 2018. As result, she testified that she arranged for the post-notice inspection or repair to take place on December 20, 2018, and sent a Manufacturer's representative to the inspection site that day. She testified that she was unaware of any attempts made by the Consumer to try and reschedule the inspection until she received a letter from him dated January 3, 2019.

The Board found that the evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the required written notification was sent to the Manufacturer. The Board found that the evidence established that the Consumer attempted, through numerous telephone calls/voice mails, and a written letter sent by both certified mail and fax, to reschedule the post-notice inspection or repair scheduled by the Manufacturer for December 20, 2018. The Board further found that the Manufacturer failed to respond to any of the Consumer's requests to reschedule the inspection. The Board found that under the circumstances of the case, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty. 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.

London v. Subaru of America, Inc., 2019-0076/WPB (Fla. NMVAB May 22, 2019)

The Consumer complained of outside debris entering the engine compartment of his 2019 Subaru Impreza. The Consumer testified that outside debris, including twigs, branches, leaves and acorns, was coming into the engine through the opening in the hood of the vehicle. He explained that outside debris got stuck on the socket that held the windshield wipers and "slides right in" through the opening, especially in weather conditions of excess rain or wind. The Consumer stated that the dealership advised him to drive on the highway, which would allow debris to clear from the vehicle, and to avoid parking under trees. He explained that as a disabled veteran, he had no choice but to park under trees that surround handicapped parking spots and had no option other than to park under trees at his residence. He acknowledged that he had not experienced any drivability issues with the vehicle.

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 outside debris on the vehicle, such as leaves, did not impair the use or safety of the vehicle. He explained that the engine cabin was not sealed, and the owner's manual instructed the Consumer to keep the front ventilation inlet grill free of debris. He argued that there were no mechanical defects or safety concerns with the vehicle and concluded that the vehicle was operating as designed.

During the hearing, the Board inspected the vehicle. Upon opening the hood of the vehicle, the Board members noticed leaves and twigs on the shock absorber pillars. The Board members observed that the vehicle was designed in a way that the weather stripping under the hood did not extend all the way to the end, which created an opening.

The Board found that the evidence failed to establish that the outside debris entering the engine compartment, as 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.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Govea v. General Motors, LLC, 2019-0072/MIA (Fla. NMVAB June 17, 2019)

The Consumer's 2017 Chevrolet Traverse was declared a "Lemon" by the Board. The Consumer requested and was awarded $375.00 for translator's services as an incidental charge for a translator who performed translating duties for him and his witness at the hearing.

Prieto v. Toyota Motor Sales, USA, Inc., 2018-0433/MIA (Fla. NMVAB April 1, 2019)

The Consumer's 2018 Lexus LC500 was declared a "Lemon" by the Board. The Consumer requested reimbursement of $600.00 for witness testimony from Richard Metzger of Lyon Investigations, Inc., as an incidental charge. The Manufacturer objected to the request. The Board found that $600.00 for witness testimony of Richard Metzger was an incidental charge and awarded that amount to the Consumer.

Kay v. Mercedes-Benz USA, LLC, 2018-0514/WPB (Fla. NMVAB May 22, 2019)

The Consumer's 2017 Mercedes Benz S-Class AMG S63 was declared a "Lemon" by the Board. The Consumer requested reimbursement of $10.00 for parking the day of the hearing; $27.45 for postage to send the Motor Vehicle Defect Notification form by express/overnight mail to the Manufacturer on November 29, 2018; $49.40 to send two sets of hearing documents by express/two-day mail; $14.70 to send two sets of hearing documents on February 14, 2019; $56.00 to send two sets of hearing documents by express/overnight mail on April 17, 2019; and $32.97 for an Uber rental to pick up the vehicle from the authorized service agent on December 21, 2018 as incidental charges. The Manufacturer objected to all postage costs other than the cost to send the Motor Vehicle Defect Notification form to the Manufacturer, as there was no statutory requirement to send other documents by means of an express, trackable method, and objected to the Uber rental cost, asserting that the authorized service agent would have picked up the Consumer and transported him to retrieve his vehicle. No evidence as to the latter objection was provided. The Manufacturer's objections were denied by the Board and the Consumer was awarded all incidental charges that were requested.

MISCELLANEOUS PROCEDURAL ISSUES:

Prieto v. Toyota Motor Sales, USA, Inc., 2018-0433/MIA (Fla. NMVAB April 1, 2019)

The Consumer sought to introduce the testimony of a witness, but did not list his name on the *Amended* Prehearing Information Sheet filed on March 1, 2019. The Consumer's witness had been previously listed on the Prehearing Information Sheet filed on February 25, 2019. The Manufacturer objected to testimony by the Consumer's witness. Pursuant to paragraph (6), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, a witness may not be allowed to testify if a party fails to send a Prehearing Information Sheet, listing the name of a witness, to the Board Administrator and opposing party no later than five days before the scheduled hearing. Upon consideration, the Board ruled that the Consumer's witness was permitted to testify.

Alford v. Ford Motor Company, 2019-0118/ORL (Fla. NMVAB June 7, 2019)

During the hearing, the Consumer sought to introduce screenshots from his cell phone of notifications that he had received from the Manufacturer and text messages that he had received from the Manufacturer's authorized service agent, to demonstrate the occurrence of a repair that was not documented; however, the screenshots had been submitted to the Board and the Manufacturer less than five days prior to the hearing. Pursuant to paragraphs (6), (10), and (22),

Hearings Before the Florida New Motor Vehicle Arbitration Board, all documents or other evidence a party intends to present for consideration by the Board must be received by the Board Administrator and the opposing party no later than five days before the hearing. Failure to do so may result in the Board declining to consider the documents or other evidence "unless good cause is shown for [the] failure to comply." The Manufacturer objected to the Board considering the screenshots, as they were not submitted timely in accordance with the Board's Rules. Upon consideration, the Board denied the request to consider the screenshots.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2019 - September 2019 (3rd Quarter)

JURISDICTION

Consumer §681.102(4), F.S.

June Therapeutic Services, LLC v. BMW of North America, LLC, 2019-0167/MIA (Fla. NMVAB July 30, 2019)

At the outset of the hearing, the Board requested testimony from Casandra Fitzgerald for the purpose of determining whether the Consumer was a "consumer" under the definition set out in section 681.102(4), Florida Statutes. Ms. Fitzgerald testified that the subject vehicle was used for both business and personal uses. The Manufacturer asserted that the vehicle was used primarily for business purposes, and alleged that the Consumer was therefore ineligible to participate in the Lemon Law. Section 681.102(4) defines "consumer" to mean "the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and any other person entitled by the terms of the warranty to enforce the obligations of the warranty." Accordingly, the Board held that the Consumer fell within the third clause of section 681.102(4), Florida Statutes, was a "consumer" for purposes of the Lemon Law, and was properly before the Board. The Board found that the Manufacturer presented "no evidence showing that the Consumer was not entitled by the terms of the warranty to enforce the obligations of the warranty." Results Real Estate v. Lazy Days, 505 So. 2d 587 (Fla. 2nd DCA 1987).

Motor Vehicle §681.102(14), F.S.

Carlucci v. American Honda Motor Company, 2019-0082/FTL (Fla. NMVAB July 14, 2019)

With respect to the circumstances surrounding the Consumer's acquisition of the subject vehicle, the Consumer testified that he was in Florida when he found the vehicle on an Indiana dealership's website. He explained that he could not find one for sale in Florida. In addition, the Indiana dealership offered a $30,000.00 rebate on the vehicle in question. The Consumer stated that he never went to Indiana, and that all of the lease paperwork was sent to him via FedEx, was signed by him in Florida, and was then sent back to the dealership via FedEx. Because this was a lease, he stated that he paid sales tax every month to Florida and that no sales tax was paid in Indiana. He said that the dealership arranged for the transport of the vehicle to him in Florida, and he paid the transport driver in cash upon delivery of the vehicle. He noted that he had removed a Florida license plate from an old car and immediately placed it on the subject vehicle, which had only been registered in Florida.

The Manufacturer asserted that the subject vehicle was not a "motor vehicle" as defined in the Lemon Law because it was not leased in Florida. In support of its assertion that the vehicle did not meet the statutory definition of a "motor vehicle," the Manufacturer argued that a vehicle must be sold or leased in this state to fall within the statutory definition of a "motor vehicle" set out in the Lemon Law. Specifically, the Manufacturer asserted that the lease agreement showed a dealership in Fort Wayne, Indiana was the lessor of the vehicle, that the Consumer paid Indiana sales tax, and that no Florida Lemon Law fee was paid, all demonstrating that the vehicle was leased in Indiana.

Section 681.102(14), Florida Statutes, defines a "motor vehicle" as:

> a new vehicle, propelled by power other than muscular power, which is sold in this state to transport persons or property, and includes a recreational vehicle or a vehicle used as a demonstrator or leased vehicle if a manufacturer's warranty was issued as a condition of sale, or the lessee is responsible for repairs, but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds or the living facilities of recreational vehicles ....

(emphasis added). Based on the totality of the circumstances, the Board found that the Consumer's vehicle was sold or leased in this state and was therefore a "motor vehicle" as defined in Section 681.102(14), Florida Statutes. The Board found particularly compelling that the only relationship the transaction had to Indiana was that the leasing dealership was in Indiana, whereas the Consumer never left Florida, the vehicle was delivered to him in Florida, was registered in Florida, and the Consumer was paying Florida sales tax.

NONCONFORMITY 681.102(15), F.S.

Magnante v. Toyota Motor Sales, USA, Inc., 2019-0126/FTM (Fla. NMVAB July 26, 2019)

The Consumers complained of a brake squealing noise in their 2016 Lexus GS-350 F Sport. The Consumer testified that the brake squeal was a "really pronounced sound" that occurred both in reverse and when the vehicle was being driven forward. Although the squealing noise was intermittent, the Consumer estimated that he heard the noise approximately 90 percent of the time. He said that after each repair, the noise appeared to be corrected; however, the noise would always come back after three or four weeks. He last heard the squeal on the morning of the hearing. He stated that he was repeatedly promised that the Manufacturer would develop an updated brake pad that would cure the problem, but has been told that the updated part was still not available. He said he was told the brake noise was an "operational characteristic" of the vehicle, but asserted that he would not have purchased the vehicle if he had known of this characteristic. The Consumers' witness testified that she was a neighbor of the Consumers and she had also driven the vehicle. She said that the brake squeal was an extremely loud, grating sound that can be heard from inside the vehicle even with the radio and air conditioner on. A different Consumers' witness testified that he has been on the phone with the Consumers while

they were driving in the vehicle and he heard, over the phone, when the brakes were being applied. A third witness testified that he previously worked for Toyota and he also owned a used car lot. He expressed his opinion that the value of the Consumers' vehicle was reduced due to the brake squeal noise and stated that "no one would buy a vehicle with this problem."

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative testified that the first documented complaint about brake noise was on September 2, 2017, and at that time the front brake pads and rotors were replaced. According to him, the F-Sport models have high performance brakes and "a low speed squeal is an operational characteristic" of these brakes. No repairs were made even though some brake noise was heard when the Consumers took the vehicle in for repair on January 4, 2018, and March 10, 2018, because it was deemed to be "normal" noise. Subsequently, on June 16, 2018, the authorized service agent again replaced the front brake pads to try to lessen the squealing, and on August 22, 2018, a thicker grease was applied between the shim and the brake pad to try to "change the harmonic" and lessen the squeal. When the Consumers returned with the same brake noise complaint in December 2018, they were advised that the Manufacturer was aware of the problem, but that no parts were available. He confirmed that the Manufacturer was working on a new brake pad that would make less noise, and he also acknowledged that he does not know when the new parts would be available.

The Board found that the evidence established that the brake squealing noise 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.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Radmanesh v. Volkswagen/Audi of America, Inc., 2019-0244/STP (Fla. NMVAB July 26, 2019)

The Consumers complained of a lane assist defect, which resulted in their 2018 Volkswagen Atlas pulling to the left. The vehicle was presented to the Manufacturer's authorized service agent for repair of the lane assist defect on November 7-21, 2018 (problem not duplicated; no repairs performed); and December 11-13, 2018 (no faults found; problem not duplicated; no repairs performed). On January 2, 2019, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on January 7, 2019, but did not contact the Consumers to schedule a final repair attempt.

The Board found that the evidence established that the lane assist defect, which resulted in the vehicle pulling to the left, substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable

rule. The question remaining for determination was whether a reasonable number of repair attempts had been undertaken. Section 681.104(3), Florida Statutes, creates a presumption of what constitutes a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. The evidence established that the lane assist nonconformity was presented for repair to the Manufacturer's authorized service agent on at least two occasions. At both repair attempts, the Manufacturer was unable to duplicate the problem and no repairs were performed. Thereafter, the Consumers provided statutory written notification to the Manufacturer, but the Manufacturer did not contact the Consumers to schedule a final repair attempt. Accordingly, under the circumstances of this case, and in light of the fact that there were serious safety implications associated with the nonconformity, the Board found that the Manufacturer failed to correct the nonconformity after a reasonable number of attempts. Accordingly, the Consumers were qualified for the requested relief under the Lemon Law and a refund was awarded.

Kamajian v. BMW of North America, LLC, 2019-0290/STP (Fla. NMVAB September 26, 2019)

The Consumer complained of the windows and sunroof in his 2018 BMW 740i would autonomously open, without owner input, while the vehicle was parked. The Consumer testified that it was approximately one month after he took delivery of the vehicle when he first observed that all four windows and the sunroof had opened on their own, while the vehicle was parked for the day at his workplace. He explained that the same problem occurred thereafter once every few months. He estimated that the problem happened a total of 10 or 12 times while the vehicle was parked at his workplace, and one time while the vehicle was parked at his condominium. He stated that when he was at work, he usually parked the vehicle 50 to 75 yards away from his office, that he did not keep his key fob in his pocket while in the office, and that he habitually placed the key fob on his desk when he arrived, where it remained untouched all day until he left work for the day. He testified that he last experienced the problem in June 2019.

The Manufacturer stipulated that the vehicle was presented to an authorized service agent for repair of the windows and sunroof autonomously opening on the following dates: October 17, 2018, when the problem could not be duplicated, and the Consumer was advised that he may be inadvertently pressing the key fob while it is in his pocket; November 30, 2018, when a fault code was found for "anti-theft activated via key," and it was recommended to the Consumer that he read the Owner's Manual; February 12, 2019, when no fault codes were found, and the problem could not be duplicated; April 9, 2019, when no fault codes were found, and the Consumer was supplied with a protective case for his key fob; and April 22, 2019, when no fault codes were found, and the problem could not be duplicated. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumer. On June 19-21, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the windows and sunroof were tested from every switch and remote, and the vehicle was coded with two-button function and conversion, correcting the windows and sunroof autonomously opening while the vehicle was parked, without owner input.

The Board found that the evidence established that the windows and sunroof autonomously opening while the vehicle was parked, without owner input, substantially impaired

the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The issue remaining was whether a reasonable number of attempts were undertaken to correct the windows and sunroof autonomously opening. The Board unanimously found the evidence established that the nonconformity was corrected at the sixth repair attempt for the problem on June 19-21, 2019, which was the Manufacturer's final repair attempt following written notification from the Consumer, when the vehicle was recoded with two-button function and conversion. However, the Board members split with regard to whether the nonconformity was repaired within a reasonable number of attempts. The statute does not specifically define how many attempts are required before it can be concluded that a manufacturer has had a reasonable number. Section 681.104(3), Florida Statutes, creates a presumption of a reasonable number of attempts; however, a consumer is not required to prove the elements of the statutory presumption to qualify for relief under the Lemon Law. According to one Board member, the nonconformity was corrected within a reasonable number of attempts, concluding the case should be decided in favor of the Manufacturer. The two remaining members, however, found that based on the repair history, the Manufacturer, through its authorized service agent, had failed to correct the nonconformity within a reasonable number of attempts, as contemplated by the Lemon Law, and concluded that the case should be decided in favor of the Consumer. Pursuant to Section 681.1095(2), Florida Statutes, a majority vote of the three-member board panel was required to render a decision. Two members having voted in favor of the Consumer, the Consumer was therefore qualified for the requested relief under the Lemon Law and a refund was awarded.

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

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

McGraw v. FCA US LLC f/k/a Chrysler Group, LLC, 2019-0219/TLH (Fla. NMVAB July 19, 2019)

The Consumer complained of a malfunction of the air suspension system in his 2018 Jeep Grand Cherokee, which he had purchased in February of 2018. According to the Consumer, a warning message for "air suspension system malfunction" had illuminated several times. He stated that he had also heard a grinding sound from the right front of the vehicle; however, he was uncertain as to when this grinding sound first began. The Consumer acknowledged that in November 2018, the vehicle was involved in an accident that required replacement of the right rear quarter panel by an independent body shop, to which he was directed by his insurance company. He also acknowledged that he had not heard the grinding noise or experienced the illumination of the air suspension system malfunction light since the repair attempt that started in February of 2019.

The Manufacturer asserted the alleged nonconformity was the result of an accident, abuse, neglect, or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's witness explained that the first repair, which took place in Miami, involved a malfunction of the air suspension system's

malfunction light, which had illuminated due to a failure of the sensor. Upon replacement of the sensor, the light malfunction was corrected. He explained that, to his knowledge, the first time there was any complaint involving a problem with the air suspension system itself was on December 10, 2018, when the Consumer left the vehicle with the authorized service agent after working hours, leaving a note indicating that he was experiencing an intermittent grinding noise and a jerk in the front end, and that a message to "service air ride/suspension" had illuminated. However, the Consumer retrieved the vehicle the next day before it could be inspected. He said that the next time the vehicle was taken to the authorized service agent was on January 28, 2019, at which time the Consumer complained that the air suspension warning message had illuminated and that he was hearing an occasional grinding noise in the right front when he started the car. The witness, who personally worked on the vehicle at that time, explained that the grinding noise described by the Consumer was from the air suspension compressor, which would not run at all when he examined the vehicle. He first discovered a "blown" fuse for the compressor, which he replaced. While the compressor then began to run, it would not complete a ride height adjustment. He ran further diagnostic tests and found an "over-temp" code, indicating to him that the air suspension compressor was running too long and overheating, so he replaced the compressor. He next tested the air suspension system for leaks, and found the system was operating within normal parameters. Because he could not find a root cause for the compressor failure, he also replaced a relay in the air suspension system "just to be safe." He explained that the vehicle was next returned to the authorized service agent on February 14, 2019, with the rear of the vehicle sagging to the bump stocks. He explained that he found that the air suspension system's left rear air bag had failed, was not seated properly in the control arm, and was "crushed." He stated that it was very rare for a suspension air bag to need replacement and that he was unable to initially determine a reason for the failure of the air bag. After replacing the air bag, he needed to test the system and attempted to access the fill-tank in the normal manner, through the back seat. He found, however, that the fill-tank had somehow shifted, and he had to access it through the trunk. In the process of trying to reach the tank, he discovered body shop dust below the trunk's load floor and observed that there had been repair work on the right rear of the vehicle. He stated that he believed a small leak, which was too small to show up in the test he performed in January, was created in the left rear air bag during the accident, and in the months since the accident had slowly led to failure of the air bag. According to him, the vehicle being hit with enough force to require replacement of the right rear quarter panel could cause damage to the suspension system air bag in the left rear. He specifically stated that, in his opinion, the suspension air bag failed as a result of the accident.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>but does not include a defect or condition that results from an accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent</u>." §681.102(15), Fla. Stat. [emphasis added]. Upon consideration of the evidence presented, a majority of the Board concluded that the evidence established that the air suspension system malfunction was the result an accident and, as such, the complained-of defect did not constitute a "nonconformity" as defined by the statute. The Board member who found that the air suspension system malfunction was not the result of an accident, also found that it was repaired within a reasonable number of attempts. Accordingly, the Board unanimously found that the Consumer was not entitled to repurchase relief under the Lemon Law and dismissed the case.

Vidal v. FCA US LLC f/k/a Chrysler Group, LLC, 2019-0265/ORL (Fla. NMVAB September 17, 2019)

The Consumer complained of an engine condition in his 2016 Dodge Challenger characterized by illumination of the check engine warning light, stalling, and failure to start. The Consumer testified that he purchased a "Tazer 2nd Gen Unlocker/Line Lock/Light Show" (hereinafter referred to as the "Tazer") approximately four months after his April 2017 purchase of the vehicle, and that he installed the Tazer at that time by plugging the Tazer into the vehicle's data port. He explained that he installed the Tazer to view additional information on the navigation screen that he was unable to see before installing the Tazer, including braking distance and changes in acceleration. According to the Consumer, the installation of the Tazer did not change the performance of the vehicle. He also commented that "it is an automatic car, so [he] cannot over-rev it." In addition, he testified that he has never taken the powertrain control module (PCM) out of the vehicle. He explained that he first brought the vehicle to the authorized service agent for repair on March 21, 2019, because the check engine warning light had turned on within the preceding 24 hours. He stated that the authorized service agent told him at that visit that a piece of the piston from cylinder one had broken off; as a result, in order to repair the problem, the piston was replaced, and the intake manifold was replaced too, in case the piston piece had lodged inside the system. He testified that, after the repairs were made, he picked up the vehicle from the authorized service agent on April 5, 2019, and the vehicle seemed to be operating normally. However, on April 10, 2019, after he pumped gas into the vehicle, he drove approximately 50 feet, then the vehicle suddenly stalled and would not start again. He said that he had the vehicle towed that night to the authorized service agent. He explained that, after the vehicle was inspected on or around April 11, 2019, he was told by the authorized service agent that the exhaust valve had broken off and collided with the piston from cylinder one, creating a hole in the piston, and that the engine was damaged. He explained further that the authorized service agent informed him that the Manufacturer would no longer authorize warranty repairs to the vehicle because the Manufacturer had determined that modifications to the PCM, including modifications made to the PCM's software by the Tazer that he installed on the vehicle a few months after purchase, had caused the engine condition.

The Manufacturer asserted the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The Manufacturer's witness testified that he inspected the vehicle in April 2019, after the vehicle was towed in for the engine condition. He explained that he observed, and the photographs admitted into evidence portrayed, a "giant hole" in the cylinder one piston, the valve missing from the cylinder head, the broken valve found inside the cylinder, and damage to the cylinder wall. He opined that "the piston had contacted the valve and broke the valve off, then fell into the engine and destroyed the top of the cylinder." He testified that the "only way the piston can contact the valve is from over-revving the engine." He explained that the valve spring was designed to close the valve, and when the engine was revved too high, the valve spring could not close fast enough, so as a result, the piston contacted the valve. After observing the damage to the engine, he stated that he inspected the engine bay where the PCM was located. He explained, using photographs admitted into evidence, that he found "significant drag marks on the top of the plastic where the PCM has been pulled in and out of the car" He

testified that he then used a scan tool to analyze the PCM data, which revealed that the odometer in the PCM read 3,399 miles, according to the PCM data printout; however, the mileage on the vehicle's odometer on the dashboard read 16,575. According to him, the PCM odometer counter starts at zero when the PCM is put inside the vehicle, and then the PCM odometer accumulates miles while driving. He explained that if the original PCM had remained in the vehicle since the time of purchase, then the mileage reflected on the PCM's odometer should read in the same range as the mileage on the vehicle's odometer, but it did not. He opined that, at some point, the original PCM was removed from the vehicle and another PCM was installed. He added that the vehicle was designed by the Manufacturer with a speed limiter, so that the vehicle "cannot be revved past the red zone." However, he noted that there are aftermarket "plug-n-play" PCMs that allow you to change the settings, including removing speed limiters. He also testified that while he did not independently detect that the Tazer was installed on the vehicle, he learned that the Tazer was installed because the Consumer admitted installing it, and the Consumer also submitted information from "Z Automotive" describing the Tazer's features. He explained that one of the Tazer's features listed in the materials was the Tazer's ability to "AutoUpshift" the vehicle, meaning to "over-ride the factory shift points." He explained further that the installation of the Tazer modified the PCM's software, such that the engine was allowed to over-rev beyond the Manufacturer's limiters. He concluded that the complained-of engine condition resulted from over-revving of the engine, which was caused by the installation of the aftermarket Tazer and an aftermarket PCM.

A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent." §681.102(15), Fla. Stat. (emphasis added). A "condition" is defined as "a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part." Rule 2-30.001(2)(a), F.A.C.

Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer's affirmative defense that the engine condition characterized by illumination of the check engine warning light, stalling, and failure to start was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the problem complained of by the Consumer did not constitute a "nonconformity" as defined by the statute and the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.

Collateral Charges §681.102(3), F.S.

Magnante v. Toyota Motor Sales, USA, Inc., 2019-0126/FTM (Fla. NMVAB July 26, 2019)

The Consumers' 2016 Lexus GS-350 F Sport was declared a "Lemon" by the Board. The Consumers requested reimbursement of $1,490.95 for new tires purchased for the vehicle a few weeks prior to the hearing. A majority of the Board voted to deny the Consumers' request to be

reimbursed for four new tires recently purchased for the vehicle, finding the tire purchase was for ordinary maintenance cost for the vehicle, not reimbursable under Chapter 681. §681.102(3), Fla. Stat.

Net Trade-in Allowance §681.102(18), F.S.

Reina and Reina Transportation v. Automobili Lamborghini America, LLC., 2019-0260/TPA (Fla. NMVAB September 4, 2019)

In order to purchase the subject 2017 Lamborghini, which was declared a "Lemon" by the Board, the "Retail Offer to Sell or Lease" ("2017 sale document") signed by the Consumers documented that the Consumers traded in a 2014 Lamborghini Aventador (the "2014 Lamborghini"), for which a net trade-in allowance of $396,255.00 was received. However, at the hearing, the Consumers argued that the 2014 Lamborghini was not a trade-in, despite the language in the 2017 sale document; rather, the Consumers asserted that the 2017 Lamborghini was actually a replacement vehicle for the 2014 Lamborghini, which they returned to the Manufacturer pursuant to a "Settlement Agreement and Release" that was not the result of a lemon law arbitration claim or a court case. As such, the Consumers asserted that they were therefore entitled to be reimbursed $461,455.13, which was their cash contribution to originally purchase the 2014 Lamborghini, rather than the $396,255.00 characterized as the 2014 vehicle's net trade-in allowance in the 2017 sale document. The Manufacturer, through its counsel, objected to the reimbursement of any amounts paid by the Consumers to purchase the 2014 Lamborghini as irrelevant, arguing that any claims relating to the 2014 Lamborghini were fully settled between the Consumers and the Manufacturer at the time the Consumers received the 2017 Lamborghini.

The Board found the Consumers were entitled to a refund of $396,255.00, the net trade-in allowance reflected in the 2017 sale document for the 2014 Lamborghini, credited toward purchase of the 2017 Lamborghini. The Board rejected the Consumers' assertion that the refund calculation for the 2017 Lamborghini should instead reflect the $461,455.13 cash originally paid by the Consumers to purchase the 2014 Lamborghini. The Board found, based on the evidence presented, that all claims concerning the 2014 Lamborghini were fully settled between the Consumers and the Manufacturer once the Consumers signed the 2017 sale document and accepted the 2017 Lamborghini. The Board further found that only the 2017 sale document, and not the documentation related to purchase of the 2014 vehicle, was relevant for the purpose of calculating the refund for the 2017 Lamborghini. Thus, in accordance with the 2017 sale document, the Board concluded that the 2014 Lamborghini constituted a trade-in vehicle, and the Consumers were entitled to a refund of the net trade-in allowance for that vehicle.

Reasonable Offset for Use §681.102(19), F.S.

Neslage v. BMW of North America, LLC, 2019-0066/PEN (Fla. NMVAB August 12, 2019)

The base selling/sale price of the Consumer's vehicle, for the purpose of calculating the statutory reasonable offset for use, was $68,975.00, as reflected in the Purchase Invoice. However, attorneys for both the Consumer and Manufacturer argued that the Board should use the

cash price of the vehicle as reflected in the retail installment contract as the base/selling price. The Board rejected the argument, citing Section 681.102(19), Florida Statutes, which defines "reasonable offset for use" as "the base selling or sale price of the vehicle as reflected on the purchase invoice."

MISCELLANEOUS PROCEDURAL ISSUES:

Radmanesh v. Volkswagen/Audi of America, Inc., 2019-0244/STP (Fla. NMVAB July 26, 2019)

The Manufacturer's Answer was filed seven days beyond the date required for timely filing. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer did not assert why the Answer was filed untimely. In addition, the Manufacturer did not file a Prehearing Information Sheet identifying any Manufacturer witnesses, nor did any Manufacturer witnesses appear at the hearing. Upon consideration, the Board declined to admit the Manufacturer's Answer and the Manufacturer was not permitted to present evidence in support of its defenses. Counsel for the Manufacturer was permitted to cross-examine the Consumers and make a closing statement on behalf of the Manufacturer.

Pedrero and Shaw v. Toyota Motor Sales, USA, Inc., 2019-0191/JAX (Fla. NMVAB August 20, 2019)

The Manufacturer's Answer was filed on July 5, 2019, four days beyond the July 1, 2019, date required for timely filing. Pursuant to paragraph (8), *Hearings Before the Florida New Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration," and any affirmative defenses raised in the Manufacturer's untimely Answer "cannot be raised at the hearing, unless permitted by the Board." At the hearing, the Manufacturer's representative did not have an explanation as to why the Answer was late; only stating that the Manufacturer's representative who handled the paperwork may have been in the hospital. Documents and correspondence submitted prior to the hearing indicated that the Manufacturer's representative was assisting her mother, who was the patient admitted to the hospital from July 1 through July 5, 2019. The Consumers objected to allowing the Manufacturer to assert its affirmative defense at the hearing. Upon consideration, the Manufacturer was not permitted to raise its untimely-asserted affirmative defense at the hearing. The Manufacturer's representative was permitted to cross-examine the Consumers, and to give a closing statement.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2019 - December 2019 (4th Quarter)

NONCONFORMITY 681.102(15), F.S.

Reyes v. American Honda Motor Company, 2019-0398/MIA (Fla. NMVAB December 9, 2019)

The Consumer complained of a transmission defect that manifested through jerking and abnormal noises, as well as grinding noise upon start-up, in her 2018 Honda Pilot. The Consumer testified that at approximately 5,000 miles, she began to experience intermittent jerking and abnormal noises coming from the transmission. She explained that she initially experienced a "mashing of the gears between 3rd and 4th" as if the vehicle was struggling to switch gears, but was also having problems between the 6th and 7th gears. She described one occasion in March 2019, while driving at a steady speed of 45 miles per hour, when the vehicle suddenly jerked her back as if someone had stepped on the brake, and she proceeded to hear an unusual noise three times in succession. She also testified that she heard an intermittent grinding noise upon start-up and stated that the noise stopped once the engine started running. She said that after the transmission was replaced in March 2019, the problems seemed to improve for about a month but were now occurring more frequently, as they did prior to the replacement of the transmission.

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 he inspected the vehicle in December 2018 and again in July 2019. He explained that the Consumer's vehicle had a gear reduction starter, which had an inherent noise upon start-up, and attributed the complaint of a noise upon start-up to the gear reduction starter, despite the Consumer's testimony that the complaint was intermittent. He explained that the vehicle's nine-speed transmission may cause the Consumer to believe that the vehicle had a harsher shift than the Consumer's former six-speed 2008 Honda Pilot, because a nine-speed transmission shifted more frequently at different shift points and had a firmer shift to promote the longevity and durability of the clutch mechanism. He also explained that the Consumer's transmission had adaptive learning, which tailored the vehicle's shift patterns to the primary driver but can take up to 1,000 miles of driving for the transmission to fully adapt to the driver. He admitted that in December 2018, three months before the transmission was replaced by the Manufacturer, he didn't detect any problems with the transmission during his test drive of the vehicle. He said that he assumed an internal failure of the transmission led Honda Engineering Techline to make the decision to replace the transmission, which was performed in March 2019. During a test drive at the final repair attempt in July 2019, he alleged that he wasn't able to duplicate the Consumer's complaints regarding the transmission but proceeded to perform the intensive process of enabling the transmission to reacquire its adaptive learning values. He stated that he compared the

Consumer's vehicle to a like model and found the Consumer's vehicle to be operating in the same manner as other nine-speed transmissions. He confirmed that he observed "normal nine-speed automatic operation, shift quality, characteristics and noises" in the Consumer's vehicle and concluded that the vehicle was operating as designed.

The Board found that the evidence established that the transmission defect that manifested through jerking and abnormal noises substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. A majority of the Board found that the evidence established that the grinding noise upon start-up substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertions to the contrary were rejected. Accordingly, the Consumer was awarded a refund.

Petgrave and Bogle v. Toyota Motor Sales, U.S.A., Inc., 2019-0279/FTL (Fla. NMVAB October 28, 2019)

The Consumers complained of excessive heat in the gas pedal area of their 2019 Toyota Highlander. One of the Consumers testified that since February 2019, after driving the vehicle for 15 to 30 minutes, she felt a gradually-increasing heat sensation on her right foot when her right foot was on the gas pedal. She explained that the heat sensation felt like hot air blowing directly onto her right foot. She also explained that it did not matter whether the air conditioner was on or off, she would continue to feel the heat sensation on her right foot until she took her foot off the gas pedal. She stated that the heat sensation would return when she returned her right foot to the gas pedal. She stated that the problem substantially impaired the use, value, and safety of the vehicle because she must periodically take her right foot off the gas pedal to cool it off when she drove long distances, which could be distracting and dangerous. The second Consumer testified that after his wife described the problem to him, he drove the vehicle and confirmed the problem.

The Board found that the evidence established that the excessive heat in the gas pedal area substantially impaired the use, value and safety 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.

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

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

Yarsin v. BMW of North America, LLC, 2019-0334/JAX (Fla. NMVAB October 21, 2019)

The Consumers complained of a malfunction of the passenger blind spot monitoring warning system in their 2019 BMW X3. The Consumer testified that he first noticed a problem with the blind spot monitoring system during a road trip to Miami. While driving on the highway, he noticed multiple occasions when a vehicle would pass him on the passenger side, at

times going much faster than his vehicle, but the warning light on the side view mirror did not illuminate to inform him of the vehicle in his blind spot. He explained that the problem was intermittent and had not been repaired. He added that the service manager was able to duplicate that problem twice during a test drive of the vehicle at the July 2, 2019, repair visit, and noted that fact on the repair order. He added that one of the critical reasons he purchased the subject vehicle was for the safety technology.

The vehicle was presented to the Manufacturer's authorized service agent for repair of the malfunction of the passenger blind spot monitoring warning system on June 21, 2019 and July 2, 2019. No repairs had ever been performed to the blind spot monitoring system. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumers. On July 9, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was test driven. The malfunction of the passenger blind spot monitoring warning system continued to exist after the final repair attempt.

A majority of the Board found that the evidence established that the malfunction of the passenger blind spot monitoring warning system substantially impaired the safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. While section 681.104(3), Florida Statutes creates a presumption of a reasonable number of attempts, the statute does not specifically define how many attempts are required before it can be concluded that a Manufacturer has had a reasonable number. Nor is a consumer required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law. The evidence established that the malfunction of the passenger blind spot monitoring warning system was presented for repair to the Manufacturer's authorized service agent on two occasions, June 21, 2019, and July 2, 2019, prior to the Manufacturer's final repair attempt. The malfunction of the passenger blind spot monitoring warning system continued to exist after the final repair attempt. Accordingly, under the circumstances of this case, in light of the fact that the nonconformity was a safety impairment and was explicitly examined by the Manufacturer's representative at the final repair attempt, a majority of the Board found that the Manufacturer failed to correct that nonconformity after a reasonable number of attempts. The Manufacturer having failed to conform the motor vehicle to the warranty within a reasonable number of attempts, the Consumers were entitled to the requested relief under the Lemon Law and a refund was awarded.

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.

Hartwig v. Toyota Motor Sales, U.S.A., Inc., 2019-0315/FTL (Fla. NMVAB November 12, 2019)

The Consumer complained of a rattle noise while driving her 2017 Toyota Camry SE. The Consumer testified that since April 2018, she intermittently heard a rattle noise when she

drove the vehicle. She explained that the rattle noise was "not very loud," but that she heard the noise and it bothered her. The Consumer stated that a technician from the authorized service agent test drove the vehicle several times with her present, and that she identified the rattle noise several times for the technician. She acknowledged that during each test drive, the rattle noise could usually only be duplicated when the vehicle drove over bumps.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value, or safety of the vehicle. The Manufacturer's representative testified that he was familiar with the vehicle and that he was present for the final repair attempt. He explained that he had test driven the vehicle with the Consumer present, several times and for over 100 miles. Like the Consumer, he stated that during the test drives, the Consumer only identified the rattle noise to him each time the vehicle drove over bumps or on uneven surfaces. He acknowledged that he was able to hear the rattle noise when the Consumer identified it to him but described the noise as "minimal" and a normal characteristic of the vehicle. He explained that the vehicle's body was designed to "flex" when it drives over bumps or on uneven surfaces, and that the noise complained of by the Consumer was the sound of moving components. Based on his inspection and test drives of the vehicle and after reviewing the repair orders, he concluded that the vehicle was operating as designed.

During the hearing, the Board inspected and test drove the vehicle. The Board test drove the vehicle for four miles, on different road surfaces to duplicate the Consumer's complaint. During the test drive, the Board agreed that they heard a noise when driving the vehicle over bumps and on uneven surfaces, and that the noise they heard was "not substantial" and was not "abnormal."

The Board found that the evidence failed to establish that the rattle noise while driving 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.

REFUND §681.104(2)(a)(b), F.S.:

Johnson and Lupica v. Kia Motors America, Inc., 2019-0199/FTM (Fla. NMVAB October 10, 2019)

The Consumers' 2017 Kia Cadenza was declared a "Lemon" by the Board. In its Attachment to the written Answer, the Manufacturer asserted that, if the Board were to find in favor of the Consumers, it was "entitled to have a set off [sic] the amount already paid to consumers…." According to the Manufacturer's letter to the Consumers, dated February 28, 2019, the Manufacturer offered the Consumers $5,000.00 "as a one-time goodwill gesture," which the Consumers accepted, and a check in the amount of $5,000.00, dated April 3, 2019, was issued to the Consumers. The Manufacturer's request that it receive an additional "set off" of the $5,000.00 amount previously paid to the Consumers was denied by the Board.

Blumenson v. BMW of North America, LLC, 2019-0280/STP (Fla. NMVAB October 11, 2019)

The Consumer's 2018 BMW 540i was declared a "Lemon" by the Board. In order to lease the subject vehicle, the Consumer agreed to contribute $5,000.00 at lease-signing, and additionally paid the first month's lease payment in the amount of $721.67. In return, the leasing dealership agreed to waive any payment due for excess mileage on a prior lease. Subsequently, it was explained to the Consumer that "he would get a better price for the excess mileage" than the dealership would, so the Consumer was asked if he would pay $1,924.65 to BMW Financial Services in return for a credit toward the amount due at lease-signing on the subject vehicle. The effect of the agreement brought the amount due from the Consumer at lease-signing down to $3,797.12 (plus the first month's lease payment). The Consumer accepted the dealership's offer. At the hearing, the Consumer explained that he "saw no downside to the deal at that time" because it still resulted in him paying the $5,000.00 in cash that he had agreed to pay to lease the subject vehicle, and asserted he should receive credit for the full $5,000.00 paid at the time of lease-signing. The Manufacturer objected to a refund of the full $5,000.00, asserting that $1,924.65 of that amount constituted payment for excess mileage on a different vehicle. The Manufacturer's objection to including the $1,924.65 paid by the Consumer to BMW Financial at the request of the dealership was denied by the Board. Accordingly, the Consumer was entitled to a refund of $5,000.00 for the amount paid at lease-signing.

Incidental Charges §681.102(7), F.S.

Mathews v. Aston Martin Lagonda of North America, Inc., 2019-0256/WPB (Fla. NMVAB October 30, 2019)

The Consumer's 2017 Aston Martin V12 Vantage was declared a "Lemon" by the Board. The Consumer requested reimbursement of $600.00 spent to obtain an expert witness for the purpose of evaluating the vehicle and writing a report, as an incidental charge. The Manufacturer objected. Over the Manufacturer's objection, the Board awarded the Consumer the $600.00 spent to obtain an expert witness for the purpose of evaluating the vehicle and writing a report. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Melendez v. Jaguar Land Rover North America, LLC., 2019-0358/STP (Fla. NMVAB December 12, 2019)

The Consumer's 2018 Land Rover Discovery was declared a "Lemon" by the Board. The Consumer requested reimbursement of the following as collateral charges: $13.89 for an adhesive cell phone holder; $11.95 for an adhesive magnet for the dash cam; $5.99 for an adhesive magnet for the cell phone holder; and $10.33 for a second adhesive magnet for the dash cam that the Consumer purchased after the windshield was replaced, which would have to be left on the vehicle. The Manufacturer objected to those amounts as being "optional, aftermarket items that were elected to be installed in the vehicle," asserting the items "were not dealer-purchased and installed," and also that the Manufacturer would have to remove them and clean the

dashboard. The Manufacturer's objections to reimbursement for those amounts were denied by the Board, and the requested costs were awarded as reasonable collateral charges. §681.102(3), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Johnson and Lupica v. Kia Motors America, Inc., 2019-0199/FTM (Fla. NMVAB October 10, 2019)

In an attachment to its written Answer, the Manufacturer asserted that the Consumers' claims were barred because the Consumers had signed a settlement agreement and release on or about March 5, 2019, "wherein the Consumers released Kia Motors America, Inc. ("KMA") and related entities from all past, present, future, known and known [sic] disputes regarding the Subject Vehicle." The Board treated the Manufacturer's assertion as a "Motion to Dismiss." Relying on the plain language of section 681.115, Florida Statutes, which provides that "any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this chapter . . . is void as contrary to public policy," the Board found that the Consumers were not barred from bringing this case before the New Motor Vehicle Arbitration Board. Therefore, the Board denied the "Motion to Dismiss," and the Consumers proceeded with their case.