OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2009 - March 2009 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Barrett and Baker v. Ford Motor Company, 2008-0624/FTL (Fla. NMVAB February 27, 2009)
The Consumers purchased a new 2008 Ford F-450 truck. One of the Consumers was the owner of a company that transported vehicles from south Florida to the northeastern USA using the 2008 Ford F-450 truck which was the subject of the claim. That Consumer testified that he typically transported three vehicles using a fifth-wheel trailer attached to the truck, and that most of the approximately 65,000 miles on the vehicle at the time of the hearing were incurred after he started transporting vehicles to the Northeast. The hitch of the fifth-wheel trailer was attached inside the cargo bed of the truck. The Consumer approximated the weight of the trailer, without any cargo added, to be 4,000 pounds. During the Manufacturer's prehearing inspection of the truck, it was weighed with the driver in the vehicle, a quarter tank of fuel and the fifth-wheel hitch attached in the cargo bed. The vehicle weighed 9,120 pounds. The Manufacturer also submitted evidence showing one gallon of gasoline equaled 5.8 pounds. The vehicle had a fuel tank capacity of 40 gallons. The Manufacturer's witness testified that having a fifth-wheel trailer attached to a vehicle such as this one adds weight to the truck separate and apart from the weight of the trailer and cargo within the trailer. Specifically he testified that a percentage of the weight of the trailer and cargo is generally added to the gross weight of the truck itself. The Board found that the totality of the testimony and evidence presented in the case supported a conclusion that the gross vehicle weight of the truck exceeded 10,000 pounds. Since the gross vehicle weight exceeded the limit set forth in the statute, the truck was not a "motor vehicle" as defined by statute. Accordingly, the Consumers' case was dismissed.

NONCONFORMITY 681.102(16), F.S.

Sprague v. Mitsubishi Motors North America Inc., 2008-0656/FTL (Fla. NMVAB February 27, 2009)
The Consumer complained of a "pungent" odor emanating from the air conditioner vents when the air conditioner was turned on in her 2008 Mitsubishi Outlander. The Consumer testified that when the air conditioner was running in the outside air circulation mode, the odor that came from the vents smelled like a "cow pasture." When the air conditioner was in the inside circulation mode, there was no odor, but her clothes got a "garage" odor. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. The Manufacturer's representative testified that, while the vehicle's cabin was not "air proof," the

Manufacturer was never able to detect an odor coming from the air conditioner vents. The Board found the problem to substantially impair the use, value and safety of the vehicle, thereby constituting a nonconformity. Accordingly, the Consumer was awarded a refund.

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
The Consumer complained of a defective electrical system in his 2007 Chevrolet Silverado. The Consumer testified that the cigar lighter fuse in the vehicle blew and on that day, he replaced the fuse with an extra fuse that was provided with the vehicle at the time of purchase. Two days later, the same fuse blew again while the vehicle was parked in the Consumer's driveway and resulted in a small fire under the hood of the vehicle, damaging many wires. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective electrical system on one occasion. At that time, the Consumer gave the blown cigar lighter fuse to a Service Advisor at the Manufacturer's authorized service agent. The Manufacturer contended that the alleged nonconformity was the result of an unauthorized modification of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer argued the alleged defect in the vehicle was caused by the Consumer replacing the blown cigar fuse in the vehicle with an "aftermarket" fuse or jumper and further contended that the blown fuse was not turned in to the service agent. A majority of the Board rejected the Manufacturer's assertion that the nonconformity was a result of an unauthorized modification or alteration of the motor vehicle by persons other than the Manufacturer or its authorized service agent. The Manufacturer produced no direct testimony from any employee who was present when the Consumer brought his vehicle in to refute the Consumer's testimony that he did provide the blown cigar lighter fuse to the service agent on that day. Accordingly, the Consumer was awarded a refund.

Scamard v. Nissan Motor Corporation USA, 2008-0627/TPA (Fla. NMVAB February 3, 2009)
The Consumer complained of a powertrain condition that caused the engine to be sluggish and the transmission to shift improperly in his 2006 Infiniti QX56. The Manufacturer asserted that the alleged nonconformity was the result of an unauthorized modification of the motor vehicle by persons other than the manufacturer or its authorized service agent. According to the Manufacturer's representative, the supercharger was the cause of the Consumer's complaints about the sluggish engine and improperly shifting transmission. While acknowledging that Infiniti of Tampa, the selling and servicing dealership which installed the supercharger on the Consumer's vehicle, was an authorized service agent of Nissan Motor Corporation USA, the Manufacturer argued that it should not be held accountable for this modification, which it did not authorize. Citing to the statutory definition of "nonconformity": "a defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent," the Board rejected the Manufacturer's assertion, since it was the Manufacturer's authorized service agent that installed the offending supercharger. 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.

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
The Consumer complained of a defective electrical system in his 2007 Chevrolet Silverado. The vehicle was presented to the Manufacturer's authorized service agent for repair of the defective electrical system on May 29, 2008. At that time, the Consumer's request to repair the vehicle was refused by the Manufacturer and its authorized service agent. The Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification; however, it did not contact the Consumer to schedule any further repair attempt. As of the date of the hearing, the defective electrical system in the vehicle had not been repaired. The Board found that, under the circumstances presented in the case, one repair attempt was 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

Carter v. American Suzuki Motor Corporation, 2008-0580/ORL (Fla. NMVAB February 25, 2009)
The Consumer complained of a gear shifter problem in her 2007 Suzuki XL7. The Board found the problem substantially impaired the use, value and safety of the vehicle, and as such, constituted a nonconformity. The evidence established that the Manufacturer was given a total of four opportunities to repair the gear shifter nonconformity, two such attempts occurring after the Manufacturer's receipt of written notification of the defect from the Consumer, and the nonconformity was not repaired. Under the circumstances in this case, the Board found the Manufacturer had a reasonable number of attempts to repair the subject vehicle and failed to do so. Accordingly, the Consumer was awarded a refund.

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

Bermudez v. Chrysler LLC, 2008-0589/MIA (Fla. NMVAB January 16, 2009)
The Consumer complained that all four power windows were inoperable in his 2006 Jeep Liberty, which the Board found to be a nonconformity under the statute. The Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on October 27, 2008. On October 31, 2008, the Manufacturer responded to the Consumer and scheduled a final repair attempt for December 11, 2008. The Consumer did not appear on December 11th, because he did not believe the final repair was scheduled within a reasonable time after the Consumer received the Manufacturer's response, as the statute requires. The Manufacturer requested that the claim be dismissed on the grounds it did not have a final repair attempt. The Manufacturer's representative argued the Consumer never requested that the final repair be set for an earlier date, and when he did not show for the scheduled appointment, the Consumer never called to reschedule the final repair. According to the representative, the final repair was scheduled when it was probably because the

technical assistant who addressed those repairs was "busy"; nevertheless, it was the Manufacturer's contention that it was within a "reasonable" time. Section 681.104(1)(a), Florida Statutes, states, in part "…The manufacturer shall have 10 days, commencing upon receipt of such notification, to respond and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility within a reasonable time after the consumer's receipt of the response." The Consumer sent the required written notification to the Manufacturer; however, the Manufacturer's response failed to direct the Consumer to a repair facility for the final repair attempt within a reasonable time. Accordingly, the Board rejected the Manufacturer's contention that it was denied a final repair opportunity and concluded that a reasonable number of attempts was undertaken to conform the vehicle to the warranty. 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), F.S.

Rivera v. Land Rover of North America, 2009-0020/WPB (Fla. NMVAB March 16, 2009)
The Consumer complained of an air suspension malfunction, a transmission hesitation and a security alarm malfunction in his 2006 Land Rover LR3. The Board found all three problems substantially impaired the use, value and safety of the vehicle, and as such, were nonconformities. The Consumer sent written notification to the Manufacturer to advise the Manufacturer that the vehicle had been out of service by reason of repair for 15 or more cumulative days. The Manufacturer received the notification and thereafter the vehicle was inspected and diagnostic tests were performed by the Manufacturer and its authorized service agent for a total of three days. The Manufacturer contended that the three days it spent exercising its post-notice opportunity to inspect or repair the vehicle should not "count" as days out of service for purposes of application of the statutory presumption of a reasonable number of attempts. Florida Administrative Code Rule 2-30.001(2)(c), defines an "out-of-service day," in pertinent part, as, "Any day, including weekends and holidays, when the motor vehicle is left at an authorized service agent or manufacturer's designated repair facility for an examination or repair of one or more nonconformities." It was undisputed that the Manufacturer examined and performed diagnostic tests on the Consumer's vehicle for three days for the nonconformities. There was no other reason for the vehicle to have been out of service during that time. Accordingly, the Board rejected the Manufacturer's argument and concluded the vehicle was out of service for a total of 32 cumulative days. The Consumer was awarded a refund.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Wheeler v. Chrysler LLC, 2008-0509/FTL (Fla. NMVAB January 12, 2009)
The Consumer purchased a 2007 Dodge 3500 Quad cab pickup truck. The Consumer complained and the Manufacturer stipulated that a fuel system condition that caused the vehicle not to start was a defect or condition that substantially impaired the use, value or safety of the vehicle; therefore, the Consumer was awarded a refund. The Consumer requested reimbursement as

incidental charges of $2,900.00, which was the cost to repair an inoperable engine in a secondary vehicle that was necessary for transportation, and $1,452.96, which represented the amount the Consumer paid to maintain insurance on the lemon vehicle during the time he did not have use of it. The Manufacturer objected to both requests. The Board awarded the Consumer $2,900.00 for the cost of repairing the engine in the secondary vehicle; however, the request for reimbursement of the cost of insurance on the lemon vehicle was denied, because such cost was not directly caused by the nonconformity.

Duenas v. Chrysler LLC, 2008-0561/MIA (Fla. NMVAB February 6, 2009)
The Manufacturer stipulated that the Consumer's 2006 Jeep Commander had a wind noise coming from the dash when the vehicle was driven at high speed and that this was a defect or condition that substantially impaired the use, value or safety of the vehicle; therefore, the Consumer was awarded a refund. The Consumer requested reimbursement as an incidental charge of ongoing public transportation costs of $6.00 per day for each business day starting from the day after the hearing, until the replacement or repurchase of the vehicle. The Manufacturer objected to reimbursement of the public transportation charges. The Board awarded the Consumer the $6.00 per day as requested.

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

Henderson v. Chrysler LLC, 2008-0586/TLH (Fla. NMVAB February 25, 2009)
The Board found the running gear vibration and noise, malfunctioning gauges and a transmission leak in the Consumers' 2007 Dodge Ram 2500 to be nonconformities and awarded the Consumers a refund. At the time of purchase, the Consumers traded in a 1985 Chevrolet Suburban with no existing lien. The purchase contract reflected a net trade-in allowance of $1,000.00, which was not acceptable to the Consumers. 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 a printout from the NADA website which listed the current high, average and low retail values for the vehicle from the NADA Classic Car Guide, and requested that the "average" retail value be awarded as the net trade-in allowance. The Manufacturer objected to the use of the NADA Classic Car Guide to determine the net trade-in allowance, arguing that Section 681.102(19), Florida Statutes, authorizes the Board to use only the NADA Official Used Car Guide (Southeastern Edition). The Manufacturer asserted that, because the Consumers' trade-in vehicle was too old to appear in that publication, the Board must award the net trade-in allowance reflected in the purchase contract. The Board rejected the Manufacturer's argument and awarded a net trade-in allowance of $3,019.00, which was the low retail value reflected in the NADA Classic Car Guide.

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

Henderson v. Chrysler LLC, 2008-0586/TLH (Fla. NMVAB February 25, 2009)
In addition to the net trade-in allowance summarized above, there was an issue in this case related to the statutory reasonable offset for use awarded to the Manufacturer. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the date of the hearing was 12,779 miles. The Consumers sought reduction of that mileage, asserting

that, during the course of repairs, they were instructed to "put mileage on the vehicle in order to make the problem go away." The Board rejected this contention.

MISCELLANEOUS ISSUES:

Adams v. General Motors Corporation-Chevrolet Division, 2009-0044/JAX (Fla. NMVAB March 30, 2009)
At the start of the hearing, the Board considered the Manufacturer's "Motion to Dismiss" the case, which asserted that the Board "lacked jurisdiction" to hear the claim. The Manufacturer argued that, because the Consumer's claim was premised on a fire that resulted in property damage, matters relating to causation, negligence, products liability and insurance were necessarily at issue in the case, and the Board was without jurisdiction to make findings on those issues. Citing to Section 681.1095(8), Florida Statutes, which states, "[t]he Board shall grant relief, if a reasonable number of attempts have been undertaken to correct a nonconformity or nonconformities," the Board concluded that the case presented by the Consumer required the Board to make findings that there was a nonconformity for which a reasonable number of attempts was undertaken, matters well within its jurisdiction. Based upon the foregoing, the Board denied the Manufacturer's "Motion to Dismiss."

Scamard v. Nissan Motor Corporation USA, 2008-0627/TPA (Fla. NMVAB February 3, 2009)
The Consumer purchased a new Infiniti QX56 in Florida on July 22, 2008. The Consumer filed a claim with BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Nissan Motor Corporation. On October 28, 2008, the program declined to consider the Consumer's complaint on the grounds that it was without jurisdiction to do so. On December 1, 2008, the Consumer filed his request for arbitration by the Board. The Manufacturer contended that the Consumer's Request for Arbitration was not filed with the Board within 30 days after the final action by the BBB. The Board rejected the Manufacturer's contention that the Consumer's Request for Arbitration was untimely because it was not filed within 30 days of the final action by the BBB. Section 681.109(4), Florida Statutes, requires that the Request for Arbitration be filed no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days <u>after</u> the final action of a certified procedure, whichever date occurs later. In this case, the date 30 days after the final action of the BBB occurred on Thanksgiving Day, Thursday, November 27, 2008, a legal holiday. In addition, the day following Thanksgiving Day, Friday, November 28, 2008, was also a legal holiday. §110.117, Fla. Stat. (2008). Taking into account the intervening Saturday and Sunday, which were not included in the time computation, the Consumer's Request for Arbitration was timely filed if filed no later than Monday, December 1, 2008. Accordingly, the Manufacturer's request that the case be dismissed was denied.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2009 - June 2009 (2nd Quarter)

NONCONFORMITY 681.102(16), F.S. (2008)

Pantera v. Toyota Motor Sales USA, 2009-0026/FTM (Fla. NMVAB April 1, 2009)
The Consumer complained of a defective driver's seat that manifested itself through "squeaking" noises in his 2008 Toyota Solara. When the Consumer took the vehicle in for repair of the noise, instead of eliminating it, the repair made the driver's seat noticeably higher and gave it a decidedly unstable feel. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's representative, who had no personal involvement in the repairs, presented a review of the written repair orders prepared by the authorized service agent. The Board found the problem complained of by the Consumer substantially impaired the safety of the vehicle. Accordingly, the Consumer was awarded a refund.

Batalla and Holcombe v. Mercedes-Benz USA Inc, 2009-0063/FTL (Fla. NMVAB April 29, 2009)
The airbag warning light on the instrument cluster of the 2008 Mercedes-Benz ML350 illuminated, warning that the front passenger airbag was disabled whenever the passenger got out of the front seat. The warning light stayed on until the engine was turned off. This caused the Consumers to be concerned that the front passenger airbag might not deploy when it is supposed to, or might deploy when it is not supposed to. The Manufacturer contended that the front passenger airbag and the related warning light were working properly. The Manufacturer's witness explained the passenger seat has an Occupant Class Recognition (OCR) sensor. That is, the sensor can detect if a small child, adult, or someone in between in weight is occupying the passenger seat. If an airbag needs to deploy, it will deploy in stages, depending upon the weight of the passenger. The Board duplicated the condition during its in-hearing inspection of the vehicle and concluded that the malfunctioning warning light, and possibly malfunctioning passenger airbag, was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumers were awarded a refund.

All Star Mirror Inc v. Nissan Motor Corporation USA, 2009-0135/WPB (Fla. NMVAB June 5, 2009)
The Consumer complained that something about or in her 2009 Nissan Rogue made whoever drove it or ride in it feel ill. When the Consumer testified first test drove the vehicle she did not feel well afterwards, but she thought perhaps the air conditioning in the dealership showroom was not cool enough. She leased the vehicle and after she drove home she felt like she was going to vomit. The windshield had a distortion and was replaced, but she continued to feel the same

whenever she was in the vehicle. She tried operating the vehicle with and without the air conditioner running, but it made no difference; she started to feel ill after being in the vehicle for 15 to 30 minutes. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety, and that all repairs were made for "customer satisfaction" only. In addition, the Manufacturer contended that it was not obligated to repair the vehicle because it believed the Consumer had "abandoned" it; however, at one point the vehicle was flat-bedded to the Consumer. Other than the repairs that were made to the windshield, none of the repair orders addressed the issue of what was or may have been making the occupants of the vehicle feel ill and the Manufacturer's representative testified the Manufacturer was aware something other than a distortion in the windshield could be causing the ill feeling. The Board concluded that the condition in the vehicle that was making its occupants feel ill was a defect that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity that required the vehicle to be out of service by reason of repair for more than 30 cumulative days. Accordingly, the Consumer was awarded a refund.

Peña v. Mercedes-Benz USA Inc., 2009-0111/TLH (Fla. NMVAB May 19, 2009)
The Consumer complained of an intermittent transmission condition manifesting itself in harsh shifting and faulty acceleration, and a hole in the carpet, in her leased 2007 Mercedes-Benz SLK 280. When she reported the transmission defect, she was assured by the Manufacturer's authorized service agent, with no examination of the vehicle, that the problem she described "happens all the time" and there was nothing to worry about because she probably put [the vehicle] in "sport mode" and caused the problem herself. The Manufacturer made the same assertion at the hearing and additionally asserted that the hole in the carpet was the result of the Consumer driving while wearing high-heeled shoes. The vehicle underwent a total of nine repair attempts and was out of service for repair a total of 37 days. The Board rejected the Manufacturer's assertions and concluded that both defects substantially impaired the use, value or safety of the vehicle, thereby constituting nonconformities. 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.

Estling and Bastani v. General Motors Company-Chevrolet Motor Division, 2009-0002/FTM (Fla. NMVAB April 10, 2009)
The Board found the defective paint on the tonneau cover of the Consumers' 2008 Chevrolet Corvette to be a nonconformity. The evidence established that the Manufacturer was given two opportunities to correct the defective paint nonconformity, including one opportunity after the Manufacturer's receipt of written notification of the defect from the Consumers. There was no dispute that the nonconformity continued to exist. The Manufacturer acknowledged that the local repainting procedure was not the same as that used at the factory, and at least one of its witnesses confirmed the Consumers' assertion that such repainting would adversely impact the vehicle's value. Under the circumstances presented in this case, the Board found that two repair attempts were sufficient to afford the Manufacturer a reasonable number of attempts to conform the

vehicle to the warranty provided by the Lemon Law. Accordingly, the Consumers were 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.

Gomez v. Porsche Cars North America Inc., 2009-0059/MIA (Fla. NMVAB April 20, 2009)
The Consumer's 2009 Porsche 911 Turbo had the following nonconformities: the air conditioner did not blow cold air and the driver's side rear view mirror was not secure and would shift when the car was driven at high speeds. After purchasing the vehicle, the Consumer took delivery in Germany under the Manufacturer-sponsored European Delivery Program. After driving it for a few days and discovering the defective conditions, he dropped the vehicle for shipment and repair at the Manufacturer-sponsored shipping facility in Spain on October 24, 2008. On November 20, 2008, the vehicle was shipped from Spain to the Porsche factory in Germany, for repair of the defects. The Manufacturer's witness testified that the vehicle underwent repair for the air conditioner and rear view mirror complaints from December 3, 2008, through December 11, 2008. Once the repairs were completed, the vehicle was shipped from Germany on January 5, 2009, and was received by the Manufacturer's authorized Florida dealer on January 27, 2009. The Consumer contended that he was never advised by the Manufacturer's authorized service agent in Pompano Beach, Florida, to pick up the vehicle once it was delivered from Europe. The Manufacturer's representative contended that the Consumer had communicated to Porsche via letter that, as a result of the abovementioned conditions and the delay in repair, he was no longer interested in the vehicle and would only like to get a full refund, and he made no attempt to pick up the vehicle from the Florida dealer. The Manufacturer further contended that the delay in getting the vehicle to the Consumer was caused by a shipping problem that resulted when the Consumer dropped the vehicle in Spain, with instructions to ship it back to the factory in Germany for repair, instead of shipping it to the dealer in the U.S., a claim disputed by the Consumer. A majority of the Board concluded that the vehicle was delivered to the Porsche factory in Germany for repair of the nonconformities on November 20, 2008, and the work was completed on December 11, 2008, for a total of 22 cumulative out-of-service days. The remainder of the days the motor vehicle was unavailable to the Consumer was not by reason of repair of the nonconformities; rather, it was the result of a shipping dispute between the Consumer and the Manufacturer. A majority of the Board further concluded that 22 days out of service by reason of repair of the nonconformities did not, under the circumstances of this case, constitute a reasonable number of attempts. Therefore, the Consumer's case was dismissed.

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

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

Pajkuric v. Ford Motor Company, 2009-0056/WPB (Fla. NMVAB May 6, 2009)
The Consumer complained that the SYNC system did not operate properly in her 2008 Lincoln MKX. The Consumer testified that shortly after taking possession of the vehicle the SYNC

system did not respond to or with a voice command, and sometimes did not pick up on the phone or Ipod. In addition, the SYNC system did not recognize by voice command 126 of the 756 songs the Consumer had loaded on the Ipod. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness testified the SYNC system is a Microsoft product that has limitations, as certain songs on the Consumer's Ipod are not compatible with the SYNC system and therefore are not recognized by the system. The Manufacturer asserted, with regard to the phone sometimes not working, that this occasionally occurs with phones that are used in vehicles; therefore, it is neither unique to this vehicle, nor a defect in vehicle materials or workmanship. The Board concluded that the SYNC system not working properly as complained of by the Consumer did not substantially impair the use, value or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

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

Turner v. Subaru of America Inc., 2009-0168/TPA (Fla. NMVAB June 26, 2009)
The Consumer complained of engine failure in his 2008 Subaru Impreza. The Consumer testified that on two occasions, the engine stalled while he was stopped at a red light. The Manufacturer contended that any vehicle defects were the result of "abuse, neglect and unauthorized modifications or alterations by persons other than the manufacturer or its authorized service agent." Specifically, the Manufacturer asserted that the vehicle had been altered to enhance performance, had been used for street racing and had exhibited oil "starvation" due to the Consumer's failure to monitor oil levels. The Manufacturer's witness explained that he found two major failures after the engine was disassembled: the rod bearings and the number four piston were damaged. The witness opined "over-boosting" the turbo engine beyond Manufacturer specifications through the access port software caused the piston to break and the lack of lubrication caused further damage to the engine. He submitted photographs evidencing a discolored clutch pressure plate and flywheel which was indicative of hot spots caused by over-boosting the engine and abusive driving. The Manufacturer's witness further testified that the Consumer's lack of frequent oil changes and failure to regularly monitor the oil level added to the untimely engine damage. A nonconformity is defined as a "defect or condition that substantially impairs the use, value or safety of a motor vehicle, <u>but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent</u>." §681.102(16), Fla. Stat. (2008). The Board concluded that the engine failure complained of by the Consumer was the result of abuse, neglect and modification by persons other than the Manufacturer or its authorized service agent. Consequently, the Consumer's case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Estling and Bastani v. General Motors Company-Chevrolet Motor Division, 2009-0002/FTM (Fla. NMVAB April 10, 2009) *See, "Reasonable Number of Attempts" above.*
The Consumers requested reimbursement of $2,438.00 for a K40 Bluetooth Radar Detector that was permanently installed in the vehicle, as a collateral charge. The Manufacturer objected, asserting it was possible to remove the detector from the vehicle. The Board denied the objection and awarded the Consumers $2,438.00 as a collateral charge.

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

Batalla and Holcombe v. Mercedes-Benz USA Inc, 2009-0063/FTL (Fla. NMVAB April 29, 2009) *See, "Nonconformity" above.*
The lease agreement showed, on one page, that the Consumers received a net trade-in allowance of $25,000.00; however, on another page a trade-in was shown as "N/A." Further documentation clarified the Consumers had contributed a trade-in vehicle which was encumbered by a debt of $21,053.85, for which they received a gross trade-in allowance of $25,000.00, leaving a net trade-in allowance of $3,946.15. The Consumers were given a check for $2,323.59, and the remaining $1,622.56 was credited as the down payment. The Consumers were not satisfied with the amount of the trade-in allowance reflected in the lease agreement. Accordingly, pursuant to Section 681.102(19), Florida Statutes (2008), the Manufacturer produced the NADA Official Used Car Guide (Southeastern Edition) (NADA Guide) in effect at the time of the trade in. The November 2007, NADA Guide did not reflect a retail price for the trade-in vehicle. The Consumers produced NADA Guides for December 2007, February 2008, and March 2008. The Manufacturer objected to the use of NADA Guides that were not in effect at the time of the trade-in to calculate the net trade-in allowance. The Board denied the Consumers' request that the net trade-in allowance be calculated using a NADA Guide other than the one in effect at the time of the trade-in, and the net trade-in allowance reflected in the lease documentation was awarded.

Incidental Charges §681.102(8), F.S.

Peña v. Mercedes-Benz USA Inc., 2009-0111/TLH (Fla. NMVAB May 19, 2009) *See, "Nonconformity" above.*
After leasing the vehicle, the Consumer moved from Florida to California and had to return to Florida for her hearing. The Consumer sought reimbursement of $340.39 for the airline ticket to attend the hearing; $45.00 for one night's hotel stay; $42.00 for cab fare; and $116.49 for mailing and copying charges as incidental charges. The Consumer also requested reimbursement for the cost of transporting the vehicle when she moved from Florida to California, and for the cost of office supplies to organize her paperwork for the hearing. The Board awarded the Consumer reimbursement of the air fare, hotel, cab fare, postage and copying costs; however, reimbursement of the cost of transporting the vehicle from Florida to California and for office supplies to organize paperwork for the hearing was denied.

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

Henagen v. Ford Motor Company, 2008-0604/TLH (Fla. NMVAB April 6, 2009)
The Board awarded the Consumer a refund. The Manufacturer objected to using mileage attributable to the Consumer up to the date of the BBB/Autoline arbitration hearing for calculation of the offset, arguing that the proceeding conducted by its sponsored dispute resolution procedure was not an "arbitration hearing" under Chapter 681, Florida Statutes, and that the length of time between the BBB hearing and the Board's hearing, and the resulting additional mileage placed on the vehicle, resulted in an offset calculation that was "unfair" to the Manufacturer. The Board rejected the Manufacturer's argument and calculated the offset based on the miles attributable to the Consumer up to the date of the BBB arbitration hearing.

MISCELLANEOUS PROCEDURAL ISSUES:

Myers v. General Motors Company-Chevrolet Motor Division, 2009-0069/JAX (Fla. NMVAB April 23, 2009)
At the start of the hearing, the Manufacturer's representative asserted that the case should be dismissed because the Consumer did not "complete" the state-certified, manufacturer-sponsored procedure, specifically, the BBB/Autoline program. The representative stipulated that the Consumer filed a claim and that the claim was accepted by the BBB/Autoline program. The program's paperwork indicated that, after the claim was accepted, there was a settlement agreement between the Consumer and the Manufacturer which entailed the Consumer sending the Manufacturer a Motor Vehicle Defect Notification form followed by a final repair attempt undertaken by the Manufacturer. The Consumer complied with the settlement agreement and a final repair attempt was undertaken on January 22, 2009. At this hearing, the representative asserted that the Consumer was "required" to proceed with an arbitration hearing through the BBB/Autoline program after the final repair attempt. The Consumer testified that he was told by the BBB/Autoline program administrator that, after the final repair attempt, the Manufacturer was willing to offer him an extended warranty and if he did not want to accept the offer, then he needed to file a request for arbitration with the state-run program. Section 681.108(1), Florida Statutes (2008), provides, "If a manufacturer has established a procedure, which the division has certified . . .the provisions of s. 681.104(2) apply to the consumer only if the consumer has first resorted to such procedure." Section 681.109(2), Florida Statutes (2008), provides, "If a consumer is not satisfied with the decision [of the manufacturer's certified procedure] or the manufacturer's compliance therewith, the consumer may apply to the division to have the dispute submitted to the board for arbitration."
The Board found the Consumer met the statutory prior resort requirement and was not satisfied with the Manufacturer's compliance with the agreement; therefore, he was not required to return to the procedure, but properly filed a request for arbitration with the Board. The Board denied the Manufacturer's request for dismissal of the claim on prior resort grounds.

Derosa v. Ford Motor Company, 2008-0641/FTM (Fla. NMVAB April 16, 2009)
This case initially came before the Florida New Motor Vehicle Arbitration Board upon approval of the Consumer's request for arbitration on March 13, 2008. The Board dismissed the Consumer's claim of a consistent vibration at speeds of 50 through 55 miles per hour, because the Board found the nonconformity was cured. Subsequent to that hearing, the Consumer filed a request for an additional arbitration for the same vehicle. The Board held a hearing to determine whether the Consumer's second request for arbitration would be allowed to be heard pursuant to paragraph 71, *Hearings Before the Florida New Motor Vehicle Arbitration Board,* which provides as follows: "Generally, consumers are entitled to only one arbitration per vehicle before the Board. However, it is within the discretion of the Attorney General's Office or the Board whether to allow a consumer to arbitrate after the consumer has lost a previous arbitration involving the same vehicle. The consumer must show a significant change in circumstances that would now qualify the vehicle for refund or replacement." The Consumer contended that the tires placed on his vehicle did not cure the vibration nonconformity, and he continued to experience the same vibration about which he complained at the previous arbitration hearing. The Consumer testified that the vibration was particularly bad when he towed his boats and drove in excess of 70 miles per hour. The Manufacturer argued that the Consumer's testimony about the vibration when towing his boats was considered by the Board at the previous hearing; therefore, the Consumer failed to show a significant change in circumstances that would allow a second hearing.
The Board agreed and denied the Consumer's request for an additional arbitration.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2009 - September 2009 (3rd Quarter)

NONCONFORMITY 681.102(16), F.S.

Pou v. Toyota Motor Sales USA, 2009-0177/MIA (Fla. NMVAB July 30, 2009)
The Consumer complained that the GPS system in her 2007 Toyota Sequoia did not locate all directions, and sometimes indicated that the vehicle was being driven in the ocean. The Consumer testified there were problems with the GPS since she took delivery of the vehicle. The Manufacturer's representative was involved with the vehicle at the final repair attempt and again at the Manufacturer's prehearing inspection. According to the representative, she was not aware the vehicle was having any problems with the GPS system so she did not inspect it. The Board concluded that the GPS failing to work properly was a defect or condition that substantially impaired the use and value of the vehicle. Accordingly, the Consumer was awarded a refund.

Hanna v. BMW of North America LLC, 2009-0242/WPB (Fla. NMVAB September 17, 2009)
The Consumer complained that intermittently, in his 2008 BMW 328i, the yellow "airbag off " warning light illuminated to signify that the passenger side airbag was off, even when a passenger was sitting in the seat. The Consumer testified he was told by one of the Manufacturer's service agents that the passenger must sit "squarely" in the seat and weigh at least 120 pounds. According to the Consumer, his fiancée weighed 130 pounds and she sat squarely in the seat, but the warning light still illuminated. At the hearing, the Consumer played a videotape which showed his fiancée sitting squarely in the seat with her feet flat on the floor, and the warning light coming on. The indicator light shows whether the passenger side airbag is activated or deactivated. According to the Owner's Manual, the airbag will be activated as long as a person of "sufficient size" is sitting "correctly" in the seat. The Manual does not further describe what is meant by "sufficient size" or how one sits "correctly." The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. The Manufacturer's representative explained that someone who weighs at least 120 pounds must be sitting in the passenger seat in order for the airbag to activate. If someone who weighs less than 120 pounds sits in the seat, the airbag automatically turns itself off. There is a sensor in the seat and if the person leans back, more weight will be shifted to the back of the seat rather than the seat itself, and the yellow warning light will illuminate. The airbag will not deploy if the yellow light is on. The Board concluded that the intermittent illumination of the passenger-side "airbag off" warning light, indicating that the airbag would not deploy, when there was a passenger weighing more than 120 pounds sitting squarely in the seat, was a defect or condition that substantially impaired the use, value and safety of the vehicle and as such, it constituted a nonconformity within the meaning of the statute. The Manufacturer's assertions to the contrary were rejected. Accordingly, the Consumer was awarded a refund.

Navas v. General Motors Company-Cadillac Division, 2009-0199/PEN (Fla. NMVAB July 31, 2009)

The Consumers complained of a broken control arm causing their 2008 Cadillac SRX to become inoperable. While the vehicle was being driven at a very slow speed, the right front suddenly dropped down, causing the vehicle to abruptly decelerate and swerve to the right, hitting a nearby wooden fence. When the vehicle contacted the fence, it was traveling approximately 13 miles per hour. Shortly after the accident, the vehicle was towed to the Manufacturer's authorized service agent where it remained for approximately the three months prior to the hearing. The Consumers also produced an affidavit of a witness to the accident which corroborated their testimony of what happened. The Manufacturer asserted the affirmative defense that the alleged nonconformity was the result of an accident of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer argued the alleged defects in the vehicle were caused by the accident. After the accident, the Manufacturer's representative inspected the vehicle at the Manufacturer's authorized service agent. He expressed the opinion that the damage to the control arm happened after the vehicle hit the fence. He testified that, if the control arm was broken before the accident, then it would have just hung down and would not have moved inward to the location it was in when he did his inspection. The Board concluded that the broken control arm causing the vehicle to become inoperable was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it was a nonconformity within the meaning of the statute. The Manufacturer failed to prove, by a preponderance of the evidence, that the defect was the result of the accident. Therefore, the Consumers were awarded a refund.

Peters v. American Honda Motor Company-Acura Division, 2009-0202/FTL (Fla. NMVAB August 3, 2009)

The Consumer's 2007 Acura RDX had a white crystalline or powdery substance growing out of the armrests, under the hood, on the stitching on the seats, the stitching on the door panels, the rubber on the door panels, and on the headrests. The substance did not have an odor, but was very visible. The Consumer testified she felt ill when she drove the vehicle, and when her son was in the vehicle he also felt ill. She never cleaned the interior of the vehicle with any chemicals, and she never carried any chemicals or fertilizer in the vehicle. None of the other vehicles owned by the Consumer and her husband had ever displayed this substance. The Manufacturer asserted the statutory affirmative defense that the alleged defect was the result of an accident, abuse, neglect, unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. An investigator with the Defense Litigation Group, Inc., looked at the vehicle and in May 2009, and obtained a sample of a "white crystalline substance" from the left rear door panel armrest. He used a razor blade to scrape the substance into a test tube, and then shipped the test tube to the ECA lab in San Diego, California. ECA analyzed the sample and reported that it "appeared" to be "ammonium phosphate monobasic, a fertilizer." The Manufacturer's representative testified that Honda does not use ammonium phosphate monobasic in its assembly of vehicles. The Board concluded that the white substance growing or appearing under the hood and on various parts of the interior of the vehicle was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity as defined by the statute. The Manufacturer's affirmative defense that the nonconformity was the result of an accident, abuse, neglect or unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent

was rejected as not proven by a preponderance of the evidence. Therefore, the Consumer was awarded a refund.

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

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

Mir v. Toyota Motor Sales USA, 2009-0178/FTL (Fla. NMVAB July 1, 2009)
The Consumer complained that intermittently, the keyless remote was inoperable in his 2009 Toyota Corolla. The Board found the problem substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. The Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification, timely responded, and attempted to set up a final repair attempt; however, the Consumer declined to present the vehicle. The Consumer testified that he was told by an individual at the National Center for Dispute Settlement, the Manufacturer's informal dispute resolution mechanism, that he did not need to present the vehicle to the Manufacturer's designated repair facility for the final repair attempt, if he did not want to, so he did not present the vehicle on the date established by the Manufacturer. The Consumer further testified, however, that when he left the NCDS hearing he told the Service Manager at Maroone Toyota, who also was at the NCDS hearing, that as soon as he got the NCDS decision, he would bring the vehicle in for the final repair attempt. The Consumer believed that a repair performed on April 20, 2009, was the final repair attempt. The Manufacturer's representative testified that the Manufacturer was not directly involved in the April 20, 2009, repair attempt and that no final repair attempt was conducted by the Manufacturer. The Board found that the Manufacturer responded to the Consumer's written notification in a timely manner and attempted to schedule a final repair attempt. The Consumer chose not to present the vehicle; consequently, the Manufacturer had not yet had a reasonable number of attempts to correct the keyless remote nonconformity and the Consumer was not qualified for repurchase relief under the Lemon Law. Therefore, the case was dismissed.

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

Morgan v. Chrysler Group LLC, 2009-0210/FTL (Fla. NMVAB September 22, 2009)
The Consumer's 2007 Chrysler 300 had the following nonconformities: dings and dents in the body of the vehicle, the "FOB" key intermittently not opening the vehicle or trunk, a rough idle, and noise from the air conditioner. The vehicle was at the Manufacturer's authorized service agent for a total of 30 cumulative out-of-service days for repair of the nonconformities. The Manufacturer contended that it should not be "penalized" for the days the vehicle was in the body shop for repair of the dents and dings as they were not "manufacturing defects." The Manufacturer's witness attributed the body damage to either the transport of the vehicle to the selling dealer or damage sustained while the vehicle sat on the dealer's lot prior to its purchase by the Consumer. The Board rejected the Manufacturer's argument and counted the days out of service for the dings and dents. Accordingly, the Consumer was awarded a refund.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Navas v. General Motors Company-Cadillac Division, 2009-0199/PEN (Fla. NMVAB July 31, 2009) (*See*, "Reasonable Number of Attempts" above.) The Consumers requested reimbursement of car insurance paid during the approximately three months the vehicle was just sitting at the Manufacturer's authorized service agent. The Manufacturer objected to reimbursement for the insurance due to the fact that the insurance expense was incurred as a result of state law and not wholly incurred as a result of acquisition of the vehicle. The Board denied reimbursement for the car insurance as not being under the definition of "collateral charges" in the statute.

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

Johnson v. Ford Motor Company, 2009-0035/WPB (Fla. NMVAB August 25, 2009)
The Consumer originally purchased a new 2006 Lincoln Town Car, which was returned to the Manufacturer's authorized service agent, due to vehicle defects. The service agent delivered to the Consumer in substitution the new 2007 Lincoln Town Car, which was the subject of the arbitration hearing. The service agent prepared a "Purchase Agreement" that reflected a "Total List Price" for the 2007 Town Car and a "Trade-in Allowance/Discount" for the 2006 Town Car of the same amount. Since the 2007 Town Car was delivered to the Consumer as a substitute for the 2006 Town Car, the documents related to the sale of the 2006 Town Car were utilized to calculate the amounts due the Consumer. The Consumer originally traded in a 1998 Lincoln Mark VIII for which she received a net trade-in allowance of $3,000.00, according to the purchase contract. The net trade-in allowance reflected in the purchase contract was not acceptable to the Consumer and she produced a NADA Official Used Car Guide, seeking the retail price as the net trade-in allowance pursuant to Section 681.102(19), Florida Statutes. However, the NADA Guide did not reflect a retail price for the 1998 Lincoln. Therefore, the Board awarded the Consumer the $3,000.00 net trade-in allowance reflected in the purchase agreement as part of her refund.

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

Johnson v. Ford Motor Company, supra.
For the purpose of calculating the statutory reasonable offset for use, the Consumer asserted the purchase price was $31,536.00 ($43,686.00 reduced by a $12,150.00 Ford rebate). The Manufacturer objected to reduction of the purchase price to take into account the rebate, arguing that the $12,150.00 identified as a "Ford rebate" in the purchase document represented an "employee discount" because the Consumer's father was a Ford dealer. The Board rejected the Manufacturer's objection and used $31,536.00 as the purchase price for calculating the offset for use.

Buchanan v. Chrysler Group LLC, 2009-0272/JAX (Fla. NMVAB September 18, 2009)
The Manufacturer stipulated that the Consumer's 2008 Dodge Avenger was a lemon; therefore, the Consumer was awarded a refund. In May 2008, the Consumer had filed a civil lawsuit against the Manufacturer for various breach of warranty claims regarding her defective vehicle. In August 2008, as part of that lawsuit, the Consumer made her vehicle available to the Manufacturer for an inspection and a chance to make a settlement offer to her. At that time the Manufacturer elected not to inspect the vehicle. The Consumer argued that the additional mileage put on the vehicle after that date should not be attributable to her in calculating the statutory reasonable offset for use, because the Manufacturer should have inspected the vehicle and subsequently, repurchased it from her. The Manufacturer objected to using the mileage as of August 2008, arguing that the lawsuit was "completely separate" from the Lemon Law claim and should not have any effect on the mileage attributable to the Consumer for calculation of the offset. Section 681.102(20), Florida Statutes (2009), establishes the formula for its calculation, in pertinent part as: "the number of miles attributable to a consumer up to the date of a settlement agreement or arbitration hearing, whichever occurs first, multiplied by the purchase price of the vehicle and divided by 120,000." The Board found the Consumer's argument on the issue to be compelling and not outside the scope of the statutory formula. The Manufacturer's objection was denied and the reasonable offset for use was calculated based on the mileage attributable to the Consumer up to August 2008.

MISCELLANEOUS PROCEDURAL ISSUES:

Urie v. Toyota Motor Sales USA, 2009-0245/TPA (Fla. NMVAB September 28, 2009)
Pursuant to Paragraph (8), *Hearings before the Florida New Motor Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration" and "affirmative defenses not timely raised in the required form, or in a timely filed amendment to the original timely filed Answer cannot be raised at the hearing, unless permitted by the Board." In this case, the Manufacturer's Answer was never filed with the Board, nor provided to the Consumer. At the hearing, the Manufacturer's Representative did not appear to have a copy of the Answer and could not provide any explanation of why the Answer had not been filed. Upon consideration by the Board, the Manufacturer was not allowed to raise any affirmative defenses at the hearing. The Manufacturer's representative was allowed to cross-examine the Consumer and to give a closing statement.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2009 - December 2009 (4th Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Fantasy Flooring Inc. v. Chrysler Group LLC, 2009-0349/FTL (Fla. NMVAB December 1, 2009)
The Consumer purchased a new 2008 Dodge Ram 2500 pickup truck and in his Request for Arbitration, indicated that the vehicle was not purchased in Florida and listed Russwood South, in Crete, Nebraska, as the selling dealer. However, during the hearing the Consumer testified that he found the vehicle online on Ebay.com and at no time did he ever leave South Florida to complete the purchase of the subject vehicle and that every part of the purchase and finance transaction was done via UPS to and from his Florida address. He added that he did not pay sales tax in Nebraska but did pay sales tax once the vehicle was delivered to Florida. The Consumer paid $7.00 to title the vehicle in Nebraska prior to its delivery in Florida and further testified that he did recall seeing the original certificate of title being from the State of Nebraska. The Consumer received the Nebraska Lemon Law booklet and had to go to the Florida Chrysler dealer to get a copy of the Florida Lemon Law booklet. The Manufacturer asserted the Consumer was not qualified for repurchase relief because the vehicle was not sold in Florida, and as such, the vehicle did not constitute a "motor vehicle" as defined by Florida's Lemon Law. The Manufacturer's representative argued that the purchase order for the vehicle as well as the finance agreement originated from Nebraska. The Manufacturer further contended that the sale of the vehicle could not be completed until the buyer's order and finance agreement reached Nebraska and therefore it was not purchased in Florida. The Board concluded that the vehicle was not sold in Florida; therefore, the Consumer's case was dismissed.

Defect First Reported During the Lemon Law Rights Period §681.103(1), F.S.

O'Neal v. Mitsubishi Motors North America Inc., 2009-0252/FTM (Fla. NMVAB October 30, 2009)
The parties stipulated that the Consumer purchased a new 2006 Mitsubishi Raider on May 18, 2007. The Consumer and his girlfriend testified that the Consumer contacted Palm Mitsubishi on May 18, 2009, and reported an engine problem. The Consumer testified that, several days later, when he arranged to have the truck towed to the authorized service agent, the engine was running. The Manufacturer contended that the Consumer's claim should be dismissed because the defect was not first reported during the Lemon Law rights period. The Service Manager at O'Brien Mitsubishi, at first confused about the actual date, later testified that he spoke with the Consumer regarding the defective engine on May 22, 2009. Although O'Brien Mitsubishi did not do any

work on the vehicle, he saw a hole in the engine block on the driver's side. The Parts Manager at Palm Mitsubishi testified that he spoke with the Consumer for the first time on May 23, 2009, regarding transfer of the vehicle to Palm Mitsubishi for repair of the defective engine. Section 681.102(10), Florida Statutes, establishes the "Lemon Law rights period" as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." In order to qualify for relief under the Lemon Law, a consumer must first report a nonconformity or nonconformities to the Manufacturer or its authorized service agent during the Lemon Law rights period. §681.103(1), Fla. Stat. The Manufacturer's assertion that the Consumer did not first report the defective engine nonconformity during the Lemon Law rights period was rejected by the Board. The Consumer's Lemon Law rights period expired on or about May 18, 2009, the date 24 months after the date of the original delivery of the vehicle to the Consumer. While there was conflict in the testimony regarding the date the Consumer first reported the nonconformity, the Board found more credible the Consumer's testimony that he reported the nonconformity on the date that it first occurred, May 18, 2009, which was within the Lemon Law rights period.

NONCONFORMITY 681.102(16), F.S.

Linus Fla. LLC v. BMW of North America LLC, 2009-0301/FTL (Fla. NMVAB November 3, 2009)
The Consumer complained of a malfunctioning I-drive system in his new 2008 BMW 535i. He testified that the I-Drive screen in his vehicle controls the bluetooth, radio and navigation system. The I-Drive screen would intermittently blank out, disabling the radio, bluetooth or SOS button which summons emergency help from BMW. The Manufacturer contended that the alleged defect does not substantially impair the use, value or safety of the vehicle. The Manufacturer's witness, testified that the Consumer's complaint with the I-Drive system was a software problem and not an electrical problem. He further testified that the Manufacturer fixed the software problem that was causing the I-Drive screen to intermittently blank out when it reprogrammed and recoded the entire vehicle. He also testified that he inspected the vehicle when it came in for the final repair attempt, and found no faults or problem with the I-Drive software at that time. The Board concluded that the malfunctioning I-Drive system was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity. Accordingly, the Consumer was awarded a refund.

O'Neal v. Mitsubishi Motors North America Inc., 2009-0252/FTM (Fla. NMVAB October 30, 2009)
The Consumer complained of a defective engine in his 2006 Mitsubishi Raider. The Consumer testified that the vehicle began making a loud tapping sound from under the hood as he drove home from a doctor's appointment. He thought the sound was possibly caused by a belt, so he got out and checked under the hood, but did not see anything amiss. As he continued driving to his home, which was nearby, he saw smoke coming from the vehicle. Once he arrived at home the Consumer asked his neighbor to look at the vehicle. At the hearing, his neighbor testified that when he started up the engine, he heard what sounded like an engine rod to him, and he then observed a hole in the side of the engine. The Consumer denied that he operated the vehicle under circumstances that would have caused the engine to ingest water. In its Manufacturer' s Answer

filed prior to the hearing, the Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of accident, abuse or neglect by persons other than the Manufacturer or its authorized service agent. Specifically, the Manufacturer asserted that the engine seized as a result of water intrusion caused by accident, abuse or neglect by the Consumer. The Manufacturer's witness testified that he inspected the vehicle in response to receipt of the defect notification form from the Consumer. After he drained the oil and found water in it, he steered the Consumer to his insurance company. The witness acknowledged that the vehicle did not show any other signs of water intrusion or water damage. The Board concluded that the defective engine was a defect or condition that substantially impaired the use and value of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. The Manufacturer's evidence was found to be insufficient to support its affirmative defense. 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.

De La Torre v. BMW of North America LLC, 2009-0287/FTL (Fla. NMVAB October 23, 2009)
The Consumer complained of an intermittent shudder and hesitation in his new 2007 BMW 328i. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent shudder and hesitation on May 19, 2008, when no faults were found and no repairs were made, and on July 6, 2009, when the vehicle's software was updated. The Manufacturer, through its counsel, argued that it was not given a reasonable number of attempts to correct the problem, if one existed. The alleged intermittent shudder and hesitation was only presented for repair on two occasions. Under the circumstances, the Board found that was not a reasonable number of attempts as contemplated by the statute. The Board declined to rule as to whether the complaint constitutes a "nonconformity" as defined by Section 681.102(16), Florida Statutes. The Consumer's case was dismissed.

Charles v. General Motors Company, Buick Division, 2009-0384/FTL (Fla. NMVAB December 15, 2009)
The Consumer complained that the handle to the door on the glove compartment fell off and the door would not stay closed, causing everything in the glove box to fall out in his 2007 Buick LaCrosse. In addition, the light in the glove box stayed on when the door was open, so the Manufacturer's authorized service agent put tape on the glove compartment door to hold it closed so it would not drain the battery. A new glove compartment handle and door were on order, but each time the Consumer called or went to the Manufacturer's authorized service agent, he was told it would be another month before the parts were available. According to the Consumer, he was told the parts would not be in until at least June, and it was suggested he should go to a junkyard or a "side" mechanic to get a new glove handle and door. The Consumer went to an independent shop and was able to get the parts and paid for them himself. The evidence established the nonconformity with the glove compartment door was a defect the Manufacturer's authorized service agent did not repair, because the parts were not available from the supplier.

Yet, upon direction from the service agent, the Consumer was able to acquire the needed parts himself. Under the circumstances, the Board found that was not reasonable and awarded the Consumer a refund.

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

Martinez v. American Honda Motor Company, 2009-0352/FTL (Fla. NMVAB December 1, 2009)
The Consumer complained of a loud squealing noise when turning left or right in his 2007 Honda Civic, which the Board found to be a nonconformity. On March 13, 2009, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the Manufacturer identified the problem and tried to repair the vehicle; however, it was unable to perform the repairs, because the Consumer called the repair facility and asked that all repairs on his vehicle to be stopped immediately. At the hearing, the Consumer and his wife testified that they ordered the final repair stopped because they believed they were going to be charged for the repair. The Manufacturer contended it was denied its final opportunity to repair the vehicle. The Manufacturer's witness testified that, during a test drive of the vehicle with the Consumer's wife at the final repair, he noticed the vehicle pulling to one side and also noticed the loud squeak noise when turning right or left. He placed the vehicle on a lift and noticed damage to the bumper and also noticed the plate on the ball bearing was causing the noise he experienced upon turning right or left. He pointed out to the Consumer's wife that the plate on the ball bearing was causing the noise and told her the Manufacturer would make that repair without charge. When he inquired about the damage to the bumper, the Consumer's wife advised him that she had run over a tire on the highway causing the damage. Apparently, a misunderstanding occurred when the dealer gave the Consumer an estimate of how much it would cost to repair the damage to the bumper. The Board found that the Manufacturer responded to the Consumer's written notification in a timely manner and the vehicle was presented for the scheduled final repair attempt. Diagnosis by the Manufacturer confirmed the existence of the nonconformity and the Manufacturer was ready and willing to attempt a repair; however, the Consumer prevented the Manufacturer from completing the final repair. Consequently, it was concluded that the Manufacturer had not yet had a reasonable number of attempts to correct the nonconformity and the case was dismissed.

Scott v. American Honda Motor Company, 2009-0324/JAX (Fla. NMVAB November 5, 2009)
The Consumers' 2008 Acura RL had a transmission nonconformity that manifested itself in rough shifting, gears slipping, and the vehicle jumping out of gear. On August 4, 2009, the Consumers sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on August 7, 2009. The Manufacturer did not contact the Consumers until August 21, 2009, 14 days after receipt of the Consumers' notification. Since the Manufacturer failed to respond within the 10 days required by statute, the Board concluded that the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply and the Consumers were awarded a refund.

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

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

Brewer v. Mitsubishi Motors North America Inc., 2009-0351/PEN (Fla. NMVAB December 1, 2009)
The Consumer complained of the engine overheating in her 2008 Mitsubishi Endeavor. The Consumer testified that, while she and her husband were driving the vehicle in Tennessee during a return trip to Florida, the air conditioner stopped working. They attempted to drive home the next day; however, while driving on the Interstate, the "Service Engine" warning light illuminated followed by a loud noise, the engine overheated and stalled. The vehicle was towed to Pete's Auto Service who then towed it back to the Manufacturer's authorized service agent in Pensacola. At the hearing, the owner and technician of Pete's Auto Service, testified that he inspected the vehicle after it was towed to his shop. He noticed the radiator hose had blown off. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of an accident by persons other than the Manufacturer or its authorized service agent. At the hearing, the Manufacturer's representative testified that he inspected the radiator that had been on the Consumer's vehicle. The radiator had been in a parts bin located at the Manufacturer's authorized service agent. According to the representative, the lower part of the radiator had two nicks in it, which would cause a leak. He believed the nicks were caused by road debris coming up under the vehicle and hitting the radiator; not due to a manufacturing defect. The damaged radiator resulted in the power train control module shutting the vehicle's air conditioning system down to prevent damage to it, as well as the engine overheating and the radiator hose coming off the vehicle. The Board concluded that the engine overheating was the result of an accident by someone other than the Manufacturer or its authorized service agent. Specifically, that the nicks in the vehicle's radiator were the cause, and the nicks were most likely caused by road debris hitting the lower portion of the radiator. Accordingly, the radiator leak and resulting engine failure did not constitute a nonconformity as defined by the statute and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Santos v. Mazda Motors of America Inc., 2009-0363/ORL (Fla. NMVAB November 22, 2009)
The Board found the Consumers' 2007 Mazda 3 to be a lemon. The Consumer requested $35.98 for rental car insurance as an incidental charge. The Board granted the request and awarded the rental car insurance reimbursed to the Consumer.

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

Armor Glass 1 Inc. v. Chrysler Group LLC, 2009-0150/WPB (Fla. NMVAB December 16, 2009)
The Board found the Consumer's 2007 Dodge Ram 2500 to be a lemon and awarded the Consumer a refund. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumer up to May 21, 2009, the date the claim was stayed as a result of the

bankruptcy of Chrysler LLC, was 62,305 miles. The Manufacturer argued the Consumer should be charged for the miles driven after the stay was lifted which was approximately July 17, 2009, through October 29, 2009, when the Board continued the hearing on its own motion. The Consumer countered it was never put on notice of such request, and thus was not accorded the option of not putting additional miles on the vehicle. The Board denied the Manufacturer's request and used the mileage up to May 21, 2009.

Gonzalez v. Ford Motor Company, 2009-0380/TPA (Fla. NMVAB December 18, 2009)
The Board found the Consumer's 2008 Ford Taurus to be a lemon and awarded the Consumer a refund**.** For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumer up to the date of the BBB proceeding was 7,232 miles. The Manufacturer objected to the mileage utilized for calculation of the offset, and asserted that the Board should utilize the mileage at the time of the final repair attempt as the Consumer was "not eligible" for consideration of his claim by the BBB, because he had not yet had a final repair attempt when he filed his claim. The Manufacturer's assertion was rejected.

MISCELLANEOUS PROCEDURAL ISSUES:

Santos v. Mazda Motors of America Inc., 2009-0363/ORL (Fla. NMVAB November 22, 2009)
The Manufacturer sought to assert the affirmative defense that the alleged nonconformity was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. The defense was not raised in the Manufacturer's Answer or any subsequent amended Answer. Pursuant to *Paragraph (8), Hearings before the New Motor Vehicle Arbitration Board*, any affirmative defenses not raised in the Manufacturer's Answer or in an amended Answer filed within the prescribed time periods may not be raised at the hearing, except as otherwise permitted by the Board. The Consumer objected due to her inability to prepare for the defense. Upon consideration, the Manufacturer was not permitted to raise the affirmative defense at the hearing.

Creel v. Kia Motors America Inc., 2009-0329/TPA (Fla. NMVAB November 3, 2009)
The Manufacturer submitted to the Consumer documents, a DVD and a prehearing inspection report, all of which was information gathered at the Manufacturer's prehearing vehicle inspection, less than seven business days prior to the hearing. The Manufacturer's counsel argued that the Consumer should not be surprised by the documents since she was present at the prehearing inspection. Paragraph (16), *Hearings Before the New Motor Vehicle Arbitration Board*, states in pertinent part: "All information gathered as a result of the prehearing inspection will be provided to the consumer **in writing** as soon as it is available, but no later than ***7 business days*** before the date of the hearing. If the manufacturer fails to provide the information to the consumer as required, evidence or testimony related to the vehicle inspection may not be considered by the board at the hearing." The information was not timely received; therefore, it was not considered by the Board.