OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2001 - March 2001 (1st Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

B & P Duplicating Service, Inc. v. General Motors Corporation, Chevrolet Motor Division, 2001-0014/ORL (Fla. NMVAB February 22, 2001).
The Manufacturer moved to dismiss the Consumer's case on the grounds that B & P Duplicating Service, Inc., was not a "consumer" eligible for relief under the Lemon Law, because the legislature did not intend for the protection of the Lemon Law to extend to vehicles purchased solely for business purposes and utilized by multiple drivers. The vehicle was purchased to be added to the Consumer's fleet of 15 vehicles which were driven by various technicians and salesmen in the course of their employment with the Consumer. Approximately seven to 10 employees had access to and drove the vehicle in the course of their employment. The Board relied on the statutory definition of "consumer" and looked to the intent provision of the Lemon Law which, in pertinent part, recognizes that a motor vehicle is a major consumer purchase. The Board concluded that the vehicle was purchased as a commercial fleet vehicle and not as a "major consumer purchase" and, therefore, B & P Duplicating Service, Inc. was not a "consumer" as defined in the Lemon Law. The case was dismissed.

Motor Vehicle §681.102(14), F.S. (1995); §681.102(15), F.S. (1997)

Crown Cleaning Supplies and Equipment, Inc. v. Ford Motor Company, 2000-1105/ORL (Fla. NMVAB January 26, 2001).
The Consumer's Request for Arbitration was initially rejected by the Division of Consumer Services because the Consumer indicated that the vehicle was a truck with a gross vehicle weight over 10,000 pounds. Thereafter, the Consumer re-registered the vehicle declaring the gross vehicle weight as 9,900 pounds, and subsequently filed a new Request for Arbitration indicating that the vehicle was a truck weighing less than 10,000 pounds gross vehicle weight. The Manufacturer asserted that the case should be dismissed because the vehicle was not a "motor vehicle" as defined in the Lemon Law statute. The Manufacturer argued that the vehicle was registered at the time of purchase has having a gross vehicle weight of 14,999 pounds; that all repairs, including the Manufacturer's final repair attempt, were conducted when the vehicle was registered at 14,999 pounds, and that the Consumer re-registered the vehicle only to gain Lemon Law eligibility. The Board concluded that, when a Request for Arbitration is rejected, a Consumer has the opportunity to cure any deficiency in order to become

eligible for arbitration, which the Consumer did. The vehicle was found to be a truck with a gross vehicle weight of 10,000 pounds or less and was a "motor vehicle" as defined by the Lemon Law. The Board also rejected the Manufacturer's contention that Consumer was not qualified for Lemon Law relief because the vehicle was primarily used for commercial or business purposes. The Board found that the vehicle was used for personal as well as business use, and relied on the appellate court case of Results Real Estate v. Lazy Days R.V. Center, 505 So.2d 587 (Fla. 2d DCA 1987) in rejecting the Manufacturer's contention. However, a majority of the Board concluded that the brake vibration did not constitute a nonconformity and dismissed the Consumer's case.

Randall & Gregrow v. DaimlerChrysler Motors Corporation, 2001-0034/JAX (Fla. NMVAB February 23, 2001).
The Manufacturer requested that the Board dismiss the Consumers' case because the truck did not meet the definition of "motor vehicle" under the Lemon Law statute, as it had a gross vehicle weight of more than 10,000 pounds. The Manufacturer relied on the definition of gross vehicle weight in Section 320.12(a), Florida Statutes, which provides that the "gross vehicle weight" for heavy trucks weighing more than 5,000 pounds but less than 8,000 pounds "is calculated by adding the net weight of the heavy truck to the weight of the load carried by it, which is the maximum gross weight as declared by the owner or person applying for registration." The Consumers testified, and the documentary evidence showed, that they did originally declare the vehicle's gross vehicle weight to be 14,999 lbs. when registering the vehicle, and later raised the weight to comply with Department of Transportation rules. They towed a trailer weighing approximately 5,800 pounds, and at any given time, they would tow a boat weighing 900-1000 pounds and swimming pools weighing 1,200 pounds. The Board utilized Section 320.12(a), Florida Statutes, and the evidence and testimony of the Consumers and held that the truck exceeded 10,000 pounds gross vehicle weight and, therefore, did not constitute a "motor vehicle" as defined. The case was dismissed.

Whether Written Notification Sent After 3 Repair Attempts or 15 Days Out Of Service §681.104(1)(a), F.S.; §681.104(1)(b), F.S.

Cappiello v. DaimlerChrysler Motors Corporation, 2000-1217/TPA (Fla. NMVAB February 1, 2001).
The Manufacturer asserted that it did not receive written notification of the alleged defect and was not afforded a final repair attempt. The Consumer testified that he mailed a Motor Vehicle Defect Notification form to the Manufacturer; however, he did not recall to what address it was mailed, he did not receive a return receipt showing that the notification was received, and he did not receive any contact from the Manufacturer following the mailing of the notification. The Consumer submitted a postal receipt showing an item was mailed, and that the Consumer's name and address was listed in the box labeled "Recipient's Name." A copy of a Motor Vehicle Defect Notification form was received from the Consumer by the Office of Attorney General, and was provided to the Manufacturer's representative during the hearing. The Board concluded that the Consumer failed to send the required written notification to the Manufacturer; therefore, the Manufacturer was not given a final opportunity to

repair the defect. The Board held that the Consumer was not qualified for Lemon Law relief at the time of the hearing; however, the Manufacturer having received a copy of the written notification at the hearing, the time period for response would commence as of the date of the arbitration hearing. The case was dismissed.

Mackenzie v. DaimlerChrysler Motors Corporation, 2001-0024/STP (Fla. NMVAB February 7, 2001).
The Manufacturer requested that the case be dismissed, because it did not receive written notification of the alleged defect and was not afforded a final repair attempt. In support of this request, the Manufacturer contended that the address to which the Consumers mailed the Motor Vehicle Defect Notification form was for the National Center for Dispute Settlement (NCDS), a company that contracts with the Manufacturer to provide mediation and arbitration services. The Manufacturer also relied on correspondence received by the Consumers from the NCDS which explained that its process was "not a Lemon Law proceeding." The Lemon Law requires that, after three attempts have been made to repair the same nonconformity, the Consumer shall give written notification to the Manufacturer, of the need to repair the nonconformity to allow the Manufacturer a final attempt to cure the nonconformity. The Board concluded that the Consumers failed to send the required written notification to the Manufacturer; accordingly, the Consumers were not qualified for relief, and the case was dismissed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Mitchell v. Ford Motor Company, 2000-1107/ORL (Fla. NMVAB January 24, 2001).
The Manufacturer contended that it was not afforded a reasonable number of attempts to conform the vehicle to the warranty because its authorized service agent was afforded only two repair attempts prior to the Manufacturer's receipt of written notice of the defect. The Consumer complained of an exhaust smoke problem, which occurred almost every time the vehicle was started after sitting overnight. When the Manufacturer's authorized service agent contacted the Consumer after completing the second repair attempt and indicated that the vehicle was ready to be picked up, because the problem could not be duplicated, the Consumer requested the Manufacturer's authorized service agent to keep the vehicle and conduct further testing and repairs. The authorized service agent agreed to keep the vehicle and further testing was conducted the next day. Thereafter, the Consumer sent the Manufacturer written notification to provide the Manufacturer with a final opportunity to repair the vehicle, because the condition still existed. The Board concluded that the Manufacturer was afforded three opportunities to repair the exhaust smoke nonconformity prior to notice; thereafter, a final repair was attempted and the nonconformity continued to exist and was not corrected within a reasonable number of attempts. Accordingly, the Consumer was awarded a refund.

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

Tate v. Ford Motor Company, 2000-1176/ORL (Fla. NMVAB February 2, 2001).
The Manufacturer asserted that the Consumers failed to allow the Manufacturer a final repair attempt after the Manufacturer's receipt of the written notification. The Manufacturer further contended that it complied with the Lemon Law by mailing a postcard to the Consumers within 10 days of the Manufacturer's receipt of the Consumers' written notification; thereafter, it became the Consumers responsibility to accomplish the scheduling of the final repair attempt. The Board found that the Manufacturer received written notification and responded within 10 days, but failed to provide to the Consumers the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the Consumers' receipt of the response. The Board held that the statute contemplates that the Manufacturer must take affirmative action and contact the Consumer with a scheduled date or negotiate with the Consumer a date for the final repair attempt. Moreover, a manufacturer acts at its peril when it simply sends a postcard in an attempt to shift the burden to the consumer to set up a manufacturer's final repair attempt. As a result, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply, and the Manufacturer having failed to correct the vibration nonconformity after a reasonable number of attempts, the Consumers were entitled to 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.

Bournias v. Ford Motor Company, 2000-1252/TLH (Fla. NMVAB February 13, 2001).
The Consumers complained of an intermittent air conditioner vent noise, which the Consumers testified sounded like paper flapping around the inside of the air conditioner vent, and became louder as the vehicle's speed increased. During the hearing, the Manufacturer's witnesses testified that there may have been "faint" noises in the Consumers' vehicle caused by a loose piece of insulation behind the radio panel, which was re-glued in place, and the movement of the air vent control knob, which was also modified and secured during the course of repairs. The Board concluded that the intermittent vent noise did not substantially impair the use, value or safety of the vehicle and dismissed the case.

McNutt v. DaimlerChrysler Motors Corporation, 2001-0119/TLH (Fla. NMVAB Mar. 7, 2001).
The Consumer complained of tire wear and related slight vibration in the truck bed. During the hearing, he testified that he purchased a truck with a cab and frame, and had an aftermarket truck bed with low sides installed. The Consumer further testified that he pulled a trailer and equipment with the truck, and rotated his own tires following the Manufacturer's recommended maintenance schedule; however, he could not describe exactly what procedure he followed. The Manufacturer contended that under-inflated tires, and towing or pulling a trailer could cause tire wear, necessitating more frequent tire

rotation. However, the slight feathering or cupping of the tires, which the Board did observe during the inspection of the truck at the Lemon Law hearing, did not substantially impair the use, value or safety of the vehicle. The Board concluded that, although there was some tire wear and related slight vibration, these conditions did not substantially impair the use, value or safety of the vehicle and dismissed the case.

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

Castillo v. Volkswagen United States, Inc., 2000-1250/MIA (Fla. NMVAB February 27, 2001). The Consumer complained about tie rod and front suspension noises, and engine failure. The Consumer regularly maintained the vehicle according to the recommendations in the Manufacturer's owner's manual. The vehicle's oil was changed twice by the Manufacturer's authorized service agent, and twice by independent service providers. During the hearing, the Manufacturer contended that the engine failure was a result of abuse or neglect of the vehicle, because the Consumer failed to properly maintain the vehicle. The Manufacturer's witness testified that only two oil changes were performed by its authorized service agent in approximately 45,000 miles of operation. The Manufacturer further argued that the Board should reject the Consumer's testimony regarding the other two oil changes because of the lack of supporting documentation. The Board rejected the Manufacturer's argument that the Consumer lacked credibility because he failed to produce written documents that supported the performance of recommended maintenance on the vehicle by independent service providers, when balanced against the unreliability of the repair orders generated by the Manufacturer's authorized service agent; accordingly, the Manufacturer's abuse or neglect defenses were rejected. The Board found that the problems complained of by the Consumer constituted nonconformities which caused the vehicle to be out of service by reason of repair for more than 30 cumulative days, as such, the vehicle was deemed a Lemon and a refund was awarded.

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

Valera v. DaimlerChrysler Motors Corporation, 2001-0044/ORL (Fla. NMVAB Mar. 12, 2001). The Board rejected the Manufacturer's argument that the Consumer's Lemon Law case should be dismissed because the Consumer's Request for Arbitration was not filed within 60 days of the expiration of the Lemon Law rights period pursuant to Section 681.109(4), Florida Statutes. Day sixty fell on Sunday, December 31st, and the following day, January 1st, was a legal holiday. The Request for Arbitration was date-stamped on Tuesday, January 2nd by the Florida Department of Agriculture and Consumer Services, Division of Consumer Services. The Board held that to require the Consumer to have filed the Request for Arbitration prior to December 31st would achieve a result contrary to the remedial intent of the Lemon Law. However, the Board dismissed the case on another ground. When the Manufacturer contacted the Consumer following receipt of the written notification, the Consumer indicated no current problems with the vehicle. The Consumer agreed to contact the Manufacturer if problems resurfaced so that a final repair attempt could be scheduled. Thereafter, an engine noise recurred, and the Consumer presented the vehicle to the Manufacturer's authorized service agent for

repair. This repair was not at the direction of the Manufacturer, and the Board held that the Manufacturer was not given a final opportunity to conform the vehicle to the warranty, and, therefore, not afforded a reasonable number of repair attempts.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Lendzion v. Nissan Motor Corporation USA, 2000-1227/FTL (Fla. NMVAB February 15, 2001).

The Board concluded that a multitude of problems, including a vibration in and swaying of the vehicle, a hesitation and lurching in the transmission, and noisy brakes, constituted nonconformities. The Consumers' van was determined to be a Lemon and a refund was awarded. As part of the refund, the Board awarded reimbursement of monies paid for a tire replacement, parking during the Lemon Law hearing, postage for mailing the written defect notification, and car rental fees while the Lemon vehicle was in the shop for repairs, as reasonable incidental charges. However, the Board denied, as being unreasonable, reimbursement for the charges submitted for motel bills in connection with-out-of town travel.

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

Lopez v. General Motors Corporation, Chevrolet Motor Division, 2000-1072/ORL (Fla. NMVAB January 8, 2001).
The Consumers did not agree with the trade-in allowance as reflected in the purchase contract and requested that the Board utilize the retail price as reflected in the NADA Official Used Car Guide (Southeastern Edition) pursuant to the Lemon Law statute. The Manufacturer provided this guide, which did not list the Consumers' 1991 trade-in vehicle. Thereafter, the Consumers presented the NADA Official Older Used Car Guide, which did list their trade-in vehicle, along with a letter from a NADA editor explaining that the Older Used Car Guide was the only appraisal guide applicable in the southeastern United States listing the value of the Consumers' trade-in vehicle. The Manufacturer argued that the Board should not use the Older Used Car Guide because the statute did not authorize the use of this guide. The Board rejected this argument, concluding that the Legislature, in providing an alternative for valuing trade-in vehicles, did not contemplate the situation presented in the instant case; that due to the age of a trade-in vehicle it was not reflected in the Southeastern Edition of the NADA Official Used Car Guide. The Board held that since the Lemon Law is a remedial statute, it should be liberally construed to effectuate its remedial purpose, and under the circumstances of this case, the use of the retail value of the trade-in vehicle, as reflected in the NADA Official Older Used Car Guide and reduced by the amount of the lien on the vehicle, carried out the legislative intent. The Consumers were awarded a refund because of a vibration nonconformity.

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

Michael & Ely v. General Motors Corporation, Pontiac-GMC Division, 2000-1198/ORL (Fla. NMVAB February 12, 2001).
During the Arbitration Hearing, the Board utilized the mileage on the odometer of the Consumers' vehicle at the time of a settlement agreement between the parties, which was prior to the hearing of the Manufacturer's certified informal dispute settlement procedure conducted by the BBB/AUTOLINE, and which the Board determined to be the mileage attributable to the Consumers' up to the date of a settlement. A replacement vehicle settlement was reached after the Consumers sent the written defect notification to the Manufacturer; however, the Manufacturer failed to provide the replacement vehicle, and the Consumers were forced to file with the BBB/AUTOLINE after delaying such filing because of their reliance on the apparent settlement.

MISCELLANEOUS PROCEDURAL ISSUES

Consumer's Failure to Appear at the Hearing ¶¶(33) and (34), *Hearings Before the Florida New Motor Vehicle Arbitration Board.*

Hernandez v. American Suzuki Motors Corporation, 2000-1025/MIA (Fla. NMVAB January 30, 2001).
Pursuant to a Notice of Hearing mailed to the Consumer and Manufacturer on December 12, 2000, the Board held a hearing on January 10, 2001. After waiting 30 minutes from the scheduled time of the hearing, the Consumer was declared in default for failure to appear, and the case was dismissed. The Consumer contacted the Board Administrator within one business day of the hearing requesting that the dismissal be set aside. Thereafter, a telephone hearing was held to consider the Consumer's request. The Consumer claimed that her failure to appear was as a result of a relative's funeral. She testified that her uncle passed away on January 5, 2001, and the cremation was on January 8, 2001. The Manufacturer contended that the Consumer's explanation did not amount to an "unforeseeable circumstance," because the Consumer made no attempt to contact the Board Administrator at any time after learning of the death of her relative, and prior to the hearing date; consequently, the dismissal should not be set aside. The Board held that the Consumer failed to demonstrate that her failure to appear was due to an unforeseeable circumstance sufficient to set aside the dismissal of her case pursuant to the applicable rules. Accordingly, the case was dismissed with prejudice.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2001 - June 2001 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Rossi v. American Honda Motor Company, 2000-1230/WPB (Fla. NMVAB April 18, 2001).
The Manufacturer argued at the hearing that the vehicle was "used" and the case should be dismissed. This defense was not raised in the Manufacturer's Answer, nor did the Manufacturer submit an amended Answer prior to the hearing. Manufacturer's counsel argued that this was a jurisdictional matter and not an affirmative defense, and could be raised at any time prior to, or at, the arbitration hearing. The Board rejected this contention and determined that this was an affirmative defense and that it was not timely raised. The case was dismissed on other grounds.

Pixley v. Ford Motor Company and Mark III Industries, 2001-0244/ORL (Fla. NMVAB April 18, 2001).
Counsel for Ford argued that the Consumer's claim should be dismissed because the conversion van was not sold in Florida and, therefore, did not meet the definition of "motor vehicle" under Chapter 681, Florida Statutes. In support of this argument, the Manufacturer contended that the Board should look at the "totality of the circumstances" surrounding the sale transaction. The certificate of origin for the motor vehicle indicated that it was sold by Mark III to a Ford dealership in Idaho, and the vehicle was ordered by the Consumer's son, who was employed by the Idaho dealership at the time of purchase. The purchase contract was prepared by the Idaho dealership, the down payment was remitted to the dealership, and a Ford Credit security agreement listed the seller as the Idaho Ford dealership. This dealership paid Mark III for the conversion package, and paid for the floor plan interest on the motor vehicle while the conversion was being completed at Mark III's Florida facility. The Consumer took possession of the vehicle at Mark III's facility when the work was completed as arranged by the Idaho dealership. The Consumer then drove the vehicle to a Ford dealership in Florida where he had made arrangements for the completion of the registration and title documents to register and title the vehicle in Florida. The Consumer did not pay a $2.00 Lemon Law fee when he purchased the vehicle, and if he had failed to take possession of the vehicle, Mark III would have arranged for the transport of the vehicle to the Idaho Ford dealership. Because of the creation of the buyer's order in Idaho, the remittance of the down payment to the Idaho dealership, the Manufacturer's certificate of origin listing the dealer as the Idaho Ford dealership, and Mark III's agreement with this dealership, the Board concluded that the sale of the vehicle took place in Idaho. Accordingly, since the vehicle was

not sold in Florida, it did not meet the definition of a "motor vehicle" under the Lemon Law; as a result, the Consumer was not eligible for relief and the case was dismissed.

Warranty §681.102(23), F.S.

Zdancewicz v. Toyota Motor Sales, U.S.A., Inc., 2001-0268/ORL (Fla. NMVAB April 19, 2001). The Consumers complained that their vehicle's horizontal surfaces had spots in the paint, which became apparent approximately six months after purchasing the vehicle. The Manufacturer asserted that the paint damage was not covered under its warranty because it was caused by "environmental contamination." Because of the passage of time from the date of purchase to the date the spots were first noticed by the Consumers, the Board concluded that the spots in the vehicle's paint on the horizontal surfaces were caused by airborne particles or environmental conditions, and were not the result of any defect in materials or workmanship subject to coverage under the Manufacturer's warranty. Accordingly, the Consumers were not entitled to relief, and the case was dismissed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Taylor v. Ford Motor Company, 2001-0434/TPA (Fla. NMVAB June 13, 2001).
The Consumers believed that they were qualified for Lemon Law relief because an engine nonconformity caused their vehicle to be out of service by reason of repair for 51 cumulative days. When the vehicle was presented to the dealership for an engine tapping noise, the problem was diagnosed as "piston slap." The Consumers were advised that a new engine would be ordered and they were instructed to pick up their vehicle and drive it until the new engine arrived; however, because they lived in a rural area and did not feel safe driving the vehicle, they refused to pick up the vehicle and allowed it to remain at the dealership while the engine was on order, and until the engine replacement was completed. The Manufacturer asserted that the engine nonconformity was cured within a reasonable number of attempts, because the vehicle was not out of service by reason of repair as defined in Rule 2-30.001(2)(c), Florida Administrative Code, for 30 or more cumulative calendar days. In support of that assertion, a Manufacturer witness testified at the Lemon Law hearing that "piston slap" was not a "driveability" problem, and the Consumers could have safely driven the vehicle until the new engine arrived; thus, the vehicle would not have been out of service at the dealership for 51 days. The Board concluded that the period during which the vehicle remained at the service facility, because the replacement engine was not available and the Consumers did not want to drive the vehicle with the nonconformity unrepaired, constituted out-of-service days, as defined in the Florida Administrative Code, because the repair work was not completed. Accordingly, the Consumers were awarded a replacement vehicle.

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

Mauldin v. Ford Motor Company, 2001-0272/FTM (Fla. NMVAB May 3, 2001).
A nonconformity consisting of an intermittent screaming or groaning noise and accompanying vibration in the steering wheel was subjected to repair by the Manufacturer's authorized service agent on two occasions. Following the second repair attempt, the Consumers were advised that no further work would be performed on the vehicle because of a lack of a Manufacturer's "fix" for the problem. The Board held that, under these circumstances, two repair attempts, plus the Manufacturer's repair attempt after written notification, were sufficient to afford the Manufacturer a reasonable number of attempts to conform the vehicle to the warranty as contemplated by the Lemon Law. The Manufacturer having failed to conform the vehicle to the warranty within a reasonable number of attempts, the Consumers were entitled to a refund under the Lemon Law.

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

Vigliotti v. DaimlerChrysler Motors Corporation, 2001-0288/ORL (Fla. NMVAB May 23, 2001).
When the Manufacturer responded to the Consumer's written notification by calling the home telephone number listed on the notice, a facsimile machine sound was heard. Thereafter, the Manufacturer contacted the selling dealer in an effort to obtain an alternate telephone number. When messages left at the work telephone number provided by the dealer went unanswered, the Manufacturer sent a letter via facsimile to the "home telephone" number asking the Consumer to telephone the Manufacturer's representative to arrange a mutually convenient time for the final repair attempt. When the Manufacturer failed to receive any response from the Consumer, a certified letter was mailed to the Consumer's post office box, which was received at the post office box on the 10th day after receipt of the Consumer's written notification. At the hearing, the Consumer testified that she was out of town and did not retrieve the letter until approximately one week after it was received at the post office box. The Consumer did not respond to the letter because she considered it "too late." A final repair attempt was not performed. The Board concluded that the Manufacturer timely responded to the Consumer's notification, both at the telephone number provided and in writing; moreover, the Consumer's failure to provide a telephone number at which she could be reached and her failure to respond to the Manufacturer's written correspondence deprived the Manufacturer of a final opportunity to conform the vehicle to the warranty; consequently, the case was dismissed.

Reimann v. Ford Motor Company, 2001-0349/STP (Fla. NMVAB May 24, 2001).
The Manufacturer asserted that it was not afforded a final attempt to conform the vehicle to the warranty, because the Consumer's failure to send the written notification to the appropriate address for consumers located inside the United States thwarted the Manufacturer's ability to appropriately respond. The notification was received at the location designated for consumers outside the United States or Canada and was internally redirected to the location designated for consumers inside the United States and Canada. The Board determined that the Manufacturer's subsequent response failed

to direct the Consumer to a repair facility for a final repair attempt and, instead, solicited information already contained on the written notification previously sent. Accordingly, the Board concluded that the Manufacturer had a reasonable number of attempts to conform the vehicle to the warranty. The Manufacturer having failed to conform the vehicle to the warranty after a reasonable number of attempts, the Consumer was awarded a refund for an intermittent hesitation and stalling nonconformity.

NONCONFORMITY §681.102(16), F.S.

Baker v. DaimlerChrysler Motors Corporation, 2001-0072/FTL (Fla. NMVAB May 13, 2001). The Consumers complained of a rust spot the size of a fingernail on the inside of the sliding door of their van. The spot kept returning after numerous attempts by the Manufacturer to remove it. The Manufacturer argued that the spot was so small that it did not constitute a substantial defect. The Board disagreed and awarded a refund to the Consumers.

Martin v. Toyota Motor Sales, U.S.A., Case No. 2000-0988/MIA (Fla. NMVAB May 14, 2001). The Consumers complained of a brake noise when the vehicle turned, which was not experienced during the first 14 months of operation of the vehicle. The Manufacturer's representative opined that the brake noise was the result of the Consumer's driving habits, for example, aggressive braking or riding the brakes. The Manufacturer's representative was unable to explain why the vehicle did not experience any brake noise during the first 14 months of operation if the Consumer's aggressive driving was the cause of the brake noise. The Board awarded the Consumers a refund and held that the Manufacturer's affirmative defense was not supported by the evidence because the Consumers drove the vehicle for more than a year before the defect occurred, during which time the defect should have manifested itself, if the cause, as the Manufacturer claimed, was Consumer driving habits.

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.

Nguyen v. Mazda Motor of America, Inc., 2001-0234/PEN (Fla. NMVAB April 13, 2001). The Consumer believed his van to be a Lemon because he could feel a vibration through the steering wheel, especially when driving the vehicle at speeds between 60-70 miles per hour. The Manufacturer asserted that the Consumer was experiencing "normal" road and tire feel with his van, which did not substantially impair the use, value, or safety of the vehicle. During the Arbitration Hearing, the Board test drove the vehicle at speeds between 60-75 miles per hour, and experienced normal "road feel" through the steering wheel when the vehicle was driven over roads with bumps, holes, concrete separations and other road hazards. Accordingly, the Board found that the vibration did not constitute a nonconformity and dismissed the case.

Brumfield v. General Motors Corporation, Pontiac-GMC Division, 2001-0233/PEN

(Fla. NMVAB April 16, 2001).
When the Consumer attempted to tow a trailer within the first week of purchasing his pickup truck, the bumper was angled so low that both the bumper and trailer almost touched the ground. Upon inspection, he discovered that the frame was bent. Following the one and only repair to the chassis, he was able to tow his trailer and put more than 45,000 miles on the truck's odometer without any frame or towing related problems. The Consumer believed he was entitled to a refund because the trade-in value on this truck was diminished due to the repaired chassis damage and the significant number of miles on the odometer. The Manufacturer did not dispute that there was some damage to the chassis initially; however, the Manufacturer asserted that the defect was cured and no longer substantially impaired the use, value or safety of the vehicle. Inasmuch as the evidence established that the Consumer was able to successfully tow his trailer truck following the only repair, and that he put an excessive amount of mileage on the odometer in a short period of time, the Board agreed with the Manufacturer's assertion and dismissed the case.

McNeil v. Ford Motor Company, 2001-0140/FTL (Fla. NMVAB April 19, 2001).
The Consumer complained of paint damage to the vehicle's rear door lift gate. The Manufacturer contended that the paint damage was excluded from the warranty because it was not "factory" damage and occurred after the vehicle left the Manufacturer's control; therefore, the paint damage was a dealer problem. In rendering its decision, the Board held that "a defect does not have to be a 'factory' defect to be potentially covered under the Lemon Law." The types of defects that are covered by the law are those that fall within the statutory definition of "nonconformity," and this definition is not restricted to "factory" defects. Moreover, contrary to the Manufacturer's assertion, the Board found that paint damage was covered by the Manufacturer's warranty. A majority of the Board found that some minor paint damage did exist; however, it did not constitute a substantial impairment to the use, value or safety of the vehicle, and dismissed the case.

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

Rushing v. DaimlerChrysler Motors Corporation, 2001-0103/JAX (Fla. NMVAB April 5, 2001).
The Consumers complained of a "tapping" noise in their vehicle's engine. The Board found that this noise was the result of a build up of sludge in the engine, caused by the Consumers' failure to regularly maintain the vehicle. Since the defect was the result of neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent, the defect was not a nonconformity as defined under the Lemon Law. The case was dismissed.

MULTIPLE MANUFACTURERS

Caswell v. Ford Motor Company, 2001-0237/TPA (Fla. NMVAB May 11, 2001). Manufacturer Ford Motor Company argued that it could not be held responsible for a "ground effects" defect of the Consumer's Ford Econoline conversion van, because, according to Ford, the defect was covered by the warranty of the van converter, and excluded from the coverage of Ford's written warranty. The repairs to the Consumer's vehicle were performed at the van converter's facility and were listed on a Ford dealership repair order provided to the Consumer. The Board held that the legislative intent establishes that "a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in" Chapter 681. The Consumer purchased a vehicle manufactured by Ford Motor Company from an authorized service agent of Ford Motor Company, and was instructed to present the vehicle to Ford's authorized service agent for all repairs to the vehicle. As no evidence was presented that the modifications and repairs performed by the van converter were not authorized by Ford Motor Company, the board held that Ford was responsible for the failure to correct the "ground effects" nonconformity after a reasonable number of attempts and ordered Ford to repurchase the conversion van and provide the Consumer with a refund of his purchase price.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8)

Cameron v. Kia Motors America, Inc., 2001-0226/STP (Fla. NMVAB April 10, 2001). Counsel for the Consumers asserted that the Consumers were entitled to reimbursement of their attorney's fees as an incidental charge as a result of the intermittent stalling of the vehicle's engine, and intermittent illumination of the "check engine" warning light nonconformities. In support of this assertion, Counsel relied on non-binding remarks of the appellate court in the case of *Holzhauer-Mosher v. Ford Motor Company*, 772 So.2d 7 (Fla. 2 DCA 2000). The Board held that, contrary to Counsel's reading of the appellate court's comment in *Holzhauer-Mosher*, recovery of attorney fees for arbitration before the Board is not authorized by Chapter 681, Florida Statutes. Accordingly, the request for an award of attorney's fees was denied.

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

Jorgensen v. Nissan Motor Corporation USA, 2001-0253/TPA (Fla. NMVAB April 20, 2001). In computing the mileage attributable to the Consumer for purposes of calculating the reasonable offset for use, the Board deducted 840 miles for six trips to the Manufacturer's authorized service agent for repair of a steering wheel vibration nonconformity.

Ayers v. DaimlerChrysler Motors Corporation, 2001-0228/ORL (Fla. NMVAB April 24, 2001). The mileage attributable to the Consumer as of the date of the hearing was 79,787 miles. Because of the high amount of mileage the Consumer put on the truck's odometer, the Manufacturer was entitled to a statutory offset for use in the amount of $24,501.26. Consequently, although the Consumer's vehicle was deemed a Lemon and the Board awarded him a refund, the refund was a negative amount, which the Consumer was required to pay the Manufacturer.

PROCEDURAL ISSUES

Harwick v. Kia Motors America, Inc., 2001-0180/JAX (Fla. NMVAB April 11, 2001). The Manufacturer's representative sought to have witnesses testify at the hearing who were not previously disclosed to the Board or the Consumers or, in the alternative, have the hearing continued so that the witnesses could be properly disclosed and the Manufacturer not prejudiced by the inability to present these witnesses, whose testimony would be crucial to the defense of the case. The Manufacturer had failed to complete and timely file its prehearing information sheet, and the representative learned of this one hour prior to the hearing and immediately faxed a listing of the intended witnesses to the office of the Board Administrator. The Board held that the Manufacturer failed to demonstrate good cause for its failure to properly disclose its witnesses, or for its continuance request; consequently, the witnesses were not permitted to testify and the request for continuance was denied. The Consumers' vehicle was deemed a Lemon, and a refund was awarded.

Andrea Kennedy v. Kia Motos America, Inc., 2001-0213/FTL (Fla. NMVAB May 12, 2001). The Manufacturer's Answer was mailed, but was returned to the Manufacturer because of insufficient postage, then re-mailed with the correct postage. The Answer was filed more than 15 days from the date the Manufacturer received the Notice of Arbitration. The Board determined that the Answer was untimely filed and did not allow the Manufacturer to present testimony in support of its affirmative defenses. The Consumer was awarded a refund.

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

Wagner v. General Motors Corporation, Chevrolet Motor Division, 2001-0300/FTM (Fla. NMVAB May 19, 2001).
The Manufacturer conducted a prehearing inspection of the Consumers' vehicle two days prior to the hearing, during which an electronic vibration analyzer was used as a diagnostic tool. The Consumers were not provided with a written report of the results of the prehearing inspection in accordance with *Hearings Before the Florida New Motor Vehicle Arbitration Board*, paragraph (13). Since the Manufacturer failed to comply with the applicable rule, the Manufacturer's witness was not permitted to testify about the prehearing inspection. The motor vehicle was deemed a Lemon because of a vibration nonconformity, and the Consumers were awarded a refund.

MISCELLANEOUS ISSUES

Kelly v. BMW of North America, LLC., 2001-0093/TPA (Fla. NMVAB May 10, 2001).
The Consumer's vehicle was declared a lemon because of an intermittent water leak at the front windows of the vehicle. The Manufacturer requested that the Consumer be required to obtain repairs to scratches and dents to the right rear quarter panel of the vehicle which were noted during the Board's inspection. The Board denied the request because the statute does not contain such a requirement, nor does it delegate to the Board the authority to impose such a requirement upon Consumers.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2001 - September 2001 (3rd Quarter)

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Castillo v. General Motors Corporation, Chevrolet Motor Division, 2001-0753/ORL (Fla. NMVAB September 26, 2001).
The Manufacturer argued that a letter sent by the Consumer describing the complaints with the vehicle was not written notification as required under the Lemon Law, but was treated as a "normal customer complaint" to which it did not respond. The Consumer subsequently sent the Motor Vehicle Defect Notification form, but declined to take the vehicle in for repairs after the Manufacturer responded. The Manufacturer asserted that this constituted a denial of its right to a final repair attempt. The Board concluded that the letter constituted notification because the Lemon Law does not require consumers to use the form located in the back of the Lemon Law booklet, but only requires written notification. Since the Manufacturer failed to respond to the Consumer's letter, the requirement that the Manufacturer be provided a final repair attempt did not apply. Because the statute does not specifically define how many attempts are reasonable, the facts and circumstances associated with the repair history of the Consumer's vehicle established that the Manufacturer was afforded a reasonable number of attempts, but failed to correct the nonconformity; thus the Consumer was awarded a refund.

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

Gillstrap v. Ford Motor Company, 2001-0721/TPA (Fla. NMVAB September 21, 2001).
In this case, the Consumer's vehicle was towed to a Goodyear dealer on September 5, 2000, at the direction of the Consumer following an accident, because the brakes failed to stop the vehicle, and Goodyear had recently replaced the front brake pads. Subsequently, the vehicle was towed by the Consumer's insurance company to an independent engineer for analysis, where it remained until March 15, 2001, when it was transferred to the Manufacturer's authorized service agent; thereafter, a master cylinder repair was completed on March 16, 2001. The Consumer wanted the Board to count the days between September 5, 2000, and March 16, 2001, as out-of-service days. The Manufacturer argued that the days the vehicle was in the custody of the Consumer's insurance company were not "days out of service" as defined in Rule 2-30.001(2)(c), Florida Administrative Code. Based on these facts, and the rule definition, the Board agreed with the Manufacturer's argument, and did not count the

days prior to March 15, 2001, as out-of-service days.

NONCONFORMITY §681.102(16), F.S.

Morrison v. Ford Motor Company, 2001-0624/ORL (Fla. NMVAB August 27, 2001).
The Consumer complained that a gas fume odor intruded into the cabin of the vehicle when the vehicle was first driven after fueling. According to the Consumer this odor intruded approximately 90 percent of the time, causing sickness and headaches. The Manufacturer argued that this alleged problem did not substantially impair the use, value or safety of the vehicle, because its authorized service agent could not duplicate the problem, did not observe any fuel leaks, and the vehicle's on-board computer did not contain any stored fault code evidencing a fuel problem. During the hearing, a test drive was conducted wherein the vehicle was driven approximately three miles to a gas station to obtain fuel. During the short trip back to the hearing site, one Board member developed a headache from the gas fume odor. The vehicle's engine was turned off and restarted. The odor was not present when the vehicle was restarted. The Board concluded that this odor constituted a defect or condition that substantially impaired the use and value of the vehicle, and declared the vehicle a Lemon.

Spina v. American Suzuki Motor Corporation, 2001-0531/ORL (Fla. NMVAB July 24, 2001).
The Consumers complained of a foul odor that was described as a urine or mold odor emanating from the air conditioner vents, which caused the Consumers to experience headaches and sore throats. The Manufacturer contended that this odor did not substantially impair the use, value or safety of the motor vehicle. The Board test drove the vehicle during the hearing and experienced an offensive, intolerable odor emanating from the air conditioner vents; consequently, the Board rejected the Manufacturer's argument as not supported by the evidence. The vehicle was deemed a Lemon and a refund was awarded.

Ferrell v. General Motors Corporation, Cadillac Motor Car Division, 2001-0575/TPA
(Fla. NMVAB July 30, 2001).
The Consumer complained of a transmission jerk or jolt upon acceleration after deceleration, which was not experienced until the vehicle attained approximately 9,000 miles of operation. The Manufacturer asserted the affirmative defense that the problem did not constitute a substantial impairment to the use, value or safety of the vehicle, because it was induced by the manner in which the Consumer drove the vehicle. During the hearing, the Board conducted a test drive of the vehicle and experienced a thud or jolt upon acceleration after deceleration. The Consumer did not drive the vehicle during the test drive. The Board rejected the Manufacturer's defense and declared the vehicle a Lemon.

Lee v. General Motors Corporation, Pontiac-GMC Division, 2001-0702/PEN
(Fla NMVAB September 17, 2001).
The Consumer complained of an intermittent "violent" shaking in the cab of his pickup truck. The Manufacturer asserted that this did not constitute a substantial impairment to the use, value or safety of

the vehicle, because, after each time the vehicle was test driven when presented for repair, the Manufacturer's authorized service agent was unable to verify or duplicate the Consumer's concern. The Board rejected this assertion, deemed the vehicle a Lemon, and awarded the Consumer a refund.

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

Freiman v. BMW of North America, LLC., 2001-0734/ORL (Fla. NMVAB September 25, 2001). At the hearing, the Manufacturer asserted that the complained of water leak constituted two different defects– a driver's window leak that was cured within a reasonable number of repair attempts, and a passenger door leak, which resulted in soaked carpet, that was only subjected to one repair attempt prior to the Manufacturer's receipt of written notice. The Manufacturer asserted it was not afforded a reasonable opportunity to repair the "door leak" problem. The Board rejected this assertion, and concluded that the "water intrusion" problem was a "condition," defined in Rule 2-30.001(2)(a), Florida Administrative Code 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." The Board further concluded that the water intrusion condition substantially impaired the use and value of the vehicle, and that this nonconformity was not corrected after a reasonable number of attempts. The vehicle was declared a Lemon and the Consumers were awarded a refund.

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

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

Bennett v. DaimlerChrysler Motors Corporation, 2001-0546/TLH (Fla. NMVAB July 30, 2001). The Consumer complained of an "excessive" whining noise in the differential, which was most prevalent at speeds between 55-70 miles per hour. During the hearing, the Consumer testified that this noise gets "very obnoxious" each time the vehicle's odometer turns over 5,000 miles. He told the Board that the noise was "obnoxious" on the date of the hearing. The Manufacturer contended that this type of noise was "normal factory noise that is evident in all vehicles," thus it did not substantially impair the use, value or safety of the motor vehicle. The Board test drove the vehicle during the hearing, and a low or normal whining differential noise, especially at deceleration, was experienced. The Board concluded that this noise did not constitute a nonconformity and dismissed the case.

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

McKenzie v. Ford Motor Company, 2001-0455/STP (Fla. NMVAB July 5, 2001).
At the hearing, Counsel for the Manufacturer argued that the Board "lacked jurisdiction" to consider the Consumer's complaint of a ball joint stud fracture, because the Board would have to determine whether an accident caused the fracture, or the fracture caused the accident and the Board had no such authority. Alternatively, Counsel argued that the fracture was the result of the accident, relying on an

accident report which stated that there was no vehicle defect that contributed to the accident, the Consumer's testimony that the vehicle exhibited no handling problems prior to the accident, and the alleged performance of a ball joint recall approximately two months prior to the accident. The Manufacturer did not present any witness testimony during the hearing. The Consumer testified that his vehicle struck a guard rail on an interstate highway when he lost control of the vehicle while attempting to avoid a collision with a "phantom vehicle" that cut him off. The Consumer provided the Board with photographs which showed no contact between the two vehicles, and that the right front ball joint stud was broken at the threads and the control arm ball joint port was fractured. The Consumer also provided a National Highway Transportation Safety Association (NHTSA) campaign statement, indicating that a fracture of the ball joint stud would result if the lower ball joints were not tightened to specifications when attached to the lower control arms, which could increase the risk of a crash. In addition, the Consumer presented a repair order that indicated a recall was performed involving a torque inspection of the lower ball joint attaching nuts. The Manufacturer presented no testimony concerning what work, if any, was performed for the recall. The Board concluded that nothing under Chapter 681, Florida Statutes, divested the Board of jurisdiction to consider a Consumer's claim simply because the vehicle was involved in an accident; instead, a determination as to whether a claimed defect constituted a nonconformity under the statute would, in certain instances, require the Board to determine whether the defect was the result of an accident. The Board held that the fracture of the front suspension lower ball joint stud constituted a nonconformity within the meaning of the statute because it was a defect or condition that substantially impaired the safety of the vehicle. The Manufacturer's argument that the defect was the result of an accident was rejected as unsupported by the greater weight of the evidence.

REFUND §681.104(2)(a)(b), F.S.:

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

Campbell v. Mercedes-Benz USA, Inc., 2001-0511/TPA (Fla. NMVAB July 27, 2001).
The Consumer did not agree with the amount of the trade-in allowance reflected in her lease agreement, and requested that the Board utilize the retail price of $14,900.00 as reflected in the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade-in. At the time she entered into the lease, she was given a trade-in allowance of $7,000.00, from which her down payment of $1,562.77 was deducted and the balance remaining was paid to her in cash by the dealer and was not applied to the lease transaction. The Manufacturer objected to awarding the Consumer the amount of the NADA Guide retail value, because the amount paid to the Consumer by the dealer for the trade-in vehicle at the time of the lease transaction reflected a "separate deal." The Manufacturer argued that the selling dealer purchased the Consumer's trade-in vehicle for $7,000.00 in cash as an "accommodation," rather than as a trade-in toward the lease of the new vehicle. The Board declined to award the Consumer the retail price as reflected in the NADA Guide, because the lease transaction was a separate transaction from the dealer's purchase of the Consumer's trade-in vehicle,

for which the Consumer received a cash payment from the dealer.

Taylor v. Mitsubishi Motor Sales of America, Inc., 2001-0785/TPA
(Fla. NMVAB September 24, 2001).

The net trade-in allowance as reflected on the purchase agreement and Simple Interest Retail Installment Contract was not acceptable to the Consumer. The Consumer presented the Board with a copy of a "Consumer Edition" of the NADA Used Car Guide. The Manufacturer argued that the Board was constrained by the Lemon Law statute to utilize the NADA Official Used Car Guide (Southeastern Edition), which the Manufacturer presented to show that the Consumer's vehicle was not listed because of the vehicle's age. The Board concluded that it had no statutory authority to require the Manufacturer to produce alternate NADA used car guides at the hearing, nor did it have the authority to look to alternate NADA guides. The Board further concluded that, in the absence of the trade-in vehicle being listed in the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, the Board was required to resort to the purchase agreement and the Simple Interest Retail Installment Contract to determine the net trade-in allowance.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2001 - December 2001 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Germain v. General Motors Corporation, Cadillac Motor Division, 2001-0761/JAX (Fla. NMVAB December 11, 2001).

The Manufacturer argued that the vehicle was not a "motor vehicle" as defined under the "Lemon Law," because it was not a new or demonstrator vehicle. When the vehicle was sold to the Consumer, the sale documents identified the vehicle as "used" and the Used Vehicle Buyer's Guide affixed to the window of the vehicle identified the vehicle as being sold as "used" with the "remainder" of the factory warranty. The application for title submitted by the selling dealer also identified the vehicle as "used," and the Consumer was not charged by dealer the $2.00 "Lemon Law fee" that is normally charged to buyers of new and demonstrator vehicles. In addition to the documentation submitted, the Manufacturer relied on the definition of "used motor vehicle" in Section 320.60(13), Florida Statutes. The Consumer argued that the vehicle was titled as "New" by the Florida Department of Highway Safety and Motor Vehicles, because it had not been titled previously and title was applied for with a Manufacturer's Statement of Origin; therefore, the vehicle was sold to the Consumer as a new vehicle, subject to the coverage of the "Lemon Law." Prior to the vehicle being purchased by the Consumer, it was utilized by an employee of General Motors Corporation as a "company car" for approximately one year. The vehicle was taken out of service as a "company car" and sent to an auction where it was purchased by the General Motors dealership that subsequently sold the vehicle to the Consumer, who was the first retail purchaser of the vehicle. The Board concluded that, as the purchaser other than for purposes of resale who was entitled to enforce the terms of the warranty, Ms. Germain was a "consumer" as defined under Section 681.102(4), Florida Statutes. The Board further concluded that the prior use of the vehicle by a GM employee as a company car was temporary with the intent that the vehicle be offered for retail sale before the expiration of the Manufacturer's limited warranty. The auction at which the vehicle was purchased by the selling dealership after the vehicle was taken out of service as a GM company car, was a closed auction, and not open to the public. The evidence established that neither General Motors Corporation, nor the dealer, ever transferred title or possession of the vehicle to an ultimate purchaser prior to its acquisition by the Consumer. Under the Chapter 320 definition of "motor vehicle" the Consumer was the "ultimate purchaser," and under the definition of "used motor vehicle" the Consumer was the person who first acquired the vehicle from the dealer; thus, the vehicle was not "used." Moreover, the vehicle was issued an "original, new" title upon its purchase

by the Consumer, and a warranty was issued as a part of the sale. Accordingly, the subject vehicle was a "motor vehicle" as defined by Section 681.102(15), Florida Statutes (2001). The Board then declared the vehicle a "Lemon" because of a vibration nonconformity, and awarded the Consumer a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Campbell v. BMW of North America, LLC, 2001-0897/STP (Fla. NMVAB November 9, 2001). The Manufacturer argued that the Consumer did not "go through the hoops" prior to filing her Request for Arbitration, because she failed to provide written notification to the Manufacturer pursuant to Section 681.104, Florida Statutes, before she filed her Request for Arbitration, or alternatively, the Manufacturer failed to receive the notification before the expiration of the Lemon Law rights period plus the 60-day filing period provided in Section 681.109(4), Florida Statutes. In response to the Manufacturer's request for dismissal, the Consumer argued that she provided verbal notice to the Manufacturer that she was asserting her rights under the Lemon Law. The Board concluded that the Consumer failed to properly preserve her rights under the Lemon Law; consequently, the case was dismissed.

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

De Landaburu v. DaimlerChrysler Motors Corporation, 2001-1002/MIA (Fla. NMVAB December 27, 2001).
The Manufacturer contended that the Consumer could not show that the vehicle was out of service for 30 or more cumulative days for repair of nonconformities. The Manufacturer argued that a repair visit of September 13-24, 2001, should not count as 12 out-of-service days, because the repairs were completed on September 22, 2001; however, the Consumer did not pick up the vehicle until September 24, 2001. The Board concluded that there were 12 days out of service, even though repairs were completed on September 22, 2001, because a reasonable interpretation of Rule 2.30.001(2)(c), F.A.C., requires that adequate notice be given to a consumer upon completion of repairs. The Consumer telephoned the service agent several times prior to September 22, 2001, to inquire if repairs were completed. The Manufacturer did not attempt to notify the Consumer that the repairs were completed until the afternoon of September 22, 2001; however, the Consumer's family had left town for the weekend. The repair facility was closed on Sunday. When the family returned from their weekend trip, the vehicle was retrieved on Monday, Sept. 24. The Board held that there wasn't adequate notice to the Consumer that repairs were completed on September 22, 2001; accordingly, it was presumed that a reasonable number of attempts were undertaken to conform the vehicle to the warranty, because the vehicle had been out of service for repair of nonconformities for 31 days. The Consumer was awarded a refund.

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

Houston v. Ford Motor Company, 2001-0830/JAX (Fla. NMVAB October 23, 2001). The Board concluded that an engine idle fluctuation and stalling may or may not have been related to each other; however, they did constitute nonconformities under the statute. The Consumer did not experience the engine stalling nonconformity after the repair attempt of May 7, 2001, when several fuel system components were replaced. This repair attempt was prior to the Manufacturer's final repair attempt of July 2, 2001. During the final repair attempt, the transmission was malfunctioning and causing a fluctuation in the engine rpm's that would be detectable by the driver. After the final repair attempt, as evidenced by test drives and diagnostic testing of the vehicle on October 1, 2001, and the Board's inspection of the vehicle during the hearing, the engine idle fluctuation returned to normal levels. Because the nonconformities were corrected within a reasonable number of attempts, the Consumer was not entitled to the requested repurchase remedy.

Final Repair Attempt under §681.104(1)(a), F.S. and Post-notice inspection or repair under §681.104(1)(b), F.S.

Leoni v. BMW of North America, LLC., 2001-0815/TLH (Fla. NMVAB October 11, 2001). The Manufacturer argued that it was not afforded its statutory 10-day final attempt to cure the nonconformity, or its "statutory final opportunity to inspect or repair" the Consumer's vehicle. 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, and to provide the Manufacturer with a final opportunity to repair the vehicle, because three or more repair attempts had been made to repair an air conditioner nonconformity. Following the Manufacturer's receipt of the written notification, an appointment was scheduled in Tallahassee for August 22, 2001, to allow the Manufacturer's Jacksonville representative an opportunity to address the Consumer's concerns. According to the Manufacturer's general practice, the Consumer was told that he could drop off the vehicle one day early if that was more convenient for him. The Consumer dropped off the vehicle two days early on August 20, 2001. Although this was unexpected, the dealership provided him with a loaner vehicle to use in the interim. On August 21, 2001, the Consumer retrieved his own vehicle, because the loaner vehicle's air conditioner did not work to his satisfaction. Based on these facts and circumstances, the Board held that, although the Consumer sent the required written notification to the Manufacturer, he failed to permit the Manufacturer its statutory opportunity for either a final repair attempt, or a post-notice inspection or repair; therefore, the case was dismissed because the Board could not conclude that the Manufacturer had a reasonable number of attempts to conform the vehicle to the warranty.

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

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

Sahlman v. DaimlerChrysler Motors Corporation, 2001-0906/TPA (Fla. NMVAB November 9, 2001).
The Manufacturer argued that the Consumer's case should be dismissed, because the Request for Arbitration was filed more than 60 days after the expiration of the Lemon Law rights period. The Manufacturer contended that the Consumer's last day to file was September 17, 2001; however, the Consumer filed one day late on September 18, 2001. The date 60 days after the expiration of the Consumer's Lemon Law rights period was Sunday, September 16, 2001. The consumer signed and dated the Request for Arbitration on Saturday, September 15, 2001, and sent it by express mail on Sunday, September 16, 2001. The Express Mail postal receipt was marked "NO SVC GUARANTEE." The Consumer claimed that the terrorist events of September 11, 2001, caused the United States Postal Service to be unable to accomplish overnight delivery, and requested that the Board consider his filing timely. The Board concluded that the 60th day being a Sunday, the last day to file the Request for Arbitration was Monday, September 17, 2001; therefore, the filing was untimely when received and filed on Tuesday, September 18, 2001. The case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Gilbert v. Toyota Motor Sales, U.S.A., Inc., 2001-0862/TLH (Fla. NMVAB October 22, 2001).
The Board found that the Consumer's vibration upon braking was a nonconformity. The Consumer claimed the following incidental charges were incurred as a direct result of the nonconformity: $9.09 for registered mail and return receipt postage in mailing the written defect notification to the Manufacturer; $13.95 for express mail and return receipt postage in mailing the Request for Arbitration to the Florida Department of Agriculture and Consumer Services, Division of Consumer Services; and $8.80 for certified mail and return receipt postage in mailing the Consumer's Prehearing Information Sheet to the Office of Attorney General and Toyota Motor Sales, U.S.A., Inc. The Manufacturer objected to reimbursement of the charges that the Consumer incurred in sending the Request for Arbitration and Prehearing Information sheet, because the statute and rules did not require that the Consumer send these pleadings via express or certified mail. The Consumer testified that she sent the pleadings in this fashion so that she had verification and proof that they were received by the intended recipient. The Board concluded that these postage charges constituted reasonable costs directly caused by the nonconformity and included reimbursement of these charges as part of the refund awarded the Consumer.

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

Lindstrom v. Ford Motor Company, 2001-0770/ORL (Fla. NMVAB October 3, 2001).
The net trade in allowance of $7,200.00 reflected on the purchase contract was not acceptable to the Consumer. In accordance with Section 681.102(19), Florida Statutes, the Manufacturer provided a copy of the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, which the Board was required to utilize, and which reflected a retail price of the Consumer's trade-in vehicle of $12,975.00, inclusive of $125.00 for power seats. The Manufacturer argued that the Board should reduce this amount by $700.00 for "high mileage," and by $200.00 for "reconditioning costs." In support of this argument, the Manufacturer relied on the guide, which provided at the bottom of its pages, "adjust for mileage," and "deduct for reconditioning." The Consumer objected to the deduction for reconditioning arguing that all trade-in vehicles are reconditioned. The Consumer testified that she had some scratches in the paint, and she agreed that a dealer trade-in appraisal reflected that the cost of reconditioning the vehicle was $200.00. The Board concluded that, in calculating the amount to be refunded as the net trade-in allowance, the reference in Section 681.102(19), Florida Statutes to the NADA Official Used Car Guide (Southeaster Edition) contemplated utilizing the entire book, including the high mileage chart and the cost of reconditioning. Accordingly, the Board awarded $12,075.00 as the net trade-in allowance.

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

Nagar v. Mercedes-Benz USA, Inc., 2001-0703/FTM (Fla. NMVAB October 25, 2001).
The Manufacturer stipulated that the Consumer's vehicle was a "Lemon." The Consumer leased the vehicle from the dealer. During the remedy phase of the hearing, the Board was required to calculate the Manufacturer's reasonable offset for the Consumer's use of the vehicle. The statutorily mandated calculation requires that the Board utilize the "purchase price" of the vehicle in determining the offset for use. The "lease price" is not the "purchase price." Counsel for the Consumer asserted that the price at which the dealer purchased the vehicle from the Manufacturer should be utilized as the purchase price for purposes of calculating the reasonable offset for use. The lease agreement provided that, if Mercedes-Benz Credit Corporation (MBCC) was not the lessor, the lessor (dealer) may assign all rights, title and interest in the lease and vehicle to MBCC. The Consumer's Request for Arbitration listed MBCC as the lessor, and lease payments were made to MBCC. The Manufacturer submitted an invoice reflecting the sale of the vehicle by the dealer to MBCC at a sale price of $40,640.00, which the Manufacturer contended was the purchase price of the vehicle. The Board concluded that MBCC was the lessor and the "purchase price" of the vehicle was $40,640.00, which was utilized in calculating the reasonable offset for use.

DeWitte and Murphy v. DaimlerChrysler Motors Corporation and Centurion Vehicles, Inc., 2001-0942/WPB (Fla. NMVAB December 28, 2001).
Prior to the Board's hearing, the Consumers voluntarily participated in an arbitration proceeding conducted by the National Center for Dispute Settlement, a non-certified dispute resolution program

sponsored by DaimlerChrysler. The mileage on the vehicle's odometer, and attributable to the Consumers, on the date of the NCDS arbitration hearing was approximately 25,000 miles. The Board's arbitration hearing was more than one year later, and the mileage attributable to the Consumers was 50,658 miles. During the calculations of the reasonable offset for use, the Consumers requested that the Board utilize the mileage as of the date of the NCDS hearing. The Board denied this request, because the National Center for Dispute Settlement was not a certified procedure, and because of the passage of time since their participation in that program.

PROCEDURAL ISSUES

Gilliam v. General Motors Corporation, Pontiac-GMC Division, 2001-0850/TLH (Fla. NMVAB October 19, 2001).

Prior to the commencement of the hearing, the Board considered the Consumers' timely filed written request to amend their Request for Arbitration to include an additional problem; to wit: "driver side door hinge welding breaking away from body of vehicle." Upon review of the record, the Board noted that the Consumers complained to the Manufacturer's authorized service agent about a popping noise caused by a dry door hinge during one repair visit, and this problem was one of many problems that was presented at the BBB/AUTOLINE hearing, the state-certified informal dispute program established by the Manufacturer. Consequently, the Board determined that it was appropriate to take testimony on and consider this additional problem. However, after considering the evidence, the case was dismissed, because the Board concluded that the problems did not substantially impair the use, value or safety of the vehicle.