OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

January 2010 - March 2010 (1st Quarter)

JURISDICTION:

Motor Vehicle §681.102(15), F.S.

Notaro v. General Motors Company – Chevrolet Motor Division, 2009-0432/PEN (Fla. NMVAB February 23, 2010)
The Consumers purchased a new 2008 Chevrolet Corvette Z06, after an internet search conducted from their home in Pensacola, Florida. The Consumers initiated, negotiated and consummated the transaction, in the words of Ms. Notaro, while "sitting at [their] kitchen table," by means of telephone, internet, facsimile and FedEx. The vehicle was purchased from Kerbeck Chevrolet, located in Atlantic City, New Jersey. As part of their purchase, the Consumers paid Florida sales tax, Florida title and registration fees, and a separate $50.00 Florida county tax. The vehicle was registered and titled in Florida. The Consumers paid no taxes to the State of New Jersey. The contract for purchase of the automobile included both an $850.00 destination charge that would have covered delivery of the vehicle to the Consumers in Florida, and a $490.00 charge for "museum delivery" of the vehicle, which was a special program package available to new Corvette owners, giving them the opportunity to pick up their newly-acquired vehicle at the National Corvette Museum in Bowling Green, Kentucky. The Consumers indicated that their vehicle arrived at the museum for the "museum delivery" directly from the Corvette plant, and was never delivered to the New Jersey dealership. Neither the Consumers, nor the vehicle they purchased, have ever been to New Jersey. The Consumers picked up the vehicle at the Museum and drove it to Florida. The Manufacturer filed an Amended Answer asserting that the Consumers' claim was not filed in good faith because "the purchase transaction took place in the State of New Jersey and the vehicle was delivered in the State of Kentucky." At hearing, counsel for the Manufacturer urged the Board to find that the Consumers' vehicle was not "sold in this state" and was therefore not a "motor vehicle" for purposes of the Lemon Law. The uncontroverted evidence established that the Consumers purchased the vehicle without ever leaving their home in Florida. If not for the Consumers choosing the "museum delivery" package, the vehicle would have been delivered to the Consumers in Florida. While the Manufacturer urged the Board to find that the vehicle was not sold in this state, it presented no evidence that would more closely tie the transaction to another state. Looking at the totality of the circumstances presented in this case, the Board concluded that the Consumers' vehicle was "sold in this state" and therefore was a "motor vehicle" as contemplated under the Lemon Law.

Cecil v. Volkswagen/Audi of America Inc., 2009-0336/FTL (Fla. NMVAB January 22, 2010)
The Consumer, a resident of North Carolina, wanted to purchase a lazer blue, manual transmission Volkswagen Jetta. Through an internet search, he located the vehicle he wanted at

Gunther Motor Company in Fort Lauderdale, Florida. Gunther faxed the necessary paperwork to the Consumer; he signed it and faxed it back to Gunther. The Consumer took delivery of the vehicle in Fort Lauderdale, Florida, and paid the $2.00 Florida Motor Vehicle Warranty Act fee and was given the accompanying pamphlet. He also paid Florida license and title fees. The Manufacturer, through counsel at the hearing, requested that the case be dismissed, asserting that the vehicle was not sold in this state, and therefore was not a "motor vehicle" as defined under the Lemon Law. The Board found that the facts of this case, considered in their totality, supported a conclusion that the Consumer's vehicle was "sold" in Florida as is contemplated by the statute. Therefore, the vehicle was a "motor vehicle" as defined by Lemon Law and the Manufacturer's request for dismissal on those grounds was denied.

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

Olson v. Chrysler Group LLC , 2009-0420/FTM (Fla. NMVAB February 4, 2010)
The Consumer complained of a brake pedal fade in his 2008 Dodge Ram 1500 pickup truck. He testified that the brake pedal dropped when the vehicle was stopped at a traffic light or stop sign. According to the Consumer, the pedal dropped approximately two inches and on occasion, dropped all the way to the floor. He used the vehicle primarily to carry goods to and from the airport and was concerned that the brake pedal fade increased the travel/stopping distance of the vehicle. He had not been using the vehicle for the purposes he originally intended. 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 the master brake cylinder was replaced "to eliminate doubt" regarding any safety concerns. Additionally a replacement brake booster was ordered to "rule out" any customer concerns. On November 3, 2009, the brake booster was damaged in shipment and a replacement brake booster was ordered which arrived on November 10, 2009, similarly damaged. A third replacement was ordered on that date. According to the Manufacturer's witness, if the Consumer was towing a heavier load, he could experience more brake fade, but not an "abnormal" amount of fade. The Board concluded that the brake pedal fade was a defect or condition that substantially impaired the use and safety of the vehicle, and as such, it constituted a nonconformity within the meaning of the statute. Accordingly, the Consumer was awarded a refund.

Ruozzo v. Chrysler Group LLC , 2009-0414/WPB (Fla. NMVAB March 5, 2010)
The Consumer complained of a foul odor that seemed to emanate from either the air conditioning vents when the air conditioner was operating, or possibly from the dashboard in her 2009 Dodge Journey SX. The Consumer testified that the dashboard by the steering column was "breaking down" and it felt "oily or tacky." She believed that the odor possibly was coming from whatever chemical was being released from the area of the dashboard that was breaking down. The odor irritated the mucous membranes in her eyes, nose, mouth and throat. The odor got worse as the ambient temperature got warmer, and when the temperature was over 78 degrees, the irritation returned. The odor also irritated other passengers in the vehicle, and the Consumer's daughter would sneeze uncontrollably whenever she was in the vehicle. The Consumer said she was tested by an allergist and the results were that she had no allergies. Her symptoms improved when she did not enter the vehicle for several days. The Manufacturer contended that the vehicle did not

have a defect that substantially impaired its use, value or safety. The Manufacturer's witness, testified that the technician who verified the odor noted that it was a "non-mildew odor." According to the witness, the substance that was used to clean the evaporator coil/core, was meant to coat and deodorize the air conditioning system, but not to kill mildew. A different Manufacturer's witness conducted the Manufacturer's prehearing inspection. He felt where the dashboard was sticky but he did not detect an odor. It was the Manufacturer's position that it builds vehicles for the general public, not individuals. A majority of the Board concluded that the foul odor emanating from inside 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 within the meaning of the statute. Accordingly, the Consumer was awarded a refund.

Domatov v. Toyota Motor Sales, USA – Lexus Division , 2009-0403/FTL (Fla. NMVAB February 5, 2010)
The Consumers complained of engine noises and an oil leak that culminated with the engine seizing in their 2007 Lexus IS350. Ms. Domotov testified that she was driving the vehicle when it started to lose power and would not accelerate. The vehicle was towed to J.M Lexus, the dealership from which she purchased the vehicle, and the Manufacturer's authorized service agent. She was told that the engine had "seized," and that she would have to pay for the repair, which would be about $15,000.00, but she was never given a written estimate. The vehicle remained at the dealership until someone from Lexus told her to pick up her vehicle. The Consumers provided proof that the engine oil was changed on numerous occasions at independent facilities. Oil changes were performed at 5,017 miles, 9,100 miles, 12,575 miles, 15,344 miles and 19,000 miles. The Manufacturer asserted that the Consumers neglected to properly maintain the vehicle, thereby causing the engine to seize. The Manufacturer's witness testified the Manufacturer offered free oil service at 1,000 miles and 5,000 miles, but the Consumers never brought the vehicle to the Manufacturer's authorized service agent for those services, or any other engine oil changes. He claimed the engine failure was the result of lack of maintenance coupled with the wrong oil filter being used in the vehicle. The Board concluded that the engine noises, engine oil leak, and engine seizing was a defect that substantially impaired the use, value and safety 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. The Manufacturer's allegation that the Consumers neglected to change the engine oil was not supported by the evidence. Accordingly, the Consumers were awarded a refund.

Recreation Vehicle: 681.1096(4), F.S.:

Borew v. Ford Motor Company and Pleasure-Way Industries, LTD , 2010-0010/WPB (Fla. NMVAB March 29, 2010)
This claim involving a recreation vehicle was heard by the Board because the RV Mediation/Arbitration Program was not qualified by the Department of Legal Affairs for Pleasure-Way Industries. The vehicle, a Class B motorhome built by Pleasure-Way on a Ford E-350 Cargo Van chassis, had a severe wandering/failure to track straight on the road when driven at highway speeds, and there was white dust emitting from the dash air conditioner vents. Neither Manufacturer disputed the existence of the defect. The affirmative defense of " no substantial impairment" was not asserted by Pleasure-Way, and was withdrawn by Ford at the hearing. The

primary contention of each Manufacturer was that the nonconformity was the result of a defect in one or more components manufactured and warranted by the other Manufacturer. The Board found both defects to be nonconformities, concluding that the white dust from the dash air conditioner was a defect in the Ford manufactured component, and the wandering/failure to track straight at highway speeds was the result of improper weight distribution between the front and rear axles, which was attributable to the modifications made by Pleasure-Way. Because the white dust nonconformity was presented for only one repair attempt, Ford was dismissed from the case on the reasoning that there had not been a reasonable number of attempts undertaken to repair that nonconformity. The remaining nonconformity was subjected to a reasonable number of attempts, but was not corrected by Pleasure-Way; therefore, Pleasure-Way was held liable for payment of the refund to the Consumers.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Borew v. Ford Motor Company and Pleasure-Way Industries, LTD , 2010-0010/WPB (Fla. NMVAB March 29, 2010) (*See, "Nonconformity" above)*
The Consumers requested reimbursement of $604.00 as the cost of insurance they alleged they had purchased for the recreation vehicle. In addition, they sought reimbursement of $250.00 for renovations to the RV's bathroom and $157.87 for LED lights. The Board denied the request for insurance reimbursement as not having been wholly incurred as a result of the acquisition of the vehicle. The other reimbursements were granted.

Notaro v. General Motors Company – Chevrolet Motor Division , 2009-0432/PEN (Fla. NMVAB February 23, 2010) *(See "Jurisdiction" above)*
In order to acquire the vehicle, the Consumers paid $77,058.28 in cash. The amount paid included a $490.00 "museum delivery" charge, reimbursement of which was objected to by the Manufacturer. The Consumers also sought reimbursement of $182.75 for a lift pad; $1,736.47 for tires; and $80.51 for an alignment. The Manufacturer also objected to payment for the lift pad, tires and alignment. The Manufacturer's objections to reimbursing the Consumers for the "museum delivery" charge, the tires and the alignment were granted; its objection to reimbursing the Consumers for the lift pad was denied

Incidental Charges §681.102(8), F.S.

Notaro v. General Motors Company – Chevrolet Motor Division , 2009-0432/PEN (Fla. NMVAB February 23, 2010) *(See "Jurisdiction" above).*
The Consumers sought reimbursement of $170.29 for monthly charges paid for OnStar's "Safe and Sound" package, to which the Consumers subscribed because of their concerns with the vehicle's safety. The Manufacturer objected to reimbursement for the OnStar package. The Manufacturer's objection was denied and the Consumers were awarded the $170.29.

Borew v. Ford Motor Company and Pleasure-Way Industries, LTD , 2010-0010/WPB (Fla. NMVAB March 29, 2010)
The Consumers sought reimbursement of the following as an incidental charge: $1,101.30 for an expert witness fee, which was granted. The Consumers submitted an additional invoice of $350.00 from the expert witness for additional preparation, hearing and travel time, because the hearing lasted longer than was originally estimated, to which Pleasure-Way objected. The initial invoice contemplated a four-hour hearing; however, the initial hearing was seven hours long. The additional expert witness fees of $350.00 were reduced by the Board to $200.00, representing reimbursement of four additional hours of hearing time at $50.00 per hour. In addition, the Consumers requested, and were awarded $663.00 for fuel charges incurred to take the vehicle in for repair of the nonconformity.

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

Borew v. Ford Motor Company and Pleasure-Way Industries, LTD , 2010-0010/WPB (Fla. NMVAB March 29, 2010)
The Consumers asserted that no offset should be charged, because none of the mileage on the vehicle was attributable to them. All of the miles driven were either pre-delivery miles or were driven to and from repair facilities, weight scales and test drives, all attributable to the wandering/failure to track straight nonconformity. Upon review of the evidence, the Board agreed with the Consumers, concluding, "Inasmuch as virtually all of miles accrued on the vehicle represented mileage attributable to the wandering/failure to track straight down the road at highway speeds nonconformity, there are zero miles attributable to the Consumers and no offset for use is payable to Pleasure-Way Industries."

MISCELLANEOUS PROCEDURAL ISSUES:

Domatov v. Toyota Motor Sales, USA – Lexus Division , 2009-0403/FTL (Fla. NMVAB February 5, 2010) *(See "Nonconformity" above).*
During the testimony of the Manufacturer's witness, the Manufacturer sought to have the Board consider certain items that he brought with him to the hearing, specifically: a container he maintained had engine oil that was taken from the engine of the Consumer's vehicle, a clear plastic bottle with a black substance in it he claimed was a sample of the engine oil, photographs of the engine which he said showed an "incorrect" engine oil filter was installed in the vehicle, and an oil filter he said was the "correct" one. The items, or notice of an intent to seek consideration of them, were not provided to the Board or to the opposing party prior to the hearing. The reason given for the late introduction of the evidence was that the hearing was "informal." The Consumer objected to the Board considering the late-submitted items. Paragraph (9), *Hearings Before the Florida New Motor Vehicle Arbitration Board* requires that "[a]ll documents supporting defenses raised shall be attached to the Manufacturer's Answer form or submitted with the Manufacturer's Prehearing Information Sheet." Paragraph (10) provides that "[t]he original Manufacturer's Prehearing Information Sheet, with any attachments, must be *received* by the Board Administrator no later than 5 days before the hearing, and a copy with all attachments must be *received* by the consumer or their attorney no later than 5 days before the hearing." Paragraph (10) further provides that if the manufacturer fails to provide any documents

to the Board Administrator and the opposing party or attorney within the time specified in the rule, the Board may decline to consider any such documents unless good cause is shown for the failure to comply. There having been no good cause shown, the items were not considered by the Board.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2010 - June 2010 (2nd Quarter)

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

Salvat v. American Honda Motor Company, 2010-0062/FTL (Fla. NMVAB June 10, 2010)
The Consumer complained of a pull to the right that was very severe at first but, after repair, was moderate in his 2009 Acura MDX. The Consumer testified he must keep his hands on the steering wheel in order to keep the vehicle in whichever lane the vehicle is traveling. He test drove the vehicle with someone from the dealership, and even though the vehicle was being driven on the wrong side of the road, it still pulled to the right. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety; rather, the vehicle had a minor drift. The Manufacturer's witness testified he was present when the vehicle was test driven at the Manufacturer's final repair attempt. The vehicle's alignment was not checked at the final repair attempt because, according to the witness, just resting one's hands on the steering wheel was all that was necessary to keep the vehicle traveling straight. The Board concluded that the pull to the right was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity. Accordingly, the Consumer was awarded a refund.

Mostow v. Maserati North America, Inc., 2010-0039/FTL (Fla. NMVAB April 14, 2010)
The Consumer complained that the leather was peeling on various interior parts of his 2009 Maserati Quattroporte. After having the vehicle for a short time, the Consumer noticed the leather peeling off the door panels, the console and the rear deck/hatshelf in the back seat. Little by little, the leather started peeling off every place where there was leather. The Consumer talked with someone at the dealership and was told that a different glue used in the manufacturing process was causing the peeling. The leather was reattached but started peeling again. Thereafter, new door panels, dash and hatshelf were shipped from Italy and installed. The Consumer was extremely unhappy with the workmanship of the installation of the new parts. The gear shift handle in the center console came off in his hand, the door handle on the passenger door did not match the door handle on the driver's side door, the trim around the doors and windows was crimped, not smooth, as before; velcro stuck out where there was none before, and the leather was peeling once again. The Manufacturer contended that the vehicle did not have a defect that substantially impaired its use, value or safety. Rather, the Manufacturer maintained the Consumer's complaint was a "cosmetic" issue. The Manufacturer acknowledged other vehicles were having the same problem with the leather peeling. Maserati only had one individual who was qualified to do leather work, so spray contact cement was used to make temporary repairs until the new parts came from Italy. Those pieces, which were manufactured for this vehicle's VIN, were factory assembled and came with the leather already attached. Maserati's witness agreed "some mistakes" were made in the installation of the new parts, but he did not believe the "mistakes" were substantial. The Board concluded that the leather peeling

was a defect or condition that substantially impaired the use and value of the vehicle, thereby constituting a nonconformity. Accordingly, the Consumer was awarded a refund.

McClain v. Chrysler Group LLC , 2010-0063/TLH (Fla. NMVAB May 7, 2010)
The Consumer testified that while he was driving his 2008 Chrysler 300 on a local street, he heard a noise coming from the engine, followed by the oil warning light illuminating, the engine seizing and the car breaking down. The vehicle was towed to the Manufacturer's authorized service agent on that day. The Manufacturer asserted the statutory affirmative defense that the nonconformity was the result of abuse or neglect of the vehicle by persons other than the Manufacturer or its authorized service agent. In support of this defense, Chrysler's witness testified that the damage to the vehicle's engine was a result of the oil not being changed at intervals recommended by the Manufacturer in the vehicle's Owner's Manual, which advised that the oil be changed every 6,000 miles. The Manufacturer produced photographs of oil sludge from the engine of the Consumer's vehicle. In rebuttal, the Consumer testified that he always had the oil changed at least every 6,000 miles, often every 3,000 miles, and produced the receipts from all but one of his oil change services. The Board resolved the evidentiary conflict in favor of the Consumer, concluding that the Manufacturer's evidence was not sufficient to prove that the engine failure was the result of a failure by the Consumer to maintain the vehicle via regular oil changes inasmuch as the Consumer's evidence established that regular oil changes were performed at the intervals recommended by the Manufacturer. The engine failure caused by the engine seizing was a defect that substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity; consequently, a refund was awarded.

Marsal v. BMW of North America LLC , 2009-0394/WPB (Fla. NMVAB April 23, 2010)
The Consumers' 2008 BMW M3 intermittently went into "limp" or "failsafe" mode; that is, the RPM's would not go over 2,500 or 3,000 and the vehicle accelerated "extremely" slow. In November 2009, when the Consumer was driving the vehicle, he was merging into traffic when all the lights on the dash lit up and the vehicle accelerated so slowly that it was almost rear ended by the car behind him. According to the Consumer, the vehicle went into failsafe mode on two other occasions after November 2009. The Manufacturer asserted the statutory affirmative defense that the alleged intermittent poor acceleration was the result of unauthorized modification of the vehicle by persons other than the Manufacturer or its authorized service agent. The Manufacturer's witness testified that, when the vehicle came in for servicing on October 17, 2008, fault code 2B14 had recorded, notifying that the idle speed actuator was defective. The idle speed actuator was replaced on October 20, 2008, and the fault code was not present in the vehicle's on-board computer at either the final repair attempt, or the Manufacturer's prehearing inspection. A second Manufacturer's witness testified that when the vehicle came in for servicing on September 7, 2009, the dash was "lit up like a Christmas tree" and the engine was in limp mode. They found a "pinched" wire so they insulated the wire and reprogrammed the connecting module. The witness believed the wire got pinched when someone other than the Manufacturer or the Manufacturer's authorized service agent, installed aftermarket lights on the vehicle; however, the witness did not see any aftermarket lights on the vehicle. The Board concluded that the intermittent poor acceleration was a defect or condition that substantially impaired the use, value and safety of the vehicle, thereby constituting a nonconformity. The Manufacturer's assertion was rejected as unsupported by the evidence.

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

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

Feltenberger v. Ford Motor Company, 2010-0003/PEN (Fla. NMVAB April 13, 2010)
A defective pre-paint preparation or fabrication process at the factory left foreign bodies or particles trapped under the paint on the Consumer's 2008 Ford Expedition, which the Board found to be a nonconformity. The vehicle was presented to the Manufacturer 's authorized service agent for repair of the defective paint job on March 17-25, 2009, July 23-28, 2009, and September 30, 2009, when the vehicle was inspected and the Consumer was told to bring vehicle back at a more convenient time. The Manufacturer asserted that it "was not given three repair attempts plus a final repair attempt," because when the Consumer took the vehicle to the authorized service agent on September 30, 2009, "[n]o repairs were made ... [and] no repair order was generated for the visit." The applicable rule defines a "repair attempt" to include "[a]n examination of a reported nonconformity, without a subsequent adjustment or component replacement…if it is later shown that repair work was justified. " Rule 2-30.001(2)(b), F.A.C. The Manufacturer's assertion was rejected by the Board; the September 30, 2009, examination by the authorized service agent was a repair attempt. The Manufacturer having failed to correct the nonconformity within a reasonable number of attempts, the Consumer was awarded a refund.

Appleton v. Toyota Motor Sales USA, Inc., Lexus Division, 2010-0075/JAX (Fla. NMVAB June 17, 2010)
The erratic shifting of the transmission in the Consumer's 2009 Lexus RX350 was found to be a nonconformity. The evidence established that the nonconformity was initially taken to the Manufacturer's service agent for repair on one occasion, at which time no repair was made. When the Consumer again contacted the Manufacturer seeking repair, he was told there had been no problem previously found and that Lexus would take no further action. Following this contact, and after written notice from the Consumer, the Manufacturer undertook the statutory final repair attempt, at which time no repair was performed. The erratic shifting of the transmission continued to exist after the final repair attempt. Under these circumstances, the Board found that a reasonable number of attempts was undertaken. The Manufacturer having failed to correct the nonconformity within a reasonable number of attempts, the Consumer was awarded a refund.

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

Kay v. BMW of North America LLC, 2010-0022/WPB (Fla. NMVAB May 4, 2010)
The Manufacturer stipulated that the Consumer's 2008 BMW 535i had an engine condition which manifested itself in the vehicle lurching forward upon acceleration, reduced power on acceleration, a hard start, defective fuel injectors and insufficient fuel pressure, and that the engine condition was a nonconformity. On December 18, 2009, the Consumer sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification on December 22, 2009, but did not respond to the notification until January 4, 2010, beyond the statutorily required 10-day response

time. No final repair attempt was conducted. At the hearing, the Manufacturer, through counsel, initially asserted that the Consumer's claim should be dismissed, arguing the Consumer "denied" the Manufacturer the opportunity for a final repair attempt. The Manufacturer asserted its response to the Consumer's written notification was "timely," given the intervening holiday and weekend. The evidence established that the Consumer sent the required written notification to the Manufacturer after at least three unsuccessful attempts to repair the nonconformity. The Manufacturer received the notification, but did not respond until 14 days after its receipt. The Manufacturer having failed to respond and give the Consumer the opportunity to have the vehicle repaired within the time required by the statute, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. Accordingly, the Manufacturer's request that the Consumer's case be dismissed was denied and the Consumer was awarded a refund.

Wirt v. Hyundai Motor America, 2010-0074/TPA (Fla. NMVAB May 26, 2010)
The Consumer's 2007 Hyundai Sonata had an intermittent electrical and transmission lock-up condition, which the Board found to be a nonconformity. On September 18, 2009, the Manufacturer received written notification from the Consumer giving the Manufacturer a final opportunity to repair the vehicle. On September 28, 2009, at 7:00 PM, a Manufacturer letter was delivered to the Consumer, directing her to bring the vehicle to a designated repair facility on October 1, 2009 at 9:00 AM, for the Manufacturer's final repair attempt. The Consumer had a previously scheduled doctor's appointment for that date and she called the Manufacturer to so advise. She was told that the Manufacturer would send her another letter; however, she never received a letter and she was never re-contacted by the Manufacturer or its authorized service agent. When she attempted to bring the vehicle in for service on several subsequent occasions, she was told by the Manufacturer's authorized service agent that they would not be dealing with her anymore. At the hearing, the Manufacturer's representative testified that he had no personal knowledge of the subject vehicle except for some notes relayed to him from the Hyundai Consumer Call Center. Those notes indicated that someone tried to call the Consumer's home to try to reschedule the Manufacturer's final repair attempt for October 22, and spoke to the Consumer's husband. However, the representative admitted that he had no personal knowledge of whether the Consumer ever received a call. The Board found that the evidence established that the Consumer sent the required written notification to the Manufacturer after at least three attempts to repair the nonconformity, that the Manufacturer received the notification, and that the Manufacturer timely responded to the notification. However, the greater weight of the evidence established that the Manufacturer failed to 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 Manufacturer's response. Accordingly, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply and a refund was awarded to the Consumer.

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

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

Tendler v. BMW of North America LLC , 2010-0082/WPB (Fla. NMVAB May 19, 2010)
The Consumer complained of engine, acceleration and electrical problems in his 2008 BMW X5. The Consumer admitted that, on September 5, 2009, he drove his vehicle through a water puddle and although much smaller cars were able to drive through the puddle, his vehicle's engine malfunction light came on and the engine stalled while he was driving through the puddle. He was advised by the Manufacturer's authorized service agent that water had gotten into his engine and the engine had to be replaced. The Consumer filed a claim with his insurance company, which paid approximately $24,486.80 for the engine replacement. The Consumer further testified that, since the engine replacement, he has experienced acceleration, engine and electrical problems, all of which were repaired by the Manufacturer's authorized service agent at no cost to him and under the Manufacturer's warranty. The Manufacturer asserted the statutory affirmative defense that the alleged engine, acceleration and electrical defects were 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; specifically, that on September 5, 2009, the subject vehicle was driven through deep water causing hydro-lockup. As a result of this incident, the engine stalled and was replaced. The vehicle's repair history revealed no engine condition or defect prior to water getting into the engine. The Owner's Manual for the subject vehicle stated the following with respect to driving through water, "Do not drive through water on the road if it is deeper than 20 in/50cm, and then only at walking speed at the most. Otherwise, the vehicle's engine, the electrical system and the transmission may be damaged." The Board concluded the engine, acceleration and electrical problems complained by the Consumer were the result of an accident; specifically, the Consumer driving through a water puddle causing water damage to the engine, and as such the resulting problems did not constitute one or more nonconformities within the meaning of the law. The case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Collateral Charges §681.102(3), F.S.

Cameron v. BMW of North America LLC , 2010-0079/WPB (Fla. NMVAB May 20, 2010)
The Consumer sought reimbursement as a collateral charge of $999.99 for "Liquid Glass Treatment" (the receipt described the treatment in relevant parts as "hand wash & dry, clean windows in & out and hand wax, buff and detail paint finish.") to which the Manufacturer objected. The Consumer's request was denied by the Board as not constituting a collateral charge as defined by the statute.

Incidental Charges §681.102(8), F.S.

Mendez v. General Motors Company, Chevrolet Motor Division, 2010-0070/ORL (Fla. NMVAB May 7, 2010)
The Board found the musty or mildew odor emitted by the air conditioner in the Consumer's 2008 Chevrolet Malibu to be a nonconformity and awarded the Consumer a refund. The Consumer sought reimbursement of $35.00 as an incidental charge, which represented a health insurance co-pay amount paid when he sought treatment for nasal irritation caused by the defect. The Board awarded the Consumer the $35.00 as a direct result of the nonconformity.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

July 2010 - September 2010 (3rd Quarter)

NONCONFORMITY 681.102(16), F.S. (2009)

Hall v. Nissan Motor Corporation USA, 2010-0158/STP (Fla. NMVAB August 9, 2010)
The Consumers complained that the front passenger "airbag off" light in their 2009 Nissan Rogue intermittently illuminated regardless of the size or weight of the passenger. When the light was illuminated, the air bag would not deploy. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. In support of that assertion, the Manufacturer's witness testified that the vehicle was operating "as designed" by distinguishing between a red airbag off warning light which warns of malfunctions and an amber airbag off light which displays for informational purposes only. According to the witness, if there was a malfunction in the system, a red diagnostic trouble alert code would have been set. The Consumers complained of an amber light illumination; therefore, no repairs were performed on the vehicle. The Board concluded that the intermittent front passenger airbag off light illumination was a defect or condition that substantially impaired the safety of the vehicle. The intermittent nature of the light illumination, even when the passenger's size and weight were not within the parameters set to turn off the airbag, and the fact that the illumination indicated the air bag would not deploy, reasonably caused the Consumers to be concerned for passenger safety. The Manufacturer's assertion that the light was functioning normally was not born out by the evidence and, in any event, did not prove the statutory affirmative defense that the vehicle did not have a nonconformity. Accordingly, the Consumers were awarded a refund.

Schifano v. BMW of North America, LLC, 2010-0168/ORL (Fla. NMVAB September 10, 2010)
The Consumer complained that the computer in his 2008 BMW 528i intermittently advised that there was a malfunction in the passenger safety restraint system (SRS). This was sometimes accompanied by illumination of the passenger airbag light. The Manufacturer contended that the Consumer, or someone on his behalf, had tampered with an electrical connector which caused the recurring illumination of the airbag light. The Manufacturer's witness explained that there was a wire that ran along the passenger SRS cable which monitored the cable. There were connectors at each end of the monitoring wire, one in the trunk, and one under the hood. The recurring faults found in the Consumer's vehicle indicated there was an open circuit for a connector at the end of the monitoring wire. The Consumer denied having any knowledge of mechanics or how the SRS worked and he also denied tampering with the tape or connector. A majority of the Board concluded that the intermittent warning of a malfunction in the SRS was a defect or condition that substantially impaired the use, value and safety of the vehicle. The Manufacturer's evidence in support of its defense that the Consumer or someone on his behalf tampered with the connector was not sufficient to overcome the credible evidence and testimony presented by the Consumer; therefore, the Board rejected the defense. Accordingly, the Consumer was rewarded 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.

Darsey v. Ford Motor Company, 2010-0146/TPA (Fla. NMVAB August 11, 2010)
The Consumer purchased a new 2009 Ford F-150 pickup truck, and complained that, intermittently, when braking, the RPMs decreased and it felt like the vehicle kept pulling and would not stop. The Consumer described one incident in which someone cut him off in traffic on a very busy local road, so he slammed on the brakes, but the vehicle would not stop. At that time, the engine lost power, all of the warning lights on the dashboard illuminated and black smoke poured out of the tailpipe. After this incident, he got a Vehicle Health Report through Ford's Sync system, which advised he should seek repair for an "urgent brake warning." The Consumer subsequently received two more "urgent brake warning" Vehicle Health Reports, but the service agent was "unable to verify the concern," and no repairs were made. The vehicle was presented to the Manufacturer's authorized service agent for repair of the intermittent braking defect on three occasions, twice after the Manufacturer's receipt of written notification of the defect from the Consumer. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle and that there "have not yet been an unreasonable number of repairs." The Manufacturer's authorized service agent had not inspected the truck for a brake problem; rather, they treated the complaint that "the vehicle feels like it does not want stop when braking" as a transmission complaint. A majority of the Board concluded that the intermittent braking defect substantially impaired the use, value or safety of the vehicle, thereby constituting a nonconformity. The Manufacturer was given a total of three opportunities to repair the intermittent braking nonconformity, two such attempts occurring after the Manufacturer's receipt of written notification from the Consumer, and the nonconformity was not repaired. The Consumers were awarded a refund.

Alpizar v. Toyota Motor Sales USA, 2010-0164/MIA (Fla. NMVAB August 12, 2010)
The Consumer's 2008 Toyota Sienna had an intermittent no start/hard start nonconformity which was accompanied by the illumination of the "check engine" warning light and which may have been triggered by the sliding doors, radio and DVD malfunctioning or being inoperable, and the transmission shifting harshly. The vehicle was presented to the Manufacturer's authorized service agent for repair of the nonconformity three times, once after written notification to the Manufacturer. During that repair, no work was performed; however, as credibly testified to by the Consumer, the no start/hard start and related electrical malfunctions continued to exist after the final repair attempt, as evidenced by three failures to start after the last repair attempt. Under the circumstances, the Board found that three 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. Consequently, the Consumer was awarded a refund.

Thompson and Black v. Toyota Motor Sales USA, 2010-0115/FTL (Fla. NMVAB July 23, 2010)
The Consumer purchased a new 2009 Toyota Camry that intermittently, when she would take her foot off the accelerator, would not slow down, but would continue to accelerate and she would have to depress the brake pedal several times to slow down the vehicle. She described the problem as occurring "sporadically" and almost resulting in an accident. The Board concluded that the intermittent continuing acceleration was a defect or condition that substantially impaired the use, value and safety of the vehicle, and as such, it constituted a nonconformity. The first time the vehicle was presented to the Manufacturer's authorized service agent for repair, the Consumer was told they were not making repairs to accelerator pedals as yet. A month later, she brought the vehicle to a different Manufacturer 's authorized service agent and was given a business card with the notation that she would be on a waiting list for a repair; however, she was never subsequently contacted. Neither service agent prepared a written repair order for these attempts contrary to the requirement of Section 681.103(4), Florida Statutes. Under the circumstances, it would have been fruitless for the Consumer to go to yet another service agent; instead, she sent written notification directly to the Manufacturer, to give the Manufacturer a final opportunity to repair the vehicle. The Consumer's address was on the written notification, which the Manufacturer received; however, the response was sent to the wrong address and the Consumer did not receive it within the statutory 10 days. The Manufacturer having failed to timely respond, the requirement that the Manufacturer be given a final attempt to cure the nonconformity did not apply. The Board looked to the two repair attempts prior to the written notification to determine whether a reasonable number of attempts was undertaken. Nothing was done by the Manufacturer's authorized service agents to repair the nonconformity during those two attempts and if it was, there was no documentation of it; consequently, the Board concluded that the Manufacturer failed to correct the nonconformity within a reasonable number of attempts and 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.

Milgrim v. Toyota Motor Sales USA, 2010-0135/WPB (Fla. NMVAB July 23, 2010)
The Consumer's 2009 Toyota Camry had a sticky gas pedal, a sticking gear shift, and the brakes did not feel "right," all of which were found to be nonconformities. The vehicle was out of service by reason of repair of the nonconformities for a total of 47 cumulative days. After 15 or more days out of service, the Consumer sent written notification to the Manufacturer to so notify the Manufacturer. The Manufacturer received the notification and thereafter, the vehicle was subjected to inspection by the Manufacturer's authorized service agent. At the hearing, the Manufacturer contended that there were not three repair attempts or 15 days out of service before the Consumer sent in the written notification. The Board rejected the Manufacturer's contention as to the days out of service and presumed that a reasonable number of attempts had been undertaken to conform the vehicle to the warranty. The vehicle having been out of service for repair of nonconformities for 47 days, the Consumer was awarded a refund.

Cohen v. BMW of North America, LLC, 2010-0144/MIA (Fla. NMVAB August 9, 2010)
The Consumer complained of an electrical condition in his 2008 BMW 528i, which the Board found to be a nonconformity. The vehicle was out of service by reason of repair of the nonconformity for a total of 28 cumulative out-of-service days. 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. Following receipt of the notification, the Manufacturer or its authorized service agent had more than one opportunity to inspect or repair the vehicle, as evidenced by the repair orders in the file. At the hearing, the Manufacturer asserted that this matter should be dismissed, because the Consumer did not accord it a "final repair attempt." The Board rejected the contention, concluding that the Consumer had met the requirements of Section 681.104(1)(b), Florida Statutes. The Consumer was awarded a refund.

What Constitutes Written Notification Under §681.104(1)(a), & Final Repair Attempt §681.104(1)(a),

Chassin v. Volkswagen/Audi of America Inc., 2010-0201/STP (Fla. NMVAB September 27, 2010)
The Consumer complained that the electric convertible top was inoperable in his 2009 Audi TT Roadster. After three unsuccessful repair attempts, the Consumer mailed a Motor Vehicle Defect Notification form to the following address: "Audi of America, P.O. Box 17497, Baltimore, MD 21297." This was not the address given in the Manufacturer's written warranty as the address to which written notice under Florida's Lemon Law should be sent. Nevertheless, the Manufacturer eventually received the notification and within 10 days thereafter, contacted the Consumer to arrange for a final repair attempt. The Consumer advised the Manufacturer that "Audi was out of compliance[,]" and that he had "retained an attorney[,]" and then he disconnected the call. The vehicle was not presented for a final repair attempt. Concluding that the Manufacturer had complied with the statute and was entitled to an opportunity for a final repair attempt, the Board dismissed the claim.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(8), F.S.

Vazquez v. Toyota Motor Sales USA, 2010-0150/JAX (Fla. NMVAB July 22, 2010)
The Board found the steering condition in the power assist system that resulted in the vehicle unexpectedly drifting right or left in the Consumer's 2010 Toyota Corolla to be a nonconformity and awarded the Consumer a refund. The Consumer sought reimbursement of $160.00 ($10.00 per hour) for two days of lost wages to attend the hearing and the NCDS hearing. The Consumer did not provide any documentation to verify the lost wages and the Manufacturer objected to the request for reimbursement as being speculative. The Consumer's unsubstantiated request for reimbursement of lost wages was denied by the Board as unreasonable.

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

Kruger v. Toyota Motor Sales USA, 2010-0147/WPB (Fla. NMVAB September 23, 2010)
At the time of purchasing their 2009 Toyota RAV4, which was declared a lemon by the Board, the Consumers traded in a 1995 Mercury Villager vehicle for which they received a "net trade-in allowance" of $4,500.00, as reflected in the purchase contract. The Manufacturer was not satisfied with the "net trade-in allowance" reflected in the purchase contract, and requested that the NADA Official Used Car Guide in effect at the time of the "trade in" be used to calculate the trade-in allowance. The Consumers objected, asserting that the NADA Guide was not applicable because the $4,500.00 allowance credited to them was money received pursuant to the United States government's "cash for clunkers" program. The Manufacturer's request that the NADA value be substituted for the "cash for clunkers" "incentive" payment for the Consumers' trade in was denied by the Board.

MISCELLANEOUS PROCEDURAL ISSUES:

Snow v. Ford Motor Company, 2010-0119/TLH (Fla. NMVAB August 17, 2010)
The Manufacturer sought to introduce into evidence the results of the Manufacturer's prehearing inspection. Pursuant to Paragraph (15) of *Hearings Before the Florida New Motor Vehicle Arbitration Board*, "the Consumer must be present during the vehicle inspection, unless he or she expressly waives the right to be present in writing." The Consumers were not present for the inspection and did not waive in writing their right to be present. The Consumers' counsel objected to the documents being submitted into evidence based on the aforementioned rule. Accordingly, the prehearing inspection documents were not considered by the Board and the Manufacturer's witness was not permitted to testify regarding the prehearing inspection.

OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2010 - December 2010 (4th Quarter)

JURISDICTION:

Consumer §681.102(4)F.S. & Motor Vehicle §681.102(15), F.S.

Cerge v. Land Rover of North America, 2010-0233/FTL (Fla. NMVAB November 16, 2010)
The vehicle, a 2008 Range Rover Sport HSE, was originally leased new by Dr. George on July 18, 2008, in West Palm Beach, Florida. Mileage at the time of delivery of the vehicle to the original lessee was 148 miles. The lease was for more than one year with the lessee responsible for having the vehicle repaired. On December 1, 2009, the Consumer, Christina Cerge, located an advertisement for the vehicle on the web site LeaseTraders.com. The Consumer paid a fee to Auto Lease Brokers in order to secure a meeting with the original lessee. At that meeting, the Consumer was told by the original lessee that he had leased the vehicle for family use, and now wanted to get a bigger car with a third row. Subsequently, the Consumer decided to assume the vehicle lease and, after she paid an assumption fee in the amount of $1,927.33 to the lessor, Fifth Third Bank, she took possession of the vehicle. Mileage at the time of her assumption of the lease and possession of the vehicle was 17,000 miles. The Consumer was provided with Land Rover of North America's written express, limited warranty. According to the Consumer, the vehicle was used for personal and family purposes. The Manufacturer asserted that Ms. Cerge was not a "Consumer" as defined by the Florida Lemon Law, and the vehicle was not a "motor vehicle" as defined by the law, because it was not a new vehicle when leased by the Consumer. The Board rejected both of the Manufacturer's contentions. The vehicle was leased to the original lessee as new and the Consumer merely assumed the lease directly from the original lessee. LeaseTraders.com and Auto Lease Brokers acted solely as advertising agents, and not as a dealer that leased the vehicle for purposes of resale. The evidence further established that the vehicle was leased by the original lessee for personal and family use, and was later transferred for the same purpose to the Consumer during the Lemon Law rights period.

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

Ruby v. General Motors Company-Buick Division, 2010-0241/WPB (Fla. NMVAB December 7, 2010)
The Consumer's 2010 Buick LaCrosse had an intermittent whining noise in the steering rack when making U-turns or when the vehicle was being moved out of a parking space. The Manufacturer contended that the intermittent whining noise did not substantially impair the use, value or safety of the vehicle, but was more of an "annoyance" or "nuisance." According to the Manufacturer's witness, the vehicle was performing "as designed." The Board concluded that

the intermittent whining noise in the steering rack 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. 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.

Fletcher and Johnson v. American Suzuki Motor Corporation, 2010-0215/TPA (Fla. NMVAB October 18, 2010)
The Consumers complained of a pull to the right and of a steering wheel grinding or moaning noise in their 2008 Suzuki Reno. The Board found the problems to be nonconformities. The Consumers presented the vehicle for repair of the steering wheel noise and pull to the right on 10 occasions. At the tenth repair attempt (after written notification to the Manufacturer), the power steering rack was replaced and an alignment was performed, which corrected the steering wheel noise and pull to the right. The Board concluded that, even if these nonconformities were finally repaired at the tenth repair attempt, under the circumstances of this case, ten repair attempts was not a reasonable number. The Manufacturer having failed to conform the vehicle to the warranty provided in Chapter 681, Florida Statutes, within a reasonable number of attempts, the Consumers were awarded a replacement vehicle.

Wilson v. Mercedes-Benz USA, Inc., 2010-0190/WPB (Fla. NMVAB October 5, 2010)
The Consumer's 2010 Mercedes-Benz ML-350 had a shifting condition that caused the transmission to switch from one gear to another without the driver's input. On at least two occasions, while the Consumer was driving on the road, the vehicle went from drive to neutral and from drive to drive1, without the Consumer shifting the gears. The Consumer testified that on at least one occasion, she parked her car, removed the key and exited the vehicle but the vehicle switched to neutral and began rolling backwards. The Consumer further testified that the vehicle felt like it was surging or lurching when driven at approximately 20 miles per hour and had even surged forward without her input on one occasion when she was driving between 55 to 60 miles per hour. The vehicle was presented to the Manufacturer's authorized service agent for repair of the shifting condition on two occasions. On both occasions, the Consumer was told by the Manufacturer's authorized service agent that they could not find anything wrong with the vehicle and no repairs were performed. The Consumer then sent written notification to the Manufacturer to provide the Manufacturer with a final opportunity to repair the vehicle. The Manufacturer received the notification and the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was inspected but not repaired and the shifting condition remained. The Manufacturer contended that the alleged defect did not substantially impair the use, value or safety of the vehicle. The Manufacturer's witnesses testified that they were unable to find any defect or condition with the car that would cause the shifting condition about which the Consumer testified. The Board found that the nonconformity was presented to the Manufacturer and its authorized service agent three times for repair, one of which was after direct notice to the Manufacturer, and on each occasion, no repairs

were undertaken. Under the circumstances, three 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. The Consumer was awarded a refund.

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

Thames v. Nissan Motor Corporation USA, 2010-0237/TLH (Fla. NMVAB November 16, 2010) The Manufacturer stipulated that the Consumer's 2010 Nissan Maxima had an excessive vibration between 45-75 miles per hour which substantially impaired its use, value and safety. According to the Consumer, a letter from the Manufacturer dated July 8, 2010, instructed him to take his vehicle to Rahal-Miller Nissan in Marianna, Florida on July 21, 2010, for the final repair attempt. On the afternoon of July 23, 2010, the Consumer met with the Manufacturer's representative, Jimmy Noles, who told him that he could not complete the final repair attempt because he needed access to testing equipment that was not available in Marianna. Mr. Noles asked that the Manufacturer be allowed to finish the final repair attempt in Tallahassee, Florida, and indicated that completion of the repair attempt could not occur until the first week of August, because of Mr. Noles' schedule. It was the Consumer's understanding that Mr. Noles was to have called either that afternoon or the next day, July 24th, to schedule the specific time to complete the repair attempt. However, on July 26, 2010, after not receiving a call from Mr. Noles on either the 23rd or 24th of July, the Consumer contacted Nissan to inform them that he intended to proceed with the Lemon Law.

The Manufacturer contended that it was deprived of a meaningful final repair attempt. Jimmy Noles, the Manufacturer's representative, testified that he was present when the vehicle was presented for the final repair attempt in Marianna, Florida, on July 21, 2010, and that on July 23, 2010, he arranged to have all four tires on the Consumer's vehicle replaced in an attempt to correct the vibration problem. When the new tires did not correct the vibration, his only recourse was to perform further tests, and the equipment needed to perform those tests was not available at the repair facility in Marianna. According to Mr. Noles, the Consumer originally agreed to allow the Manufacturer to continue the final repair attempt at a future date in Tallahassee, Florida, and was incorrect in his understanding of when Mr. Noles had intended to call. Mr. Noles acknowledged that, because of his schedule, he would not have been available to complete the final repair attempt until the week of August 2nd. He asserted, however, that the Consumer's refusal to allow him to finish the final repair attempt deprived the Manufacturer of a meaningful final repair attempt. Once the Consumer delivers the motor vehicle to the designated repair facility for the final repair attempt, the Manufacturer, "... shall have 10 days ... to conform the motor vehicle to the warranty. ... If the manufacturer fails to ... perform the repairs within the time periods prescribed in this subsection, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply." §681.104(1)(a), Fla. Stat. (2009). Under the facts presented in this case, a majority of the Board found that the Manufacturer was afforded the final repair attempt contemplated by the Lemon Law on July 21-23, 2010. The Consumer presented the vehicle at the time and place designated by the Manufacturer. The Manufacturer's proposal to "complete" the final repair attempt at a later time, and at a different location, would have exceeded the 10 day time limit for the final repair attempt provided by statute, and would have required the Consumer to transport the vehicle to a different repair facility, which is also

not required under the statute. The Manufacturer having failed to conform the vehicle to the warranty within a reasonable number of attempts, 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.

Bedri v. American Honda Motor Company Inc., 2010-0219/JAX (Fla. NMVAB October 25, 2010)
The Consumer complained of a premature deterioration of the neoprene-type tabs or "fingers" that line the circumference of the front-seat cupholders in his 2009 Honda Pilot. The Consumer testified that he is a heavy coffee drinker, and always has a cup of coffee with him when he is driving. Because he drives a great deal, the Consumer explained, the vehicle cupholders located in the center console between the front seats get a lot of use, and are very important to him. The Consumer explained that the tabs lining those cupholders, which act to stabilize whatever cup is inserted, crack and weaken over a short period of time, which had necessitated their replacement on three occasions. 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, when she observed the vehicle at the final repair attempt, the tabs around the edge of the cupholders in question were "abraided" and "cracked"; functional but not pretty. Another Manufacturer's witness testified, based on the damage he saw, that something "too big" was being forced into the cup holder. He also stated that the only time he had seen similar damage was in an old vehicle where the tabs had melted. The Board concluded that the premature deterioration of the neoprene-type tabs or "fingers" that line the circumference of the front-seat cupholders, as complained of by the Consumer, did not substantially impair the use, value or safety of the vehicle so as to constitute a nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

Prado v. American Honda Motor Company Inc., 2010-0242/ORL (Fla. NMVAB November 18, 2010)
The Consumer complained that the head restraint on the driver's side was uncomfortable in his 2009 Honda Accord. He testified that the head restraint was so uncomfortable that he would lose concentration when he was driving, which gave him concern for his safety and the safety of others. He acknowledged that the head restraint was the same one that was in the vehicle when he purchased it and that it was not broken and had not been repaired. 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 all Honda Accord head restraints are identical and that the design complies with federally-mandated safety guidelines. He stated that it was the Consumer's positioning of the driver's seat-back which caused the Consumer to find the head restraint uncomfortable. An inspection of the subject vehicle was performed by the Board in the presence of the Consumer and the Manufacturer's attorney and witnesses. The Consumer demonstrated the position of the head restraint and how he sat in the driver's seat, and he operated various seat controls to move the seat up and down. When the Consumer adjusted his

seat back so that it was not completely straight, the head restraint did not appear to be in an uncomfortable position. The Board concluded that the uncomfortable head restraint complained of by the Consumer did not substantially impair the use, value or safety of the vehicle so as to constitute a nonconformity within the meaning of the law. Accordingly, the Consumer's case was dismissed.

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

Pagan v. Toyota Motor Sales, USA, 2010-0231/ORL (Fla. NMVAB November 9, 2010)
The Consumer complained of a sudden acceleration on one occasion in his 2010 Toyota Corolla. The Consumer testified that, while he was "taking off " from a stop light at approximately 20 miles per hour, the vehicle began to accelerate by itself up to approximately 60 miles per hour. He attempted to apply the brakes; however, the brake pedal went all the way to the floor and the vehicle continued to accelerate. He acknowledged that he had two floor mats placed under the accelerator and brake pedals at the time; the original Corolla mat and over that, he had positioned a larger Tacoma all-weather mat, to keep the vehicle clean. He additionally testified that he had not experienced any other occurrence of sudden acceleration, either prior to this date or since he removed the larger Tacoma mat, as instructed by the Manufacturer's authorized service agent. The Manufacturer asserted the statutory affirmative defense that the alleged nonconformity was the result of unauthorized modification or alteration of the vehicle by persons other than the Manufacturer or its authorized service agent. Specifically, it was the Manufacturer's position that, when the sudden acceleration event occurred, the subject vehicle was equipped with two floor mats on the driver's side floor, one of which was unauthorized by the Manufacturer and, as a result of this unauthorized modification, the accelerator pedal stuck, causing the sudden acceleration. In support of that assertion, the Manufacturer's witness testified that, prior to the acceleration event, the subject vehicle had already been presented to the Manufacturer's authorized service agent for the A0A or "sticky pedal" recall, which modified the accelerator pedal by installing a reinforcement bar to increase the clearance between the internal mechanisms of the pedal assembly and eliminate any excess friction which might cause the accelerator pedal to stick.

After the vehicle was driven to the Manufacturer's authorized service agent on the day of the sudden acceleration, Toyota technical assistance advised the service agent to remove any additional floor mats not intended for the subject vehicle, to semi-permanently attach the original mat in the driver's position, and to order parts for the ongoing safety recall 90L. Two days later, the 90L safety recall was performed, wherein a new modified, trimmer pedal was installed, to reduce the risk of pedal entrapment by incorrect or out of place accessory floor mats. The witness additionally referred to the subject Owner's Manual advising consumers to "not place floor mats on top of existing mats." The Board concluded that the sudden acceleration problem complained of by the Consumer was the result of unauthorized modification of the motor vehicle by persons other than the Manufacturer or its authorized service agent, to wit: the Consumer's acknowledged stacking of a second floor mat from another vehicle on top of the Manufacturer's authorized floor mat, resulting in the sudden acceleration. Consequently, the Consumer's complaint of sudden acceleration did not constitute a nonconformity within the meaning of the law and the case was dismissed.

Consumer's claim not timely filed §681.109(4), Fla. Stat.

Cohen v. Volkswagen/Audi of North America Inc., 2010-0165/WPB (Fla. NMVAB October 28, 2010)

The Manufacturer contended that the Consumer failed to file the Request for Arbitration within the time period required by statute. On March 4, 2010, the Consumer filed a claim with the BBB/AUTOLINE, the state-certified informal dispute settlement program sponsored by Audi. On April 14, 2010, the program rendered a decision awarding a refund to the Consumer. The decision was forwarded to the Consumer, accompanied by a letter dated April 15, 2010, which advised the Consumer that she had 14 days from receipt of the refund calculation that accompanied the letter to either accept or reject the decision. In response to the decision and accompanying refund calculation, the Consumer filed a Correction/Clarification Request with BBB/Autoline. On May 17, 2010, BBB/Autoline issued its response to the Consumer's Correction/Clarification Request. That response was accompanied by a letter dated May 18, 2010, advising the Consumer that she had 14 days from the date of this most recent letter in which to either accept or reject the decision, and that if no response was received in that time, the decision would be considered rejected. The Consumer did not respond within the 14-day time period, thereby rejecting the decision.

On June 16, 2010, the Consumer filed her request for arbitration with the New Motor Vehicle Arbitration Board, seeking a refund. The Manufacturer asserted that the Consumer's case should be dismissed because she failed to file her request for arbitration within 30 days after the final action of the Manufacturer's certified procedure. In support of its position, the Manufacturer first contended that April 14, 2010, the date the certified program issued its first decision, should be considered the "final action" date for purposes of calculating the timeliness of the Consumer's request for arbitration. The Manufacturer objected to considering the certified procedure's response to the Consumer's clarification request as the final action, arguing that the Correction/Clarification Request was actually an attempt to re-argue the Consumer's case, and its filing was not authorized under the BBB/Autoline program rules. In the alternative, the Manufacturer asserted that if the Board were to deem the date of the BBB/Autoline's response to the Consumer's Correction/Clarification Request, as the date of the certified program's final action, the Consumer's request for arbitration would still be untimely. In making this alternative argument, the Manufacturer focused on the language of Section 681.109(4), Florida Statutes, which provides that a consumer's request for arbitration must be filed "**no later than** 60 days after the expiration of the Lemon Law rights period, or **within** 30 days after the final action of a certified procedure, whichever date occurs later." The Manufacturer argued that the contrast in wording used by the legislature ("no later than" as opposed to "within") was intentional and must be given effect by interpreting that language as intending to produce differing results. Therefore, the Manufacturer asserted, in order for the Consumer's request for arbitration to have then been filed "**within**" 30 days of May 17, 2010, the request had to have been filed by June 15, 2010, 29 days after the final action of the certified procedure.

The Board rejected both contentions and concluded that the final action of the certified procedure was May 31, 2010, the 14th day of the accept/reject time given in the response to the Correction/Clarification Request. The Consumer's request for arbitration filed on June 16, 2010, was deemed timely filed within 30 days after the final action of the certified procedure.

REFUND §681.104(2)(a)(b), F.S.:

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

Cohen v. Volkswagen/Audi of North America Inc., 2010-0165/WPB (Fla. NMVAB October 28, 2010)
In order to lease the vehicle, the Consumer traded in a 2000 Lexus RX300 for which she received a trade-in allowance of $8,949.80. She applied $3,902.80 of the trade allowance as a down payment on the vehicle lease, with the remaining $5,047.00 paid directly to her via check from the selling agent. The amount of the trade-in allowance was not acceptable to the Consumer. Accordingly, pursuant to Section 681.102(19), Florida Statutes, the Manufacturer was required to produce the March 2008 NADA Official Used Car Guide (Southeastern Edition), the version of the NADA Guide in effect at the time of the trade-in. The Consumer's trade-in vehicle was not listed in the printed NADA Guide, and the Manufacturer submitted several Board Decisions to support its argument that, in the absence of a listing, the Board should use the trade-in allowance reflected in the lease agreement. The Consumer, however, produced a computer printout from the NADA Official Used Car Guide, Southeastern Edition-March 2008, online version, which reflected a retail price for her trade-in of $15,150.00. The Consumer contended that, in the absence of the vehicle listing in the printed NADA Guide book, the Board could look to the online version of the NADA Guide. The Board rejected the Manufacturer's argument. The statute directs the Board to utilize the NADA Official Used Car Guide (Southeastern Edition) but does not specifically limit the Board to use of the printed version of the NADA Guide. Accordingly, the Board awarded the Consumer $15,150.00 for her trade-in vehicle as reflected in the NADA online printout.

MISCELLANEOUS PROCEDURAL ISSUES:

Thames v. Nissan Motor Corporation USA, 2010-0237/TLH (Fla. NMVAB November 16, 2010)
At the hearing, the Nissan representative requested that the Board consider copies of internal emails sent between himself and Heather Arbuckle, an Arbitration Specialist with Nissan North America. The Nissan representative did not submit the emails to the Board or the Consumer prior to the hearing. Pursuant to paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, all documents the Manufacturer intends to present for consideration by the Board must be received by the Board Administrator and the Consumer no later than five days before the hearing. Failure to do so may result in the Board declining to consider the documents unless good cause is shown for the failure to comply. The Consumer objected to the emails being considered, because he did not receive them ahead of time as required by the rule. Based on the aforementioned rule, the Board did not consider the emails.