OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2005 - March 2005 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer, a U.S. military service member on active duty who was stationed in North Carolina at the time of the hearing, was a resident of Florida, and was stationed in Korea at the time he began the process of purchasing this vehicle. He ordered the vehicle through the Overseas Military Sales Corporation, an authorized distributor for Ford Motor Company, through Ford's special program for military personnel stationed overseas. He took delivery of the vehicle and signed the Retail Installment Contract at Tropical Ford in Orlando, Florida, at which time he received the "Consumer Guide to the Florida Lemon Law," and a written, limited warranty from Ford Motor Company with a term of coverage applicable only to vehicles delivered in Florida and Puerto Rico. The Manufacturer argued the vehicle was not a "motor vehicle" under the statute because it was not sold in Florida. The Board rejected this contention, reasoning that the Consumer signed the purchase contract in Florida, took physical delivery of the vehicle in Florida, was given Florida's Consumer Guide to the Lemon Law, and a written warranty from Ford with a term of coverage applicable only to vehicles sold in Florida.

In addition, the Consumer was awarded a refund which included reimbursement for collateral charges of $622.18 for North Carolina vehicle sales taxes and licensing fees, and incidental charges of $9.25 for postage, and $103.41 for rental car insurance incurred while the vehicle was out of service for repair. Hotel expenses of $96.14 and $51.36 for fuel which were incurred for travel to this hearing from Fayetteville, North Carolina were also reimbursed.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Rodriguez v. Isuzu Motors America, Inc., 2004-0899/MIA (Fla. NMVAB January 18, 2005).
The Consumers complained that the air conditioner stopped working one week after they took delivery of the vehicle, and it had not worked properly since then. The air conditioner blew cool air only when the vehicle was moving; it blew hot air when the vehicle was stopped or idling. The Manufacturer agreed the vehicle had a problem with the air conditioner not cooling

properly, but contended the problem was corrected with repairs that were made prior to the final repair attempt, and therefore no repairs were necessary at the final repair. Almost five months after the final repair, the air conditioner compressor had to be replaced. Accordingly, the Consumers were awarded a refund.

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

Ward v. American Honda Motor Company, 2004-0918/WPB (Fla. NMVAB January 20, 2005). The Manufacturer was scheduled to conduct the final repair attempt on September 29, 2004; however, due to conditions caused by the hurricanes, the Manufacturer's representative who was to conduct the final repair was unable to travel from Orlando to Delray Beach to do so. The Service Manager at the designated repair facility testified he offered to keep the consumer's vehicle at the dealership and provide the Consumer a rental car, but because the Consumer refused to pay the insurance charge for the rental, the Consumer was not given a rental. The Consumer would not agree to reschedule the final repair. At the hearing, the Consumer argued by not keeping the scheduled appointment, the Manufacturer waived its right to the final repair. A majority of the Board concluded the Manufacturer did not waive its final repair opportunity; rather, under the circumstances, the Manufacturer had not yet had a final opportunity to attempt to repair the alleged defect. The Board made no ruling as to whether or not the Consumer's complaint constituted a "nonconformity" as defined by the statute.

Marcelli v. Isuzu Motors America, Inc., 2004-0929/FTL (Fla. NMVAB January 12, 2005). After receiving written notification from the Consumer, the Manufacturer sent the Consumer a letter informing her where and when the final repair attempt would be held. The Consumer's attorney faxed a letter to the Manufacturer advising that the Consumer would be unable to attend the final repair at the designated authorized service agent. Rather, the Consumer asked that the final repair be conducted at an alternate location, but on the same date and time. The Manufacturer advised their representative would not be able to accommodate the Consumer's request as he had other appointments scheduled at the original location. The Manufacturer suggested an alternate date for the location the Consumer requested. No final repair was conducted. The Consumer argued by "refusing" to conduct the final repair on the original date at the location requested by the Consumer, the Manufacturer waived its right to a final repair. The Board found the attempts by the Manufacturer to arrange for the final repair at the facility preferred by the Consumer on a different date did not constitute a "waiver" of the final attempt, and dismissed the case.

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

Williams v. Nissan Motor Corporation, USA, 2004-0927/WPB (Fla. NMVAB January 19, 2005). The Consumer complained the warning lights that indicate a brake failure continually came on. The Consumer testified that while the vehicle was out of service he asked that he be allowed to drive his vehicle until the brake parts on order arrived and the vehicle could be repaired. The Manufacturer's authorized service agent said the vehicle was unsafe to drive, and would not

release the vehicle to the Consumer unless he signed a waiver of liability, which he declined to do. The vehicle was out of service for a cumulative total of 44 days. The Consumer filed a claim with BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Nissan. The Manufacturer declined to arbitrate the Consumer's complaint and the Program did not require the Manufacturer to submit to arbitration. The Manufacturer did not appear at the Lemon Law proceeding, either. The Board found a reasonable number of attempts had been undertaken to conform the vehicle to the warranty, and further found the warning lights indicating a brake failure continually coming on was a defect that substantially impaired the use, value and safety of the vehicle.

Alfonso v. Ford Motor Company, 2005-0007/MIA (Fla. NMVAB February 22, 2005).
The Consumer complained the vehicle had a rough engine idle and stalling defect. The Consumer testified he brought the vehicle to the Manufacturer's authorized service agent at Midway Ford for the first four repair attempts, and took the vehicle to the Manufacturer's authorized service agent at Palmetto Ford for the fifth repair of the rough idle/stalling problem on November 22, 2004, where the vehicle remained, waiting for parts ever since. As of the day of the hearing, the vehicle had been out of service for a cumulative total of 106 days. At the hearing, the Manufacturer argued when it received the written notification from the Consumer, the vehicle had been out of service for less than 30 days, but the Consumer refused to accord it a "final repair." The Consumer relations Manager at Midway Ford testified the Manufacturer notified her of the impending Lemon Law proceeding on November 22, 2004, and asked her to contact the consumer to set up an appointment for a "final repair" to be held at Midway Ford. When she spoke with the Consumer he informed her the vehicle was at Palmetto Ford awaiting repairs. The Consumer relations Manager relayed the information to the Manufacturer. The Manufacturer never contacted the Consumer. The Board found the evidence established the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle after receipt of written notification, but failed to do so. The Consumer was awarded a refund.

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

Scott v. General Motors Corporation, Chevrolet Motor Division, 2004-0971/TLH (Fla. NMVAB February 14, 2005).
The Consumers complained of a vibration and concurrent rattling or "rumbling" noise which appeared to emanate from underneath the vehicle, and which was most noticeable when the vehicle was driven at steady speeds between 45-60 miles per hour. After three repair attempts, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. At the hearing, the Consumer testified a person identifying themself as Ken Moneghan advised that the Manufacturer would not conduct a final repair, because there was no current definite fix for the vibration and concurrent rattling/rumbling noise. A witness for the Manufacturer testified that pursuant to a GM Technical Service Bulletin, the rear coil springs were replaced during a prior repair attempt, dampeners were installed on the exhaust system pipe and the exhaust system was realigned in an attempt to diminish the resonance. According to this witness, on a scale of one to 10, with 10

being the loudest, the resonance in the Consumers' vehicle was a "10" before the repair, and a "9" after the repair. The Board found the problem to be a nonconformity that was not corrected by the Manufacturer after a reasonable number of attempts. The Consumers were awarded a refund.

Lauda v. DaimlerChrysler Motors Corporation, 2005-0158/FTL (Fla. NMVAB March 16, 2005).
The Consumer testified approximately six weeks after he took delivery of the vehicle it developed an engine oil leak, and the engine continued to leak oil. The vehicle was taken to the Manufacturer's authorized service agent for repair of the oil leak six times and the following occurred: 1) the inner cooler charge tube was not sealed properly; 2) the Consumer was told it was "normal" for oil to "sweat" from the intake plenum; 3) no work performed; 4) the clamp on the left front turbo line was found to be leaking oil and residue was cleaned off the intercooler hose; 5) PCV valve replaced; and 6) residual oil seepage was found on the bottom hose. When the vehicle was presented to the manufacturer's designated repair facility for the final repair attempt, a slight amount of residual oil film was found at the turbo intercooler hose. The Consumer was told this was a "condition" that would occur during rapid acceleration and/or performance driving, and he must monitor the engine oil. When the Consumer brought the vehicle in for repair of the oil leak two weeks later, he was advised to install a custom "oil catch can" for the oil "overflow" problem. At the hearing, the Manufacturer testified it was "normal" for there to be "oil seepage, at times," and a slight amount of oil seepage was necessary to prevent an excessive amount of oil vapors from re-entering the engine. The Board concluded the engine oil leak was a defect or condition that substantially impaired the use, value and safety of the vehicle, and awarded the Consumer a refund, including reimbursement of the incidental charge of $79.00 for purchase of the "oil catch can."

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

Bender v. Mercedes-Benz USA, Inc., 2004-0802/TPA (Fla. NMVAB February 9, 2005).
The Board concluded the intermittent rough idle which required the driver to apply throttle pressure to avoid an engine stall, the engine running rough at times during acceleration like the transmission was hanging up and not shifting, the transmission constantly searching for a gear, the vehicle going into "limp home" mode, and the intermittent illumination of the "check engine" warning light were evidence of a poor engine performance condition that substantially impaired the use and safety of the vehicle. The Board rejected the Manufacturer's contention there were two separate problems with the vehicle, the problem of the transmission not shifting, which the Manufacturer alleged was "cured" at the final repair attempt, and the rough idle problem, which the Manufacturer contended was not subjected to a reasonable number of repair attempts.

Mascellino v. Ford Motor Company, 2004-0946/ORL (Fla. NMVAB January 19, 2005).
The Consumers complained of a vibration in their Ford F150 pickup truck, which was felt in the vehicle's seats when driving at speeds of 45 to 60 miles per hour. The vibration was most severe when the vehicle maintained a speed of about 50 miles per hour, the speed at which the Consumers commonly drove. The Consumers owned several Ford F-150s in the past and had no complaints about the quality of the ride of those vehicles. There currently were two Ford Technical Service Bulletins ("TSB") addressing the vibration in the seats, but they had not yet been performed on the vehicle. One of the bulletins required the use of special equipment each time the vehicle's tires were rotated and balanced. The availability of the equipment was limited, and it would increase the cost of routine maintenance for the vehicle. The Board considered as evidence of substantial impairment the existence of the TSB which required special maintenance, and the Consumers' satisfaction with previously owned pickups, to overcome the Manufacturer's testimony the vibration was "normal" for a pickup.

Kuba v. Toyota Motor Sales, USA, Inc., 2005-0034/TPA (Fla. NMVAB February 24, 2005).
The Consumer complained of an intermittent squeak in the left front suspension which could be heard when the vehicle was traveling at speeds less than 20 miles per hour; road noise obscured the squeak at higher speeds. The Manufacturer's representative did not dispute the existence of the noise, but believed it was "repairable." A majority of the Board concluded the defect substantially impaired the value of the vehicle, reasoning that the Manufacturer's or its authorized service agent's inability to diagnose and repair the noise after nine attempts would cause a subsequent purchaser to pay less than full value for the vehicle. 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.

Early v. General Motors Corporation, Chevrolet Motor Division, 2004-0950/FTL (Fla. NMVAB January 26, 2005).
The Consumer complained the automatic window on the driver's side squeaked whenever it went up or down. The Consumer testified that on three occasions the Manufacturer's authorized service agent greased the window channels and each time the window stopped squeaking, but a month later the squeak returned. The Consumer said he was a smoker and drove with the windows down 25 percent of the time. The Manufacturer's witness argued there were no contaminants on any of the passenger side windows, but there was a film on the driver's side window. The witness explained the film on the driver's side window was caused by nicotine attaching to that window, and that contaminants were found on the window and in the window channel. The Manufacturer contended the problem with the window squeaking was due to poor maintenance. The Board inspected the window during the hearing. The windows on the vehicle were dirty, inside and outside, and a gray residue was observed inside the door panel. Further, when the windows were operated no objectionable noise was heard. The case was dismissed.

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

Ray v. DaimlerChrysler Motor Corporation, 2005-0028/ORL (Fla. NMVAB February 22, 2005).
The Consumer complained of transmission failure because the transmission would not shift out of first gear. Two fault codes were identified so the transmission solenoid pack was replaced. Following the repair, a 92-mile test drive was conducted; the transmission operated properly. The Consumer continued to report problems with the transmission not shifting out of first gear and downshifting harshly. On one occasion when the vehicle was towed to the Manufacturer's authorized service agent, "event data" was retrieved showing the transmission had been placed in reverse, the brake depressed, and 85 percent throttle had been applied. The transmission fluid had reached a temperature of 340 degrees, and the engine coolant had reached 248 degrees, both of which were extremely excessive temperatures. At the hearing, the Manufacturer's witness testified the authorized service agents' inability to duplicate or diagnose a problem after the replacement of the transmission solenoid, coupled with the "event data" retrieved from the vehicle's computer, indicated the vehicle was subjected to "power braking," causing the transmission to overheat. The Manufacturer's representative conceded the first two repairs were legitimate problems with the transmission, but argued the transmission problems experienced thereafter were the result of abuse by persons other than the Manufacturer or its authorized service agent. The Board found the Manufacturer established by the greater weight of the evidence that the transmission problems complained of by the Consumer were the result of abuse by persons other than the Manufacturer or its authorized service agent and the claim was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Henry v. General Motors Corporation, Chevrolet Motor Division, 2005-0083/FTM (Fla. NMVAB March 10, 2005).
Included in the Consumer's down payment was $750.00 in the form of a "goodwill certificate" received from the Manufacturer in settlement of a class action lawsuit on a vehicle previously owned by the Consumer. A majority of the Board concluded the Consumer was entitled to a refund of $750.00 for the goodwill certificate. The goodwill certificate was not a purchase price reduction in the form of a rebate available to any purchaser; rather, it was personal to the Consumer to apply as a down payment toward the purchase of any General Motors vehicle of his choosing. He lost the value of the certificate because the vehicle he chose turned out to be a "lemon."

Pronto Auto Sales Corporation/Welcome Realty Corporation v. Mercedes-Benz USA, Inc., 2005-0061/MIA (Fla. NMVAB March 8, 2005).
Although the Consumer paid cash to purchase the vehicle, he did so by obtaining a home equity loan on which he made payments. The Consumer sought reimbursement of $5,124.92, which represented the interest paid on that loan. The Manufacturer objected. The Board granted the Consumer's request for reimbursement of the interest paid on the home equity loan that was attributable to the purchase of the vehicle.

Collateral Charges §681.102(3), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer, a U.S. military service member on active duty who was stationed in North Carolina at the time of the hearing, was awarded a refund that included reimbursement for collateral charges of $622.18 for North Carolina vehicle sales taxes and licensing fees**.** After taking delivery of the vehicle in Florida, his state of residence, the Consumer was transferred by the military to North Carolina.

Incidental Charges §681.102(8), F.S.

Birch v. Ford Motor Company, 2005-0086/JAX (Fla. NMVAB March 18, 2005).
The Consumer was awarded incidental charges of $9.25 for postage, and $103.41 for rental car insurance incurred while the vehicle was out of service for repair. The Board rejected the Manufacturer's contentions that postage was "only" $4.42, and that the Board "universally" denies reimbursement for rental car insurance. Hotel expenses of $96.14 and $51.36 for fuel which were incurred for travel to the hearing from Fayetteville, North Carolina were also reimbursed over the Manufacturer's objections.

De La Rosa v. Ford Motor Company, 2004-1028/TPA (Fla. NMVAB February 17, 2005).
The Board awarded $143.88 paid by the Consumer for unreimbursed damage waiver and personal accident insurance on rental cars while the vehicle was undergoing repair. The Board rejected the Manufacturer's argument that rental vehicle insurance is not reasonable because it is "optional."

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005)**.**
The Consumers sought and were awarded reimbursement for the following disputed incidental charges: $2.88 for copies and $2.06 for faxes to send documents to BBB/AUTOLINE, the Manufacturer's sponsored informal dispute settlement mechanism to which the Consumers were required to resort prior to arbitration by the Board. The Manufacturer's argument that the Consumers could have filed the documents via the internet was rejected.

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

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005).
The Consumers were not satisfied with the $8,143.75 trade-in allowance reflected in the purchase contract. The Manufacturer provided a copy of the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in, which indicated a retail price for the Consumer's trade-in of $22,775.00. A lien in the amount of $7,106.25 existed against the trade-in, resulting in a net trade-in allowance of $15,668.75. The Manufacturer argued the phrase "inclusive of any allowance for a trade-in vehicle" in the definition of "purchase price" found in Section 681.102(19), Florida Statutes (2003), means the purchase price for calculating the reasonable offset for use should be recalculated by the Board to include the "windfall" given to the Consumers when they "required" the Board to use the NADA retail price for the net trade-in

allowance. The Board reasoned the plain language of the definition of "purchase price," including the reference to the definition of "cash price" found in Section 520.31(2), Florida Statutes (2003), did not contemplate adjusting the purchase price utilized to calculate the reasonable offset for use because a party found the net trade-in allowance, as reflected in the purchase contract, to be an unacceptable means of determining the dollar amount to be refunded for the trade-in vehicle. The Board thus held the purchase price established by a seller and agreed to by a consumer at the time of sale to be the "purchase price" contemplated in Section 681.102(19), Florida Statutes (2003). In addition, the Consumers paid off the purchase price of the vehicle by taking out a home equity loan on which they had been making payments. The Consumers sought reimbursement of the interest paid on that loan. The Board denied that request.

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

Collier v. American Honda Motor Company, 2004-1000/ORL (Fla. NMVAB March 2, 2005). The Board rejected the Manufacturer's argument that, because consumers are "required" to provide manufacturers with a reasonable number of attempts to correct nonconformities, miles driven to and from the authorized service agent for repair constituted "miles attributable to a consumer" under the definition of the "reasonable offset for use" in Section 681.102(20), F.S. In reaching the amount of the offset, miles attributable to repair were not considered to be miles attributable to the consumer.

Heilman v. DaimlerChrysler Motors Corporation, 2004-0909/FTM (Fla. NMVAB March 17, 2005).
The Manufacturer did not dispute the merits of the Consumer's claim; rather, the parties were unable to agree to the mileage attributable to the Consumer as of the date of the hearing. The Consumer sought reduction of miles for the six trips she said she made to the Manufacturer's authorized service agent for repairs, and estimated it was 40 miles each way. The Manufacturer's representative testified he generated a "Mapquest" inquiry utilizing the Consumer's home address and the address to the service agent, which showed a distance of 7.64 miles one way, and a total of five trips. The Consumer also asked the Board to include the miles driven to Sears for an alignment, which she estimated to be 50 miles one way. The Board accepted the "Mapquest" results as more credible, and calculated the total miles attributable to repair trips to the authorized service agent to be 80 miles. The Board declined to further reduce offset by miles for the trip to and from Sears.

PROCEDURAL ISSUES

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

Martinson v. Toyota Motor Sales, USA, 2005-0170/WPB (Fla. NMVAB March 30, 2005). When the Consumers objected to the admission of the Manufacturer's prehearing vehicle inspection report due to various issues involving the method by which the inspection was conducted, the Manufacturer voluntarily withdrew the report from consideration.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2005 - June 2005 (2nd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Barcenas v. Ford Motor Company, 2005-0202/MIA (Fla. NMVAB April 26, 2005).

The Manufacturer contended this case should be dismissed because the gross vehicle weight of the truck exceeded 10,000 pounds. In support, the Manufacturer presented the Certificate of Registration for the vehicle, which declared the gross vehicle weight as 11,500 pounds. The Consumer presented documentation that, when empty, the "gross weight" of the vehicle was 7,100 pounds. The Consumer had the vehicle weighed with himself and the typical load he carried in the vehicle, and the gross weight then was 7,380 pounds. The Board found more persuasive the gross vehicle weight declared on the Certificate of Registration, and dismissed the case.

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

Shaw v. Ford Motor Company, 2005-0208/FTL (Fla. NMVAB April 14, 2005)

The Consumer complained of a strong mildew odor, that was most noticeable with the air conditioning unit in use. The Consumer also testified that the mildew odor irritated her eyes and caused her children to complain about the harsh odor when the air conditioning was running. The Manufacturer argued that the problem complained of was not a nonconformity because the smell of mildew was undetectable at the final repair attempt. The Board concluded that the mildew odor problem complained of by the Consumer substantially impaired the use and value of the vehicle, and granted a refund to the Consumer.

Alvarez v. Ford Motor Company, 2005-0194/MIA (Fla. NMVAB April 19, 2005).

The Consumer presented his vehicle to the Manufacturer's authorized service agent for repair of a "rattling" or "clunking" noise coming from the rear of the vehicle on three occasions. At the first repair a "part" was special ordered; at the second repair the clutch pack was replaced, and at the third repair the vehicle was road tested and the noise was heard, but when the suspension was inspected it was determined there was no problem and no repairs were made. Nor were any repairs made at the final repair attempt. During the hearing, the vehicle was taken for a 15-mile

test drive. A clunking or clanging noise was heard several times during the test drive. The Board concluded the rattling or clunking noise was a condition that impaired the use, value and safety of the vehicle, and awarded a refund.

Clark v. Ford Motor Company, 2005-0310/JAX (Fla. NMVAB May 19, 2005).

The Consumer complained of a vibration or shimmy that was felt through the frame of his truck when it was driven at highway speeds between 45-60 miles per hour. The Consumer bought the truck with a trailer hitch installed for the purpose of towing his small tractor. He noticed the vibration the first time he drove the vehicle after taking delivery, and the vibration/shimmy was even more intense when the truck pulled the small trailer loaded with the small tractor. Because of the vibration/shimmy, the Consumer only used the truck to tow the trailer and tractor three times since purchasing the vehicle. The repairs made by the Manufacturer's authorized service agent included: balancing all four tires; replacement of the rear axle assembly; and replacement of the truck cab mounts and drive shaft. The Consumer noticed no change in the vibration, and sent the Manufacturer written notification to give the Manufacturer a final opportunity to correct the vibration/shimmy defect. During the three-day final repair attempt, the vehicle was test driven, but no work was performed because the Manufacturer believed the vibration was not "abnormal." The Board test drove the vehicle during the hearing, and a very distinct vibration or shake was felt when the truck was driven at speeds between 53-55 miles per hour. The Board found that although the Manufacturer made serious attempts to correct the defect by replacing major vehicle components, the condition was not changed, and it constituted a nonconformity. The Board awarded a refund to the Consumer.

Weis v. Ford Motor Company, 2005-0175/PEN (Fla. NMVAB May 3, 2005).

The Consumers complained that when the brake pedal was depressed to bring the vehicle to a stop, intermittently, the engine unexpectedly revved up to 3,000 rpms and the vehicle accelerated forward. According to Mr. Weis, this happened approximately 17 times between November 5, 2004, and February 22, 2005, with it last occurring on April 22, 2005. Mrs. Weis testified that one time when she was riding as a passenger in the truck, she had to grab the hand rail above the seat because of the acceleration forward. She initially thought the truck had been hit from behind by another vehicle. As a result, she refused to drive the truck. Each time the vehicle was brought in for repair, the Manufacturer's authorized service agent was not able to duplicate the intermittent problem. The Manufacturer's witness testified Ford engineering advised his dealership nothing could be done to address the Consumers' complaint without "conclusive evidence" of a problem with the transmission or engine. The Board found the Consumers' testimony was credible, and concluded the above-described problem constituted a nonconformity within the meaning of the statute. The Consumers were awarded a refund.

Mashraghi v.Ttoyota Motor Sales, U.S.A., 2005-0350/WPB (Fla. NMVAB June 23, 2005).

The Consumer complained that the transmission intermittently hesitated or delayed on shifting and on acceleration. Wen the vehicle was driven at low speeds and the gas pedal was depressed,

the vehicle hesitated and then "jumped" or "jerked" forward, according to the Consumer. When he accelerated while driving at higher speeds, he could hear the engine revving and could feel a stronger "kick" or "jerk" when the vehicle finally shifts into gear. The Consumer's wife testified when the vehicle finally did accelerate, it did so with such force it made her head jerk. At the final repair attempt, the push rod on the master cylinder was adjusted, and the power steering return hose was replaced; however, this did not correct the defect. At the hearing, the Manufacturer's witness testified the Engine Control Module was updated pursuant to a technical service bulletin, to "enhance" shifting, that is, make shifting "softer." The Manufacturer's witness acknowledged the condition existed, but said the brief delay was a "characteristic" of the shifting in this vehicle, and it was not "abnormal." The Board performed a 12-mile test drive, during which a slight hesitation then jerk upon acceleration was experienced. The jerk was harsher when the vehicle was shifting into fourth gear. The Board concluded the intermittent hesitation/delay upon acceleration was a defect or condition that impaired the use, value and safety of the vehicle, and awarded a refund to the Consumer.

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

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

Jackson v. Mazda Motor of America, Inc., 2005-0361/JAX (Fla. NMVAB May 20, 2005).

The Consumers complained the vehicle had a severe pull to the right. After four repair attempts, the Consumers sent written notification to the Manufacturer to give the Manufacturer a final opportunity to correct the pull to the right. At the final repair attempt, the Manufacturer's representative test drove the vehicle and authorized replacement of all four tires, after which the vehicle was aligned. Although the severe pull to the right did not continue to exist after the final repair attempt, the Consumers believed the severe pull to the right would return and so filed a request for arbitration. At the hearing, the Manufacturer argued the pulling problem was corrected at the final repair attempt, and any "drift" to the right currently being experienced was the vehicle following the crown of the road. The Board test drove the vehicle during the hearing; the vehicle was easy to control and drifted with the road crown. The case was dismissed.

Ashourian v. BMW of North America, LLC, 2005-0370/JAX (Fla. NMVAB June 10, 2005).

The Consumer complained the "Service Engine Soon" (SES) warning light illuminated intermittently. After three repair attempts, the Manufacturer was accorded a final repair. The Consumer testified the SES light had not illuminated since the final repair. The Board concluded the illumination of the SES light was a substantial defect, but that it was corrected at the final repair attempt. The Consumer also complained that, intermittently, after driving the vehicle on the highway, when it was stopped at a traffic light, the engine rpm's dropped and the car would "shake" and feel like the engine was going to shut off. He was told to use a different brand of gasoline, and he did, but he still was experiencing the problem. This problem was presented for repair once before the final repair attempt, when it could not be duplicated, and at the final

repair, when it was duplicated and the recommendation to change fuel brands was made. A majority of the Board concluded that the Manufacturer had not yet been accorded a reasonable number of attempts to diagnose and repair the complaint as of the time of the hearing. The case was dismissed.

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

Branson v. Volkswagen of America, Inc., 2005-0234/STP (Fla. NMVAB April 27, 2005). The Consumer complained there were several occasions when the transmission would not shift out of park gear or would be hard to shift. The Consumer also complained of an electrical condition which was evidenced by headlights failing, the gas gauge fluctuating when the engine was idling, the airbag warning light coming on, the "check engine" warning light coming on, and frequent failures of the instrument cluster that resulted in engine failure. The vehicle was presented to the Manufacturer's authorized service agent for repair of the transmission on February 3, 2003, October 19, 2004, and April 26, 2005. The vehicle was presented for repair of the electrical condition on December 10, 2003, July 12, 2004, September 15, 2004, January 10, 2005, January 12, 2005, February 4, 2005, February 9, 2005, February 17, 2005, and April 21, 2005. As of the date of the hearing, the vehicle was again at a Volkswagen service facility after having been towed in because the transmission would not shift out of park gear. On October 1, 2004, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer failed to respond to this notification. The Consumer sent a second notification to the Manufacturer that was received in January 2005. The Manufacturer responded to the second notification by letter, stating it would "repair any current demonstrable defect from manufacture under the terms of an applicable warranty, but that the vehicle was "ineligible for Florida Lemon Law guidelines." There was no final repair attempt by the Manufacturer. At the hearing, the Manufacturer argued all the Consumer's "concerns" were repaired after at least two attempts. The Board found that the Manufacturer twice chose to decline the opportunity for a final repair attempt, and that the Manufacturer failed to correct the nonconformities after a reasonable number of attempts. The Consumer was awarded a refund.

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

Toledo v. Mercedes-Benz, 2005-0148/MIA (Fla. NMVAB April 12, 2005).

The vehicle was out of service by reason of repair of the engine vibrating and hesitating at idle for 30 days prior to the Manufacturer's opportunity to inspect or repair, and out of service for an additional seven days during the Manufacturer's post-notice repair opportunity. At the hearing, the Manufacturer's witness testified the problem was fixed during the post-notice repair, when carbon deposits were detected on the spark plugs, and top engine cleaner was applied, and the spark plugs were replaced. The vehicle was taken for a test drive, but carbon deposits appeared again, so engine cleaner was reapplied and the spark plugs were replaced for a second time. The Board concluded the engine vibration and hesitation at idle was a defect that substantially

impaired the use, value and safety of the vehicle, and constituted a nonconformity that required the vehicle to be out of service by reason of repair for more than 30 cumulative days. The Board further concluded that, whether the nonconformity was corrected was not relevant to the application of the days-out-of-service presumption, since it is the time out of service for repair, and not the inability to cure, that controls.

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

Manfre v. DaimlerChrysler Motors Corporation, 2005-0296/ORL (Fla. NMVAB May 19, 2005).

The law firm of Krohn & Moss, as counsel for the Consumer, sent a letter dated February 17, 2005, addressed to 'DaimlerChrysler Corporation, ATTN: Legal Department...." The Manufacturer's representative stipulated the letter was received by the Manufacturer's legal department, which treated it as a threat to institute a lawsuit. The Manufacturer did not direct the Consumer to a repair facility for a final repair attempt. The Consumer, through counsel, filed a Request for Arbitration. At the hearing, the Manufacturer argued it was not afforded an opportunity to cure the alleged defect because the February 17, 2005, letter did not constitute written notice pursuant to Section 681.104(1), in that the letter was not mailed to the address provided in the vehicle's warranty manual, and the intent of the letter was to advise the Manufacturer's legal department about a claim of revocation, the requirement that attorney's fees be paid, and that a lawsuit would be filed if the matter was not resolved within 14 days. A majority of the Board concluded the letter dated February 17, 2005, from Consumer's counsel to the legal department of the Manufacturer did not put the Manufacturer on notice of a final repair opportunity as required by the language in the statute. The case was dismissed.

Dwellely v. General Motors Corporation, 2005-0258/TPA (Fla. NMVAB May 9, 2005).

In September 2004, the Consumer wrote a letter to the Manufacturer complaining about the failure of various gauges and warning lights on the vehicle's dashboard. Subsequently, on January 21, 2005, the Manufacturer received from the Consumer a copy of the September 2004 letter, along with a copy of the Request for Arbitration the Consumer was filing with the Division of Consumer Services. The Manufacturer argued that the September 2004 letter, which did not mention the "Lemon "Law" or a "final repair attempt," did not put the Manufacturer on notice that the Consumer was attempting to assert his Lemon Law rights. A majority of the Board agreed and found the Consumer failed to provide the required written notification to the Manufacturer. The case was dismissed.

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

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

Wealcatch v. Mercedes-Benz, USA, Inc., 2005-0233/FTL (Fla. NMVAB April 27, 2005)

The Consumer complains that the vehicle pulled to the right when driven at speeds of 15 to 20 miles per hour and above, and that the position of the steering wheel was "off-kilter." The Consumer testified that he was constantly compensating for the pulling problem while driving, which presented a possible safety hazard; hoever, he acknowledged that he was able to control the vehicle. The Manufacturer contended that technicians were never able to verify the pulling complaint over the course of repair attempts and that, during a series of test drives, the vehicle followed the normal crown of the road. The Manufacturer also contended that the vehicle's tires did not display any uneven wear, which the Manufacturer asserted could be an indication of a steering or an alignment problem. The Board test drove the vehicle and found that the steering wheel was sensitive but did not display any variation. The Board concluded that there was no nonconformity, consequently, the case was dismissed.

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

Arends v. Mazda Motor of America, Inc., 2005-0314/MIA (Fla. NMVAB June 7, 2005).

The Consumers asserted the vehicle had transmission problems. Mr. Arends testified that sometimes when he shifted into third gear the transmission "locked up," and at other times the vehicle started "bugging." There were approximately 7,500 miles on the vehicle when it was brought in for the first repair of severe gear damage. The transmission shift fork, fifth gear, hub, and idler gear were replaced, the shift rods were repaired, and metal debris was removed from the transmission. It was also noted at that time that the tires were bald. Although abuse was suspected, the vehicle was repaired under warranty. At the second repair, the fourth gear was destroyed and a complete overhaul was performed on the transmission. The vehicle was again repaired under warranty, but Mr. Arends was asked to, and signed a waiver, acknowledging if the vehicle was again damaged due to abusive driving it would not be repaired under warranty. The vehicle was brought in for a third time because the differential unit had snapped in half, destroying all the gear parts. The repair order noted the transmission failure was due to abusive driving; the Consumers paid for the repairs. At the time of the hearing, the vehicle had been at the Manufacturer's authorized service agent awaiting repairs for approximately eight months. The Consumers claimed the vehicle was defective. The Manufacturer maintained the alleged defect was the result of abuse by persons other than the Manufacturer or its authorized service agent. The Manufacturer's witness testified he worked on the vehicle each time it was brought in for repairs, and such damage was indicative of someone speed-driving the vehicle; that is, revving high and shifting fast without using the clutch, causing the gear teeth to snap. The last time the vehicle was brought in for repair, six teeth on the transmission gears were completely stripped. The Board concluded the transmission failure was the result of abusive driving by persons other than the Manufacturer or its authorized service agent, and dismissed the claim.

Central Parking System v. Ford Motor Company, 2005-0424/FTM (Fla. NMVAB June 28, 2005).

The person responsible for maintenance of the Consumer's vehicle drew on his personal knowledge of general automotive maintenance and determined the vehicle's oil should be

changed every 5,000 to 7,000 miles. The first oil change was performed at 5,975 miles; the second oil change was performed at 10,892 miles, and the third oil change was performed at 16,306 miles. The oil changes were performed at an independent repair facility, and no unusual observations were recorded on the oil change receipts. The Consumer complained of engine sludge. The Manufacturer argued the vehicle was not properly maintained. The vehicle was used in conjunction with the Consumer's business of managing 158 parking meters. The Manufacturer's witness testified the manner in which the vehicle was operated, frequent short trips on local streets, was severe; thus, according to the "Special Operating Conditions" section in the owner's manual, the vehicle's oil should have been changed every 3,000 miles or three months. The Board found the engine sludge problem was the result of abuse or neglect by persons other than the Manufacturer or its authorized service agent, in the form of lack of proper maintenance, and dismissed the claim.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Burkhart v. Ford Motor Company, 2005-0399/FTM (Fla. NMVAB June 28, 2005).

The Consumer's vehicle completely failed on more than one occasion, causing the vehicle to be inoperable and blow oil out the rear of the vehicle, resulting in a pungent odor being present in the interior of the vehicle. The Manufacturer did not object to the Consumer being reimbursed for the following incidental charges which were a result of the nonconformity: $235.00 for towing ; $250.00 for pressure cleaning the Consumer's driveway on two occasions when oil leaked from the vehicle; $56.97 for dry cleaning to remove the odor of oil from the Consumer's clothing; and $44.42 for postage to mail written notice to the Manufacturer. However, the Manufacturer did object to the reimbursement of incidental charges of: $35.23 for certified mail expense for mailing various documents required for the hearing; $32.00 for a meal; and the Consumer's request for compensation for the depletion of frequent flyer miles. The Consumer mailed documents associated with the proceeding by certified mail, return receipt requested, because she considered it to be sound business practice to ensure all documents were received. The Manufacturer objected on the grounds the statute requires that only the written notification to the Manufacturer be mailed by certified mail. With regard to the $32.00 for the meal, the Consumer's vehicle broke down on the way home from vacation, causing the Consumer and her husband to arrive home too late to attend a previously planned dinner engagement, and they purchased a meal at a restaurant. The Manufacturer argued that expense was not reasonable. As for the frequent flyer miles, the Consumer and her husband were on vacation and on their way to Denver, Colorado, when their vehicle broke down in Virginia. The loaner vehicle provided by the Manufacturer could not be driven out of Virginia. The cost to the Consumer and her husband to book the flights on short notice would have been $2,316.60, so they used frequent flyer miles to fly to and from Denver. The Consumer sought some kind of "fair compensation" for the depletion of the frequent flyer miles. The Manufacturer objected on the grounds the value of the miles was speculative. The Board awarded reimbursement for the meal and the additional

certified postage, but denied the request for compensation for depletion of the frequent flyer miles, because the Consumer incurred no out-of-pocket expense for the airline tickets.

Ranck v. General Motors Corporation, 2005-0355/ORL (Fla. NMVAB June 7, 2005).

The Consumer complained the steering wheel vibrated or shimmied whenever the vehicle was driven at speeds above 65 miles per hour. After receiving no satisfaction from the Manufacturer and an adverse decision from the Manufacturer's certified program, the Consumer engaged the services of an expert, an ASE Certified Master technician, to evaluate the vehicle and testify at the Lemon Law arbitration hearing. The Board found for the Consumer, and the Consumer sought reimbursement of the $1,500.00 fee paid to the expert witness. The Manufacturer objected, arguing the expense was not "directly caused" by the nonconformity, and that the expert's fee was "no different" than attorney fees which are not reimbursable in arbitration under Chapter 681. A majority of the Board concluded the expert's fee was directly caused by the nonconformity, but that the $1,500.00 fee amount was not reasonable. The Board determined a reasonable charge for three hours spent preparing for the hearing was $300.00, and a reasonable charge for three hours attending and testifying at the hearing was $450.00, for a total reimbursement of $750.00 for the expert witness fee. In addition, the Board reimbursed the Consumer $77.61 in UPS expense for mailing various documents to the Manufacturer and to the Board.

Yadav v. Ford Motor Company, 2005-0354/ORL (Fla. NMVAB June 30, 2005).

During times the vehicle was at the Manufacturer's authorized service agent for repairs, the Consumers were provided a rental vehicle. However, they were charged a total of $164.86 by the rental agency for insurance for the various rental vehicles. The Board rejected the Manufacturer's argument that, because insurance on a rental vehicle is optional, it is unreasonable, and the Consumers were reimbursed the $164.86 paid for insurance on the rental vehicles as incidental charges.

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

Silsbe v. DaimlerChrysler Motors Corporation, 2005-0406/FTM (Fla. NMVAB June 28, 2005).

The Consumers were not satisfied with the net trade-in allowance of $1,800.00 they were given for their 1995 Oldsmobile Ninety-Eight. Because of the age of the trade-in vehicle, it was not listed in the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in. The Consumers provided a copy of the NADA Official Older Used Car Guide for January through April 2005, which reflected a retail value of $4,375.00 ($4,175.00 plus $200.00 for low mileage). The Manufacturer objected to the use of the Older Used Car Guide, arguing Section 681.102(19), Florida Statutes, authorizes the use of the Southeastern Edition of the NADA Official Used Car Guide only, and thus the trade-in value in the purchase contract was controlling. The Board determined it appeared the Legislature did not contemplate the situation where, due to the age of the trade-in vehicle, it was not reflected in the Southeastern edition of

the NADA Official Used Car Guide. A majority of the Board concluded the Legislature intended to exclude other brands of published used car guides in favor of NADA publications, and that the use of the NADA Official Older Used Car Guide to determine the retail value of the trade-in vehicle carried out the legislative intent. The Consumer was awarded a refund, including a net trade-in allowance as reflected in the Older Used Car Guide.

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

Silsbe v. DaimlerChrysler Motors Corporation, 2005-0406/FTM (Fla. NMVAB June 28, 2005).

The Consumers testified they drove about 70 miles round trip on four occasions for repairs, although they had never recorded the actual miles driven. The Manufacturer objected, arguing the Board lacked sufficient evidence of the actual miles driven in order to reduce the consumer miles by the miles driven for repairs. The Board concluded the miles driven by the Consumers to the Manufacturer's authorized service agent are miles attributable to the nonconformity and are not miles attributable to the Consumers, and while the Consumers' testimony to establish the approximate miles driven to and from the authorized service agent was objected to, it was not refuted. Consequently, the Board concluded the miles attributable to the Consumers did not include the 280 round trip miles caused by the nonconformity.

Earthwork Consultants, Inc. v. Ford Motor Company, 2005-0087/FTM (Fla. NMVAB April 7, 2005).

Immediately upon purchasing the vehicle, the Consumer noticed the vehicle had a bounce or vibration in the rear. The Consumer telephoned the Manufacturer's authorized service agent, who instructed him to drive the vehicle for 500 miles before scheduling the first repair attempt. He followed the instructions and first presented the vehicle for repair of the vibration or bounce problem when the odometer had a reading of 498 miles. The Board found the defect to be a nonconformity and awarded a refund. Over objection by the Manufacturer, the Board ruled the 498 miles were not attributable to the Consumer for the purpose of calculating the statutory reasonable offset for use.

Clark v. Ford Motor Company, 2005-0310/JAX (Fla. NMVAB May 19, 2005).

The Consumer was awarded a refund. In calculating the reasonable offset for use, the Board ruled the miles attributable to the Consumer did not include delivery miles, miles attributable to repairs, or the miles driven to the hearing.

MISCELLANEOUS PROCEDURAL ISSUES:

Request for Technical Correction of Decision, Paragraph (66), *Hearings Before the Florida New Motor Vehicle Arbitration Board*

Mangione v. Isuzu Motors America, Inc., 2005-0130/MIA (Fla. NMVAB May 3, 2005).

After the Manufacturer received the Board's decision finding the Consumer was entitled to repurchase relief, the Manufacturer requested a technical correction, arguing the $3,500.00 down payment awarded to the Consumer was not, in fact, paid by the Consumer, but was a rebate the Manufacturer gave to the dealer, and which the dealer assigned to the Consumer. The Manufacturer asked that the $3,500.00 be removed from the refund awarded to the Consumer. The Consumer objected. The Board considered the following: the purchase order/bill of sale for the vehicle that was in the file and utilized during the hearing, indicated the Consumer made a down payment of $3,500.00. There was no reference to a rebate in the record. The Manufacturer's representative at the hearing did not contest or question the fact that the Consumer had made the down payment, or otherwise testify that the transaction involved any rebate. The request for technical correction of the decision was denied.

Failure to appear at a hearing, Paragraphs (32)-(35), ***Hearings Before the Florida New Motor Vehicle Arbitration Board***

Curry v. Ford Motor Company, 2005-0118/FTL (Fa. NMVAB May 4, 2005)

The Consumer did not appear at the hearing. The Notice of Hearing was mailed to the last known address of the Consumer. The Consumer did not notify the Board Administrator of a subsequent change of address or inability to attend the hearing on the scheduled date. After waiting 30 minutes from the scheduled time of the hearing, the case was dismissed, with prejudice in accordance with Paragraph (33), *Hearings Before the Florida New Motor Vehicle Arbitration Board*.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2005 - September 2005 (3rd Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Worth-Doney v. Mercedes-Benz, 2005-0442/TPA (Fla. NMVAB July 11, 2005)

The Manufacturer contended this case should be dismissed, because the vehicle was purchased as a used vehicle and as such was not a "motor vehicle" as defined by Section 681.102(15). The Retail Purchase Agreement, the Bill of Sale and the Certificate of Title/ Registration Application for the subject vehicle all stated that the vehicle was "used." Further, the Certificate of Title for the vehicle indicated that, prior to its purchase by the Consumer, the vehicle was leased as a new vehicle to a different purchaser with 23 miles on the odometer. The vehicle was returned by the initial lessee to Mercedes-Benz of Tampa with 1,473 miles on its odometer. The Consumer testified that she considered the vehicle to be new, because it was purchased at a new car dealership. The Board found that the vehicle was purchased by the consumer as a used vehicle. Accordingly, the vehicle was not a "motor vehicle," and the claim was dismissed.

Schlemovitz v. Ford Motor Company, 2005-0483/FTL (Fla. NMVAB August 30, 2005)

The Consumer purchased a new 2005 Ford F-350 pickup truck**.** The Manufacturer asserted that the subject vehicle was not a "motor vehicle" as defined by Section 681.102(15), Florida Statutes (2005), because it was a truck that weighed more than 10,000 pounds gross vehicle weight. The gross vehicle weight given on the State of Florida Registration Certificate was 13,000 pounds. This was the only evidence of gross vehicle weight that was presented to the Board. Accordingly, the Board concluded that the vehicle was not a "motor vehicle" as defined by Section 681.102(15), Florida Statutes (2005), and the Consumer was not qualified for repurchase relief under the Lemon Law.

WARRANTY §681.102(23), F.S.

Deehl v. DaimlerChrysler Motors Corporation, 2005-0475/TPA (Fla. NMVAB August 3, 2005)

The Consumer purchased a new 2005 GEM E4 neighborhood electric vehicle. The Consumer was provided with Global Electric Motorcars, LLC's written express, limited warranty. The

Consumer complained that the vehicle would not achieve 25 miles per hour at all times and did not travel 30 miles on each charge as he was verbally promised by the dealer sales person at the time of purchase. The vehicle's maximum speed was 23 or 24 miles per hour. On one occasion the vehicle only traveled 17.8 miles on a charge. The Board found that the verbal promise made by the dealer sales person at the time of purchase did not constitute a warranty as defined in the statute**.** Additionally, the Board concluded that no nonconformity existed, and the claim was dismissed.

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

Schuppe v. Mazda Motor of America Inc., 2005-0480/ORL (Fla. NMVAB July 18, 2005)

The Consumer complained that the climate control system did not operate as it was supposed to. When operating in the "feet alone" mode, a large volume of air flowed to the windshield, and when the "face and feet" mode was engaged, with the defrost mode off, defrost air "seeped" out through the air vents on the dashboard, causing condensation to form on the outside of the windshield, obstructing the driver's view. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The climate control system was inspected on both the inside and the outside of the vehicle by the Board during the hearing. The air conditioner was operated in varying configurations and fan speeds. When operated on "face and feet" mode with the defroster off, a large area of condensation formed on the windshield that was about the size of a medium pizza and obstructed the view of the driver. The Board found the faulty operation of the climate control system to be a condition that substantially impaired the use, value and safety of the vehicle, and the Consumer was awarded a refund.

Chickering v. DaimlerChrysler Motors Corporation, 2005-0460/FTL (Fla. NMVAB July 20, 2005)

The Consumer complained that when he took delivery of the vehicle there was a dent in the rear passenger door. The Manufacturer's authorized service agent was asked to remove the dent but not paint the door. However, the door was painted, leaving "pits," "scratches" and "swirls" in the newly painted surface. The service agent tried to repair the damage to the paint on two more occasions, but the paint continued to show scratches and streaks, and the door was a different shade of the paint color. The Manufacturer argued that "spider webs" in the paint were visible, and agreed there was a "slight" discoloration of the paint on the passenger door; however, there was no damage to the paint, there was nothing abnormal about the paint job that could be considered a nonconformity. During the hearing, the Board observed the spider webbing in the paint, and also observed that the paint on the rear passenger door was a noticeably different shade of paint color from the rest of the vehicle. The Board concluded that the paint mismatch between the rear passenger door and the rest of the vehicle substantially impaired the value of the vehicle and was a nonconformity within the meaning of the statute. Accordingly, the Consumer was awarded a refund.

Duran v. Toyota Motor Sales U.S.A., 2005-0508/ORL (Fla. NMVAB July 28, 2005)

The Consumer complained that the vehicle failed to start if it was not driven for a period of three or four days. Because of the ongoing nature of the problem the Consumer checked the vehicle's lights and accessories when she parked the vehicle to make sure nothing was left on. Her husband also checked the vehicle when he jump-started it and found nothing on that would cause the battery to drain. The Manufacturer contended that the alleged defect was the result of the Consumer's neglect or misuse of the vehicle. The Manufacturer witness testified that the Manufacturer's authorized service agent was never able to find a problem with the vehicle that would cause the failure to start problem. A Manufacturer representative testified that, at the prehearing inspection, he found two interior lights in the "on" position which could cause a battery drain over a three to four day period. The Board was not persuaded by the Manufacturer's assertion that the nonconformity must be the fault of the Consumer, because the authorized service agent was unable to diagnose the problem. 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.

Riopelle v. General Motors Corporation, 2005-0511/TPA (Fla. NMVAB July 20, 2005)

The day after purchasing the vehicle, the Consumer began to experience a variety of problems. She reported the brake pedal intermittently sticking, a poorly aligned driver's door, and an intermittent popping noise on many occasions to three separate Manufacturer's authorized service agents. On some occasions the Consumer received a written repair order, but as time passed personality conflicts developed and the authorized service agents either declined to accept the vehicle for repair or would accept the vehicle and not perform repairs. On many occasions the authorized service agents did not provide written repair orders, in violation of Section 681.103(4), Florida Statutes (2005). The Consumer did not keep a record of her visits to the authorized service agents. At the hearing the Consumer provided the testimony of a witness who often assisted the Consumer in dropping off and picking up the vehicle, and the witness recalled at least 10 occasions when repair orders were not provided to document visits to the authorized service agents. The Manufacturer contended that the Consumer failed to establish a reasonable number of repair attempts. The Consumer's testimony about her repeated unsuccessful attempts to have the nonconformities repaired was corroborated by her witness and no evidence was presented by the Manufacturer to rebut the Consumer's testimony. Under the circumstances, the Board found that the Manufacturer was afforded a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. The Consumer was awarded a refund.

Lovette v. DaimlerChrysler Motors Corporation, 2005-0542/MIA (Fla. NMVAB September 9,

2005)

The Consumer brought his vehicle in once to the Manufacturer's authorized service agent for squealing, tapping and/or cracking noises in the engine before sending written notification to the Manufacturer. The vehicle was brought in a second time after receipt of the written notice, and at that time the Manufacturer duplicated the problem, acknowledged that the engine was under strain causing a chattering noise from the serpentine/tensioner belt, but maintained the noises were a "normal characteristic" of the vehicle and that nothing could be done to fix the problem. The Manufacturer contended at the hearing that the case should be dismissed, because the Manufacturer was not been afforded the required number of repair attempts. Section 681.1095(8), Florida Statutes (2005), provides that "the Board shall grant relief if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities." Here, the Manufacturer verified the presence of the problem and stated that nothing could be done to fix it. The problem was deemed a nonconformity. Under the circumstances, the Board found one repair attempt followed by written notice and a last opportunity to repair the nonconformity were sufficient to afford the Manufacturer a reasonable number of attempts. The Consumer was granted the requested relief.

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

Camacho v. Ford Motor Company, 2005-0373/MIA (Fla. NMVAB September 1, 2005)

A final repair attempt was scheduled for January 3, 2005, but the Consumer did not present her vehicle for repair on that date. The Consumer testified she was too busy at work during that time and she was not able to bring the vehicle in for the final repair. A manufacturer's representative testified she called the Consumer on January 4, 2005, and again on January 20, 2005, and the Consumer said she still did not have the time to bring the vehicle in for repair. The Consumer testified she told the Manufacturer she would call when she was able to bring the vehicle in for the final repair. The Consumer finally brought the vehicle in for repair on March 1, 2005; however, she did not notify the dealership or anyone else that she was bringing the vehicle in for the Manufacturer's final repair attempt. The Manufacturer requested that the claim be dismissed because the Manufacturer was not afforded a final repair attempt. The Board found that the Manufacturer did not have a final repair attempt, because the Consumer failed to keep the January 3, 2005, appointment and failed to notify the Manufacturer that she was presenting the vehicle for the final repair attempt on March 1, 2005. The claim was dismissed for failure to provide a final repair attempt.

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

Morganelli v. DaimlerChrysler Motor Corporation, 2005-0517/ORL (Fla. NMVAB July 26, 2005)

The Manufacturer asserted that the Consumers' claim should be dismissed for failure to provide the Manufacturer with the written notification and opportunity for a final repair attempt required by the statute. The Consumers relied upon a copy of a letter dated April 20, 2005, from the law firm of Krohn & Moss to DaimlerChrysler Corporation's legal department as proof of written notification to the Manufacturer. The Consumers did not provide documentary proof of receipt of the letter by the Manufacturer, and they had no personal knowledge of the letter's mailing and receipt, because it was mailed by their attorney and directed all responses to be made to the attorney. Included as evidence was a blank receipt for certified mail which contained a tracking number. The Manufacturer utilized that tracking number on the U.S. Postal Service website and received a response that there was "no record of this item." The Board found that the required written notification was not received by the Manufacturer; consequently, the Manufacturer was unable to avail itself of the final repair opportunity. The Consumers' claim was dismissed.

Pastore v. DaimlerChrysler Motors Corporation, 2005-0474/STP (Fla. NMVAB August 24, 2005)

On April 25, 2005, the Consumer sent written notification to the Manufacturer addressed to "Daimler-Chrysler, 26311 Lawrence Ave., Centerline, MI 48015" to provide the Manufacturer with a final opportunity to repair the vehicle. The Consumer got the address for the Manufacturer from a business card in his possession for one "J.E. Goodwin, Manager Wholesale Sales & Parts Brand Protection." The Consumer testified that he believed he met with Mr. Goodwin in October 2004 about a problem with his previous Dodge Viper and received the business card at that time. The Manufacturer did not respond to the Consumer's written notification. The Manufacturer requested the dismissal of the Consumer's claim on the grounds that the Manufacturer was not afforded written notification and a final repair attempt, because the Manufacturer did not receive the written notification. The address to which the Consumer sent the written notification was not the address for correspondence regarding warranty problems set forth in the materials provided to consumers by the Manufacturer at the time of vehicle acquisition. The Manufacturer submitted into evidence three publications provided to consumers with all DaimlerChrysler vehicles. The publication "Owner's Rights Under State Lemon Laws, Disclosure Notice for Florida," directed consumers to notify the Manufacturer of problems with vehicles at "DaimlerChrysler Motors Company LLC, Customer Center, P. O. Box 21-8004, Auburn Hills, MI 48321-8004." The Owner's Manual and Warranty booklet also directed customers in the United States to write to the Manufacturer at the Auburn Hills, Michigan, address. The Board found that the Consumer's failure to send the written notification to the correct address prevented the Manufacturer from taking advantage of its statutory final repair attempt, consequently, the Consumer's claim was dismissed.

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

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

Deehl v. DaimlerChrysler Motors Corporation, 2005-0475/TPA (Fla. NMVAB August 3, 2005)

The Consumer purchased a new 2005 GEM E4 neighborhood electric low-speed vehicle. The Consumer complained that the vehicle would not achieve 25 miles per hour at all times and would not travel 30 miles on each charge as he was verbally promised by the dealer sales person at the time of purchase. The maximum speed the vehicle would attain was 23 or 24 miles per hour. On one occasion the vehicle only traveled 17.8 miles on a charge. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified that, as the charge diminished, the maximum speed of the vehicle also would diminish and that many variables would impact the number of miles achieved per charge. The Board concluded that the Consumer's complaint was not a substantial impairment, and the claim was dismissed.

Hemphill v. Toyota Motor Sales, U.S.A., 2005-0450/TLH (Fla. NMVAB July 1, 2005)

The Consumer complained that the brake pedal traveled all the way to floor when applying the brakes. According to the Consumer, when he "mashed" down on the brake pedal or continued to apply pressure to the pedal after the vehicle came to a stop, the pedal traveled to the floor and there was a feeling of a "tapered release" of brake pressure. The brakes never failed to slow the vehicle's speed or stop. The vehicle did not roll or move after the brake pedal was depressed. The brake warning light never illuminated, nor was there any evidence of the brake fluid leaking. The Consumer's biggest concern was that he did not know where the brake fluid went as the pressure was released. The Manufacturer contended that there was no defect with the brake pedal or the braking system. The brake lines, hoses, calipers and master cylinder were all inspected. There was no evidence of any damage, leaks or air in the system. The brake pads were intact and exhibited only "normal wear and tear," according to the witnesses. The brake warning light never illuminated in the Consumer's vehicle; thus, there was never any evidence of any problem with the Consumer's brake pedal or braking system. The Board concluded that there was no nonconformity; consequently, the case was dismissed.

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

Central Parking System v. Ford Motor Company, 2005-0424/FTM (Fla. NMVAB July 6, 2005)

The Consumer complained of engine sludge. The Manufacturer argued at the hearing that the defect was the result of abuse or neglect by persons other than the Manufacturer or its authorized service agent; specifically, the vehicle was not properly maintained. The Manufacturer's witness testified that the manner in which this vehicle was operated, i.e., frequent short trips on local streets, was "severe"; hence, the vehicle's oil should have been changed every 3,000 miles or three months, according to the Owner's Manual. The first oil change was performed eight months after purchase, and subsequent oil changes were performed every seven months. The

Manufacturer's witness testified that the constant heating and cooling of the engine oil caused by short-distance travel caused the engine oil to degrade, resulting in the engine sludge problem. The witness inspected the subject engine and found its condition to be consistent with lack of maintenance. The Board found that the Manufacturer established its affirmative defense by the greater weight of the evidence and that the engine sludge problem was the result of abuse or neglect in the form of lack of proper maintenance, by persons other than the Manufacturer or its authorized service agent. The engine sludge problem was not a nonconformity within the meaning of Section 681.102(16), Florida Statutes (2005); consequently, the Consumer was not entitled to repurchase relief under the Lemon Law.

REMEDIES §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Yadav v. Ford Motor Company, 2005-0354/ORL (Fla. NMVAB July 1, 2005)

The Consumer requested $164.86 for rental vehicle insurance charges as an incidental charge. The Manufacturer objected, contending that because those charges were optional they were "unreasonable." The Manufacturer's assertion that the purchase of rental vehicle insurance was unreasonable was rejected. Accordingly, the Consumer was awarded $164.86 for rental vehicle insurance as an incidental charge.

Espinoza v. Ford Motor Company, 2005-0559/TPA (Fla. NMVAB August 25, 2005)

The Consumer requested the following incidental charges as a result of the nonconformities: $758.05 for three tires which were worn prematurely due to the vibration nonconformity; $14.73 for postage; and $106.87 for the cost of fuel to drive to and from the Manufacturer's authorized service agent for repair. The Manufacturer objected to reimbursement for the tires, arguing that the tire replacement was "normal maintenance." The Manufacturer also argued that the Consumer should not be reimbursed for the cost of fuel attributable to trips to the authorized service agent, because the Consumer had already received the "benefit" of having those miles excluded from the reasonable offset for use calculation. The Board rejected the Manufacturer's argument and awarded the Consumer the incidental charges requested.

Dillehay v. Ford Motor Company, 2005-0552/JAX (Fla. NMVAB August 15, 2005)

The Consumer requested $13.93 for postage. The Manufacturer objected to reimbursement of postage in excess of $4.42. The Board rejected the Manufacturer's argument and awarded the Consumer $13.93 for postage.

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

Silsbe v. DaimlerChrysler Motors Corporation, 2005-0406/FTM (Fla. NMVAB July 1, 2005)

The net trade-in allowance of $1,800.00 reflected in the purchase contract was not acceptable to the Consumers. The trade-in vehicle was a 1995 Oldsmobile Ninety-Eight. The trade-in vehicle was not listed in the applicable NADA Official Used Car Guide (Southeastern Edition) because of the age of the vehicle. The Consumers provided a copy of the NADA Official Older Used Car Guide for January through April 2005 which reflected a retail price of $4,375.00 ($4,175.00 plus $200.00 for low mileage) for the Consumers' trade-in vehicle. The Manufacturer objected to the use of the Older Used Car Guide, arguing that Section 681.102(19), Florida Statutes, (2005) clearly authorizes only the use of the NADA Official Used Car Guide (Southeastern Edition), and if the vehicle is not listed in the "authorized" NADA guide, the Board is controlled by the trade-in value in the purchase contract. The Manufacturer asserted that a "national" guide should not be used in a Florida Lemon Law proceeding, that the statute is unambiguous and does not need interpretation, and use of the Older Used Car Guide would place a burden on manufacturers to subscribe to and maintain used car guides not contemplated by the Legislature. The Board found that the Legislature, in providing an alternative for valuing a trade-in vehicle, did not contemplate the situation presented in this case that, due to the age of the trade-in vehicle, it was not reflected in the Southeastern Edition of the NADA Official Used Car Guide. The Board concluded that the Legislature intended to exclude other brands of published used car guides in favor of NADA brand publications, and that use of the NADA Older Official Used Car Guide to determine the retail price of the trade-in vehicle carried out the legislative intent. Accordingly, the Consumers received a $4,375.00 net trade-in allowance.

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

Espinoza v. Ford Motor Company, 2005-0559/TPA (Fla. NMVAB August 25, 2005)

The Consumer argued that 1,023 miles driven by her to and from the Manufacturer's authorized service agent for repairs and the prehearing inspection should not be miles attributable to the Consumer when determining the offset for use. The Manufacturer argued that miles driven to and from the authorized service agent should be attributable to the Consumer, because she "chose" to take the vehicle back to the selling authorized service agent rather than the one closest to her home. The Board rejected the Manufacturer's argument and did not attribute those miles to the Consumer.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2005 - December 2005 (4th Quarter)

JURISDICTION:

Consumer §681.102(4)F.S.

Veilleux v. Volkswagen/Audi of America, Inc., 2005-0669/MIA (Fla. NMVAB November 8, 2005)

The Manufacturer contended that the Consumer was not qualified for relief under the Lemon Law, because he used his vehicle for business "95 percent of the time." The Board rejected the Manufacturer's argument on the basis of Results Real Estate v. Lazy Days R.V. Center, 505 So.2d 587 (Fla. 2d DCA 1987). The evidence established that the Consumer was a "consumer" under the Lemon Law because he was entitled by the terms of the warranty to enforce its obligations. The Consumer was awarded a refund because the air conditioner odor in the vehicle was a nonconformity.

Motor Vehicle §681.102(15), F.S.

Ingraham v. Mercedes-Benz USA Inc., 2005-0703/FTL (Fla. NMVAB November 7, 2005)

The Motor Vehicle Retail Sales Agreement for the sale of the Consumer's vehicle identified the vehicle as a "used " vehicle. The Certificate of Title issued listed the name of the previous registered owner. The Consumer testified that, when he purchased the vehicle, he was told by the selling dealer that it was a demonstrator. The Manufacturer contended that, because the vehicle was purchased as a used vehicle, it was not a "motor vehicle" within the meaning of Chapter 681, Florida Statutes, and the Consumer was not qualified for repurchase relief. The Board found that the subject vehicle was sold to the Consumer as a used vehicle, and not as a new or demonstrator vehicle; therefore, it did not constitute a "motor vehicle" as defined by statute. Accordingly, the Consumer's case was dismissed.

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

Mumtaz v. Nissan Motor Corporation USA, 2005-0626/FTL (Fla. NMVAB October 5, 2005)

The Consumer testified that both front windows produced a variety of noises during operation,

including a cracking sound that was not eliminated when the authorized service technician replaced the motor and stabilizer in both windows over the course of repair attempts. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's authorized service agent replaced the right front window motor because the window would not go down properly. Grease marks on the right and left front windows were addressed in a Technical Service Bulletin that called for the replacement of the inside door stopper, which was performed on the left front window during a repair attempt. While the Manufacturer's representative asserted that the window defect had been cured, he said that additional weather stripping had been ordered at the time of the final repair attempt to reduce the window cracking noise. The Board concluded that the grease marks on the windows and the window noises were a "condition" that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumers were awarded a refund.

Murray v. Toyota Motor Sales USA, Lexus Division, 2005-0699/ORL (Fla. NMVAB October 24, 2005)

The Consumer complained of an intermittent clunking sensation when decelerating which was more pronounced on long trips and at times felt as if someone had hit the vehicle in the rear. The Consumer used the vehicle to transport business clients, and the clunking sensation was noticeable to them. The Manufacturer contended that the alleged defect was a "characteristic" of the vehicle and did not substantially impair its use, value or safety. A Manufacturer Field Technical Specialist testified that the vehicle was equipped with a two-piece drive shaft, and at times the compression and release could be felt, which was "normal" for this vehicle. The Manufacturer issued a "Technical Service Information Bulletin" entitled "Rear Driveshaft Clunk/Thump Noise" which stated: "Some 2003 and 2004 model year GX 470 vehicles may experience a clunk/thump noise from the rear of the vehicle just before a complete stop. A new propeller shaft assembly has been introduced to improve this concern." The Board concluded the Manufacturer's assertion that the problem was "normal" was not a defense to the Lemon Law claim, particularly in this case where the service bulletin clearly indicated that only "some" vehicles exhibited the problem. 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.

Baznik v. Nissan Motor Corporation, 2005-0856/ORL (Fla. NMVAB December 19, 2005)

A vibration when the brakes were applied which caused a shimmy in the vehicle's steering wheel was found to be a nonconformity. The Consumer brought the vehicle in for repair on two separate occasions. The nonconformity was the subject of a Manufacturer's technical service

bulletin; however, the Manufacturer's representative could not explain why part numbers required by the TSB were not listed on the Consumer's repair orders. The Manufacturer contended that the Consumer had not "met the requirements" of the Lemon Law, because there had not been a "sufficient number"of repair 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 (2005), 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 evidence established that the nonconformity was subjected to repair by the Manufacturer's service agent on at least two occasions. The nonconformity was known to the Manufacturer and involved a major safety component. Under the circumstances, the Board concluded that two repair attempts were sufficient to afford the Manufacturer a reasonable number of attempts to conform the subject vehicle to the warranty as contemplated by the Lemon Law. Accordingly, the Consumer was awarded a refund.

Delaney v. Ford Motor Company, 2005-0794/ORL, (Fla. NMVAB December 2, 2005)

The Consumer complained of a vibration in the vehicle's rear end during turns, poor engine performance and the engine was hard to start. The vehicle was presented to the Manufacturer's authorized service agent for repair of these defects a total of seven times (4 times for the rear-end vibration, and 3 times for the engine problems) and was out of service for repair a total of 24 cumulative days. Nevertheless, the total number of days out of service and the number of repair attempts in this case were not sufficient to support a conclusion that a reasonable number of attempts were undertaken. Consequently, the Consumer was not entitled to repurchase relief under the Lemon Law.

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

Ippolito v. DC Concepts and DaimlerChrysler Motors Corporation, 2005-0892/ORL (Fla. NMVAB December 20, 2005)

The Consumer sent written notification to DC Concepts to provide a final opportunity to repair the vehicle. DC Concepts received the notification on September 21, 2005. On that date DC Concepts' representative telephoned the Consumer to arrange the final repair attempt. The Consumer was scheduled to be out of town for approximately one month beginning Sunday, September 25, 2005. DC Concepts offered to send technicians on Saturday, September 24, 2005, to perform the final repair attempt. The Consumer declined, and DC Concepts offered to perform the final repair attempt upon the Consumer's return. On September 27, 2005, the Consumer filed his Request for Arbitration with this Board seeking a refund, and the final repair attempt did not take place. Manufacturer DC Concepts contended that the Consumer failed to afford a final repair opportunity to DC Concepts after it received the written notification. The Board found that DC Concepts was not afforded its final opportunity to correct that

nonconformity. The Consumer's claim was dismissed.

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

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

Garbarino v. Jaguar Cars, 2005-0446/FTL (Fla. NMVAB October 5, 2005)

The Consumer complained that the vehicle stalled and would not start again. The Manufacturer contended that the alleged defect was the result of abuse on the part of the Consumer. A Manufacturer's witness testified that the Consumer put diesel fuel in the vehicle's gas tank instead of the required gasoline. A different Manufacturer's representative testified that approximately one-half liter of fuel was taken from the vehicle's fuel tank and placed into an empty plastic quart size water bottle. The sample fuel was placed on a work bench from February to when it was sent for testing some time in August. The results of the fuel testing were not available at the hearing. The Board found that the Manufacturer failed to prove its defense of abuse by the greater weight of the evidence. Accordingly, the Consumer was awarded a refund.

Breslin v. General Motors Corporation - Chevrolet Division, 2005-0707/STP (Fla. NMVAB November 16, 2005)

The Consumer complained that the gear shifter assembly was "binding," preventing the key from turning in the ignition. The Consumer testified that the "shifter cable" had broken off three to four times with the key in the ignition. The Manufacturer argued that the alleged conformity was the result of abuse or neglect. The Manufacturer's witness testified that the first encounter with the Consumer ' s vehicle was on November 4, 2005, when he found four lug nuts missing from the right rear tire, and, on February 17, 2005, he found an unknown sticky substance spilled on the key release cable. Ultimately, on March 1, 2005, the vehicle was towed in with the gear shift lever completely broken from the base assembly, and the Manufacturer determined that there was no Manufacturer defect within the shift lever cable and that "some outside force had caused the shifter to break off." The Board rejected the argument of the Manufacturer and awarded the Consumer a refund.

REFUND §681.104(2)(a)(b), F.S.:

Wallace v. Ford Motor Company, 2005-0823/TPA (Fla. NMVAB December 2, 2005)

The purchase of the vehicle was financed with a loan from Ford Credit. Prior to making any payments to Ford Credit the Consumer used the vehicle as collateral for a new loan from the lienholder, Suncoast Schools Federal Credit Union, in the amount of $38,280.00. The lienholder disbursed $20,126.94 to Ford Credit and $18,153.06 to the Consumer; in other words, 52 percent of the new loan was for the purchase of the subject vehicle and the remaining 48 percent of the

new loan was disbursed to the Consumer. The Consumer made eight monthly payments to the lienholder for a total of $4,966.16. Fifty-two percent of that amount was $2,582.40. Accordingly, the Consumer was entitled to a refund of $2,582.40 for 52 percent of the monthly loan payments made as of the date of the hearing, plus 52 percent of any subsequent monthly payments the Consumer would make prior to the date of repurchase by the Manufacturer.

Incidental Charges §681.102(8), F.S.

Fletcher v. Jaguar Cars, 2005-0860/FTL (Fla. NMVAB December 2, 2005)

The Consumer incurred the following incidental charges as a result of the nonconformities: $9.62 for postage, $25.00 for a car she rented from a friend for one day when the vehicle was out of service for repair and the Consumer was not able to get to a rental car facility and she needed to be at work, and $40.00 for parking at the hearing. The Manufacturer objected to the Consumer being reimbursed for the amount of the rental car, and the amount of postage in excess of $4.42. The Board rejected the Manufacturer's argument and awarded all the incidental charges that the Consumer incurred.

Levy v. American Honda Motor Company (Acura), 2005-0609/MIA (Fla. NMVAB October 6, 2005)

The Consumers sought to recover incidental charges for lost wages and faxing costs. The Manufacturer objected to these charges. The Board denied the Consumer's request for reimbursement of unspecified lost wages and faxing costs.

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

Brown v. Ford Motor Company, 2005-0594/JAX (Fla. NMVAB October 28, 2005)

In order to purchase the vehicle, the Consumer paid $23,001.89 in cash and traded in a 1998 Volvo S70 and a 1996 Nissan. The purchase contract reflected a net trade-in allowance of $6,000.00 designated for both vehicles, without any indication as to how much was attributable to each. This was not acceptable to the Consumer. In accordance with Section 681.102(19), Florida Statutes (2004), the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) in effect at the time of the trade-in (hereinafter NADA Guide). The 1996 Nissan was not listed in the NADA Guide. Taking into account the 1998 Volvo ' s equipment and mileage, the retail price reflected in the NADA Guide for that vehicle was $8,625.00. The Consumer chose to accept $8,625.00 as the net trade-in allowance for both vehicles.

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

Liwosz v. DaimlerChrysler Motors Corporation, 2005-0716/TPA (Fla. NMVAB October 24, 2005)

The purchase contract reflected a "total including accessories" for the vehicle of $34,748.24, which did not include taxes, dealer service fees, or license or registration fees. The Consumer received $4,250.00 in rebates. The Manufacturer's dealer invoice listed the "MSRP Retail Total" for the vehicle as $25,970.00. The Consumer testified that the purchase price was increased because of the debt on the trade-in vehicle, and that without the trade-in vehicle the purchase price would have been less than the "MSRP" for the vehicle. The Manufacturer's representative argued that a "logical reading" of the definition of "purchase price" found in Section 681.102(19), Florida Statutes (2005), required the Board to utilize the purchase price reflected in the buyer's order and finance agreement to calculate the offset for use, because the Consumer agreed to this amount at the time of purchase. The Manufacturer further argued, as stated in Section 520.31(2), Florida Statutes (2005), the purchase price reflected in the purchase documents was negotiated "in the ordinary course of business," and that historically the Board had interpreted the phrase "excludes debt from any other transaction" to mean loans for items such as home improvements or vacations when combined with a new vehicle loan by using a home equity loan or line of credit. The Board recognized that a typical new car purchaser does not pay "MSRP" when purchasing a new vehicle; however, the "MSRP Retail Total" of $25,970.00 as reflected on the Manufacturer's dealer invoice more accurately met the definition of "purchase price," because it represented the price not inflated to account for any debt from the transaction associated with the trade-in vehicle. Accordingly, the Board used $25,970.00 as the purchase price for purposes of calculating the reasonable offset for use.

MISCELLANEOUS PROCEDURAL ISSUES:

Brown v. Ford Motor Company, 2005-0852/FTM (Fla. NMVAB December 15, 2005)

The Manufacturer's prehearing inspection originally was scheduled to take place on November 4, 2005. On the evening prior to the inspection, a Manufacturer's Representative called the Consumer to cancel the appointment because of the unavailability of the Manufacturer to attend on that date. The Manufacturer and Consumer rescheduled the prehearing inspection for November 22, 2005, and then December 2, 2005, but the Consumer had to cancel both scheduled inspections. The prehearing inspection occurred on December 5, 2005, two days prior to the hearing. During the pendency of this claim the Manufacturer never requested the assistance of the Board to schedule the prehearing inspection so that the written inspection information could be supplied to the Consumer in a timely manner. The Manufacturer's request to admit the prehearing inspection report was denied; furthermore, the Manufacturer was not permitted to present testimony about the prehearing inspection during the hearing.